

**Hawkins Parnell Thackston & Young LLP**

Austin – Atlanta – Charleston – Dallas – Los Angeles – St. Louis – San Francisco

**Litigation Cost Control: Tools for  
Predicting and Controlling Costs in  
Both Hourly and Alternative Fee  
Engagements**

**Edward M. Slaughter  
Managing Partner, Dallas Office**

“I’m Very Important...”

- Ron Burgundy, Anchorman

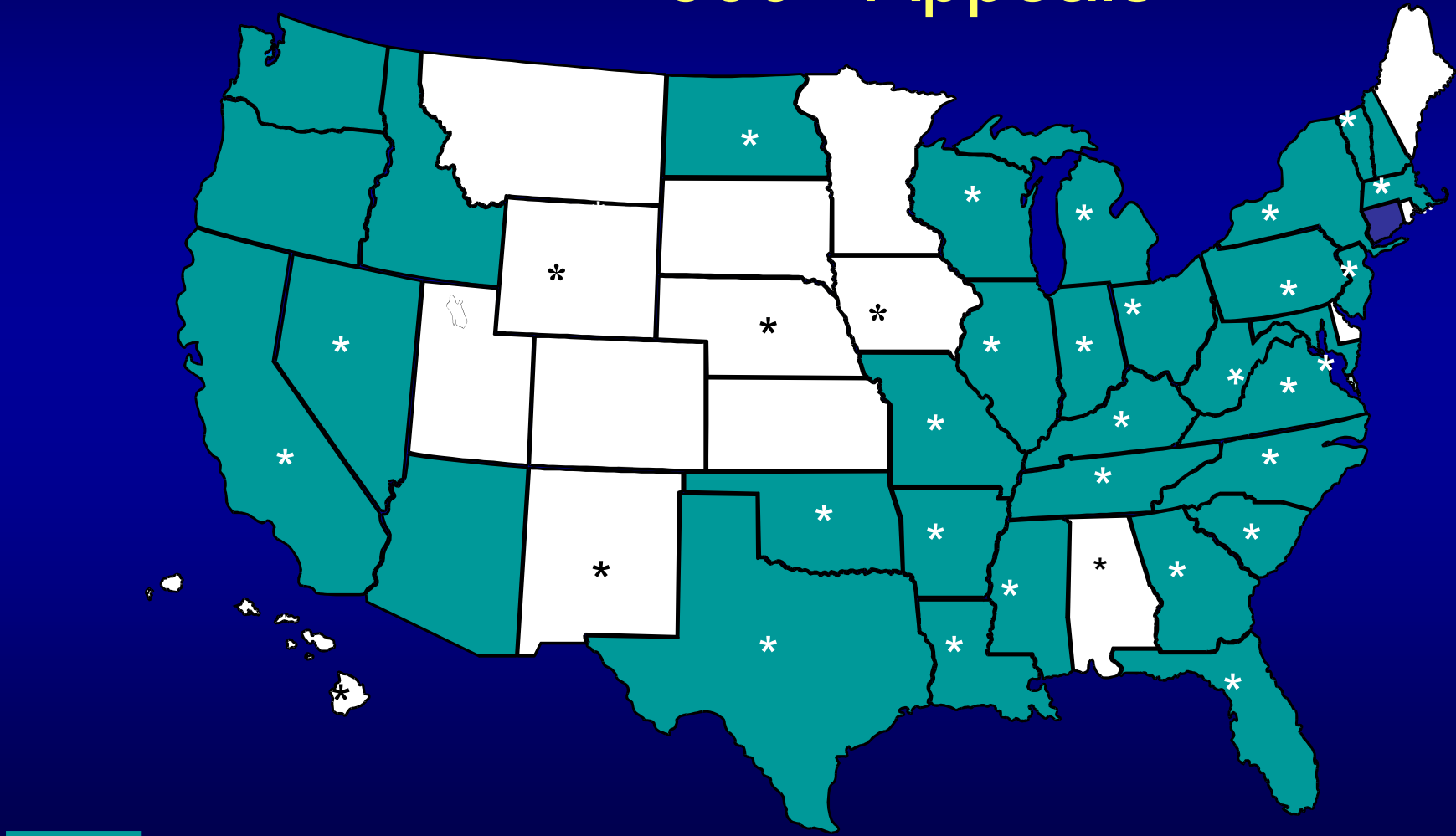


# Representative Clients



Financial Institutions	Construction	Petrochemical Industry	Retail	Product and Premises Litigation	Product and Premises Litigation
<ul style="list-style-type: none"> <li>•Beal Bank</li> <li>•J.P. Morgan Chase</li> <li>•SunTrust</li> <li>•Citizens National</li> <li>•Merrill Lynch &amp; Co. and Merrill Lynch, Pierce, Fenner &amp; Smith Incorporated</li> </ul>	<ul style="list-style-type: none"> <li>•Heery International</li> <li>•Grand Homes</li> <li>•D.R. Horton</li> </ul>	<ul style="list-style-type: none"> <li>•B.P.</li> <li>•Amoco</li> <li>•Exxon/Mobil</li> </ul>	<ul style="list-style-type: none"> <li>•Home Depot</li> <li>•Victoria Secret</li> <li>•LaZboy</li> <li>•Fruit of the Loom</li> <li>•Hanesbrands Inc.</li> <li>•Sherwin Williams</li> </ul>	<ul style="list-style-type: none"> <li>•Lycoming/Bell Helicopter</li> <li>•Alcoa</li> <li>•Rheem</li> <li>•Eli Lilly</li> <li>•Suburban</li> </ul>	<ul style="list-style-type: none"> <li>•Union Pacific</li> <li>•Volkswagen</li> <li>•Chrysler</li> </ul>

