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FOCUS

President's Message

Joseph Santos

CONNACCA is continuing with its excellent speaker and training series. Most recently, on March 17 at The Hartford Club, David Laufman, Esq., spoke on "Congressional Investigations—Watch Out!" As Congress homes in on financial and other issues of the current economy, related investigations are increasingly common and risky. Congress' powers permit short-notice requests for testimony and documents, backed by the threat of subpoenas. Moreover, Congress' investigative authority goes beyond what most practitioners are used to, since rules of evidence and attorney-client privilege do not necessarily apply. Mr. Laufman's background gave him the ability to speak on this with particular insight. He is a former federal prosecutor and investigative attorney for Congressional Committees, and is now partner in Kelley, Drye & Warren's Washington, DC,

office representing numerous companies and individuals in matters related to Congressional investigations.

On April 7, another session in this series of events—also held at The Hartford Club—explored various areas of employment law, such as the Family Medical Leave Act, changes to COBRA and the Employee Free Choice Act. These topics have been particularly timely and important in light of the reductions-in-force at many corporations across the region and the country. It is important that members understand both employee and employer rights and obligations as companies undertake reduction-in-force actions. This session was presented by the law firm of Berchem, Moses & Devlin, P.C., who is new to our roster of presenters. We welcome their



involvement and contributions to the seminar series.

The next seminar in June will discuss export regulations and issues, and will be by the law firm of Kelley,

Drye & Warren. For more information on upcoming programs, check out our chapter website at connecticut.acc.com.

I am happy to report that despite economic conditions, CONNACCA's membership remains steady. This is good evidence of the value we bring to our members. Additionally, CONNACCA's programs continue to be free to all of its members—our membership likes this a lot, and CONNACCA's leadership plans to continue to deliver programs this way.

Alternative Fee Arrangements: Moving Toward Better Valuation of Lawyer Services

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We can all agree that our clients believe that the cost of a legal problem should not be assessed simply by how much a lawyer would like to be paid to spend time solving it. As we struggle to deal with tighter budgets and as clients become increasingly disenchanted with many law firms' lack of focus on value, we get more and more interested in alternative fee relationships.

Both clients and firms struggle when figuring out how to value legal services they previously "costed" exclusively on an "hourly rate X time spent" basis. Some of our frustration with finding other ways to value a lawyer's contribution is inexperience or a lack of comfort with reassessing risk or quantifying the unknown, supported by a lack of good data that would point to the actual cost of a matter (rather than the cost of a lawyer's time).

The result is that clients are guilty of not managing their outside counsel with clear directives and understanding of what value is and how they want it quantified. At the same time, many outside counsel with experience in doing certain kinds of matters really well somehow haven't yet figured out how much the next matter will cost.

What is needed to move us forward?

Law firms need to better "mine" their own business knowledge and align their practices to their clients' needs—in terms of pricing and expertise. But no law firm will agree to throw out what are largely proven and successful business practices (in terms of profit and their current experience) without clients willing to reward them for trying something different and somewhat more risky (from their perspective).

In-house counsel can best drive value in firms by better understanding and communicating their expectations and their assessment of the value of the work they are outsourcing. Too many clients ask firms to think creatively in making a bid for work or in yearly assessments, and then award

their work to firms that continue to bill by the hour and simply offer a discount.

My experience with the ACC Value Challenge project suggests that firms will do whatever you want them to do. So if moving your firm to an alternative fee or staffing structure is important to you, all you need to do is show your firms that you will reward those who step forward with such solutions.

The following is a short outline of alternative fee issues; you can also find a lot more information at www.acc.com/advocacy/valuechallenge/toolkit/index.cfm. Remember that you can often combine these kinds of fee structures or relationship alternatives to create service models that best fit your clients' needs.

Volume, Blended and Discounted Fees

Description: Law firm reduces its hourly rates or offers a blended rate that all time-keepers adopt, often in return for client guaranteeing a certain volume of legal work. (Not an "alternative" fee at all, but mentioned here since so many folks think this is alternative billing.)

Advantages: It's quick and easy.

Disadvantages: Experience shows us that discounts don't generate real savings, since poor business models at firms remain unchanged. Lawyers have no incentive to bill fewer hours, nor do they need to be more efficient or consider staffing that makes more sense; perversely, some firms will feel penalized for discovering an early resolution of the matter. Lawyers billing on a discount do not learn to establish a value and cost for the services they provide—and they often offer discounts without thinking through whether they can actually profit at that rate. Finally, discounted fees can be difficult to manage.

Contingency Fees

Description: Client pays the law firm based on results achieved. Payment is often expressed as a percentage of the recovery, settlement or amount saved.

Advantages: Clients only pay when the law firm achieves successful results—they don't pay for time. This allows economically challenged clients to obtain legal representation, and allows law firms that carefully screen new matters to fully leverage their efficiency and expertise.

Disadvantages: Law firms assume all of the risk. As a result, those firms with little experience, inefficient operations, poor screening processes, weak financial skills or a case that goes south risk losing money. In addition, some jurisdictions are placing caps on contingencies in certain circumstances.

Retrospective Based on Value

Description: Fee is determined by law firm at the conclusion of a matter and is based on client objectives as defined at the outset. Some firms that are trying this method allow the client to adjust their final bill to what they think is a better assessment of the value.

Advantages: Shifts focus from time spent to the value of results. The amount of the fee is based on the value to the client.

Disadvantages: Requires a great deal of trust between lawyer and client. Client may not agree with how law firm values its services and vice versa.