125+ Lawyers  
1,000+ Trials Nationwide  
500+ Appeals



Cases Tried

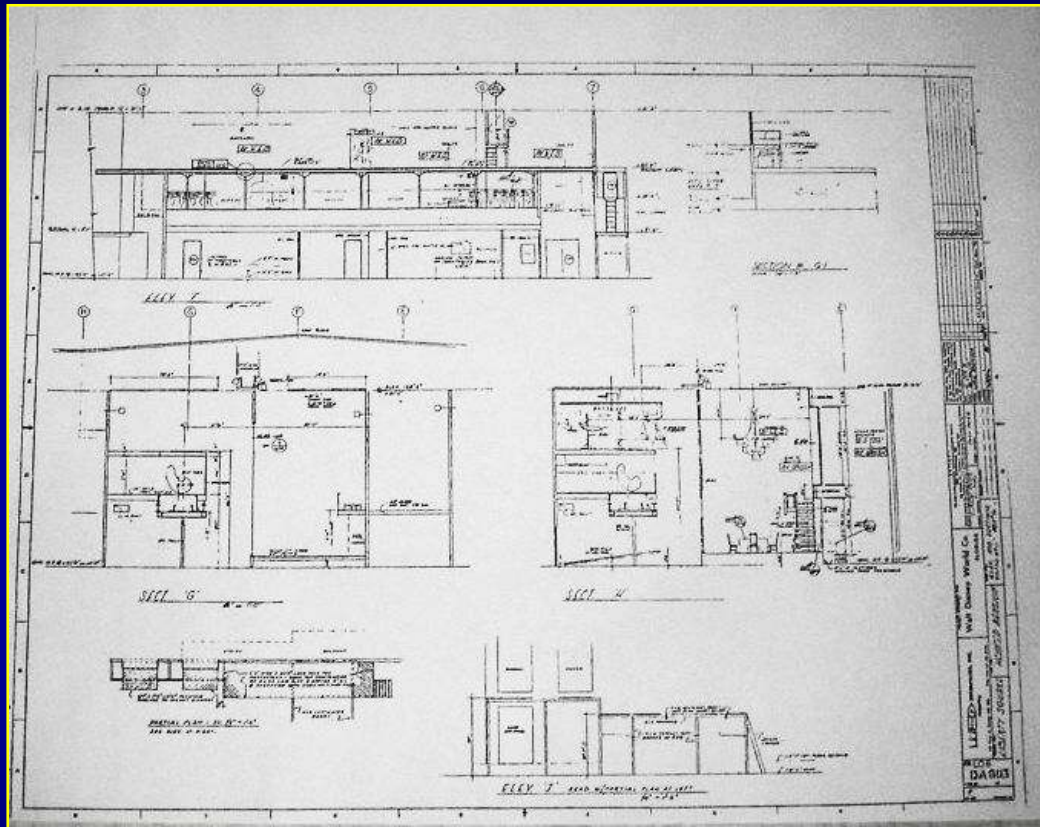
\* Attorneys with Bar Admissions

# Seven Office Locations

Atlanta•Austin•Charleston•Dallas•Los Angeles•St. Louis•San Francisco



# Legal Project Management



## Defined:

n. the discipline of planning, organizing and managing resources around specific project goals while honoring project constraints.