(This kind of arrangement is best for clients and law firms that know and trust each other well—and when the value to the client of the results achieved can be accurately calculated.)

Retainers

Description: Client makes a deposit against charges for future services or client makes a deposit in return for which law firm guarantees its availability for a specific period of time.

Advantages: Clients are more likely to seek legal help when they know the clock isn't ticking, and this leads to good relationships and better ability for firms to provide meaningful counsel. Law firms are paid upfront and thus can avoid billing, collection and profitability problems, provided retainer is kept current and accurately reflects the costs

of providing legal services. Many folks using retainers in today's market are outsourcing an entire function to a firm on a flat fee per month, quarter or year. **Disadvantages:** Disagreements about what is included in the retainer can occur if details are not clearly specified. This can cause firms to think they're doing too much and/or it can cause clients to think they're receiving too little. (While not required, law firms are wise to provide clients with periodic summaries of tasks performed and results achieved to demonstrate the value of the services the client is receiving.)

Fixed or Flat Fees/Capped Fees

Description: Client engages law firm to provide a specific service for a set price. This service could also represent one segment of a larger matter or a recurrent type of litigation. For capped fees, the law firm is paid up to a specified maximum amount. **Advantages:** Fee is not based on time (even if the firm continues to internally track hours for its own use); both client and firm know at the outset what the (maximum) fee will be. This allows client to budget accordingly and avoid billing surprises, and it allows firm to leverage its expertise and efficiency. It requires both firm and client to document with specificity what services will be performed for the fixed fee. It gives firm an incentive to improve staffing decisions, processes and workflow and make better use of technology. **Disadvantages:** Law firm assumes the risk of cost overruns. Thus, unforeseen circumstances could lead to tensions around the need for higher quality work product and/or additional effort. Clients must also be ready for the firm that succeeds under the model and not expect the firm to return a large profit that they fairly won. Some firms/clients choose to manage risks in both directions by including safety valves or "reopeners" that allow both client and firm to revisit and revise the agreement in specified circumstances.

Budgeting

A growing number of companies have come full circle, from discounts to alternative fee arrangements to "hard budgeting." To my mind, alternative fees are actually little more than a full understanding, anticipation and management of costs through a well-crafted budget, which

have been a requirement in retainer letters for years. However, they tend to be observed in the breach, used by one side only or used only for accrual/forecasting purposes—not for cost management.

To truly budget a matter, you have to have data that suggests the matter's worth from the outset. This is the real work of alternative billing—shifting the focus from lawyer contributions to client assessment of value and desired outcome.

My advice to those of you just getting started is to remember that you can approach many of these strategies in smaller bites until you develop greater comfort and more experience. You can design staged fees so that some portions are billed on a traditional hourly basis, but a portion that is more easily segregated for cost purposes can be billed on a fixed or other alternative fee.

Additional Thoughts

- Base your expectations on data that you or your firms have mined: what is the average cost of such matters across all your firms, or in the experience of your in-house practice peers at other companies (time to use the ACC networks!), or in the experience of your firms which have done this work over and over for hundreds of clients. Begin there, even if that information is based on billable hours. You need to start somewhere, so start with what you know.
- Focus on a budget or the cost of all-in tasks rather than an arbitrary fee. Manage to the cost and outcomes, and not time spent.
- Establish metrics and evaluation processes that allow measurement of how you're doing so you can engage in continuous improvement in the process. Link compensation to results.
- Consider an ebilling system, if you don't already have one; the idea is not to focus on "gotcha!" auditing practices on each bill, but to use the system to help both sides manage matters without surprises and stay on target from before the process is done to the mandatory evaluation process that concludes each matter. Check out the services offered by companies such as Serengeti (www.serengetilaw.com), which has offered ACC lots of great ideas and support on our value project.

- Ask your firms if they are monitoring the running costs of your alternatively priced matter against billable hours—they probably are if they're also early into this process. If so, ask them to share the results. There are probably some matters that are better billed on an hourly basis.

Beyond Fees: It's Not Just About Alternatives to the Billable Hour!

Don't just apply these theories to law firms; apply them to other vendors of legal services too.

Combine alternative fee ideas with other value-based alternative strategies, such as partnering your firms with service providers who can do portions of the task for far less. Ask your firm if they will rethink their own staffing of your matters to assure you're driving the right horses for courses, or ask the firm to offer you a seconded associate or junior partner to help you get a matter done that you can't afford to pay for at higher rates (or to help you staff through high volume surge periods or maternity leaves, etc.).

Ask firms to complement their commitment to value-based billing with other kinds of offers: have them train your in-house staff to do certain kinds of work, man a hotline for your clients to call at no additional fee or establish an extranet with resources they can offer to help you get their jobs done. Don't limit your quest for value to the bill: Think broadly.

What we're all interested in is the place where the firm makes more money because you've given them more work and they've gotten really good at doing it, but you pay less because the firm agrees to price your matters based on stronger efficiencies, proper staffing and a focus on what value means to you: speed, result, relationship, communication skills, innovation—whatever that may be!

Read about what others are doing www.acc.com/advocacy/valuechallenge/IdeasDiscussions.cfm, or contribute your or your law firms' best billing and alternative fee practices by emailing us at accvaluechallenge@acc.com.

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Welcome New Members

We wish to welcome the following new members:

Paul Berry, Henkel of America, Inc.

David Burns, United Technologies Company

Rhonda Michelle Karlin, CIGNA Companies

Ken Langevin, CIGNA Corporation

Edward Potanka, CIGNA Corporation

Dylan Remley, Alliance Energy LLC

Andrea Wysocki, Chubb Specialty Insurance