# Legal Project Management: Applying Business Principles to Legal Service Delivery

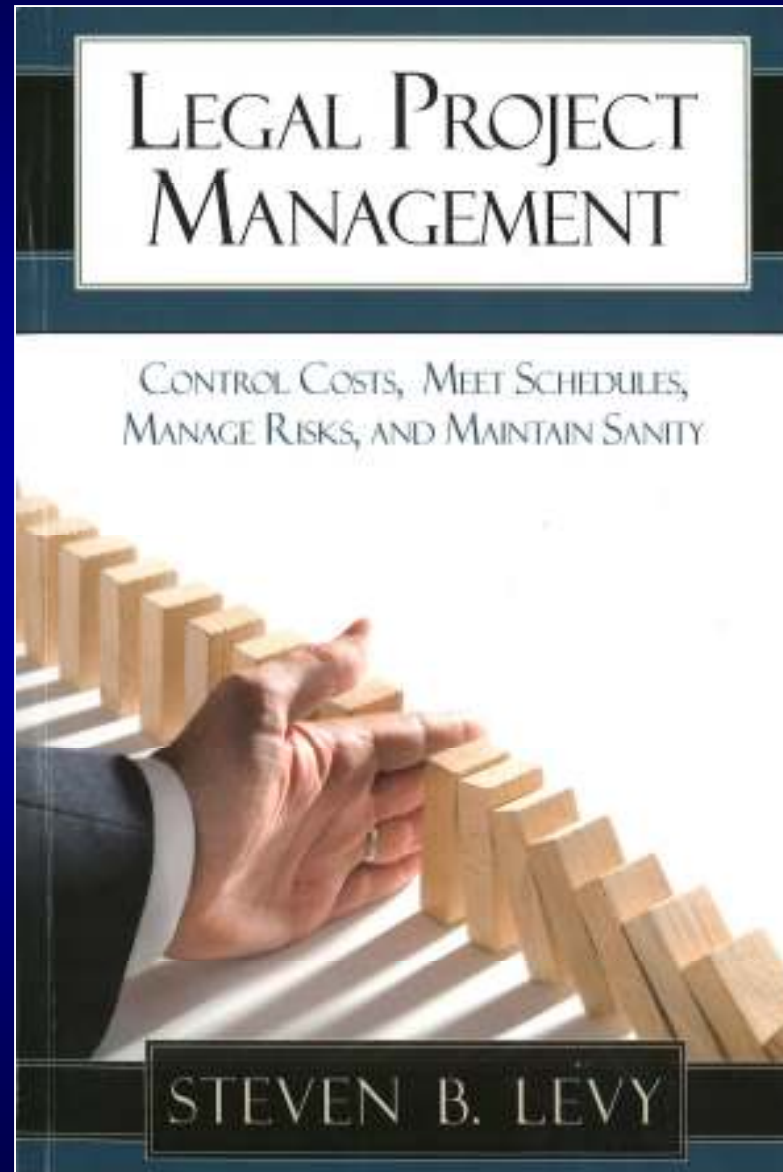
- Focus on predictable and reproducible results
- Measure value of work input
- Decision making based on data
- Decision-making on less than perfect data
- Risk sharing

**“Plans are worthless. Planning is essential.”**

- Dwight D. Eisenhower

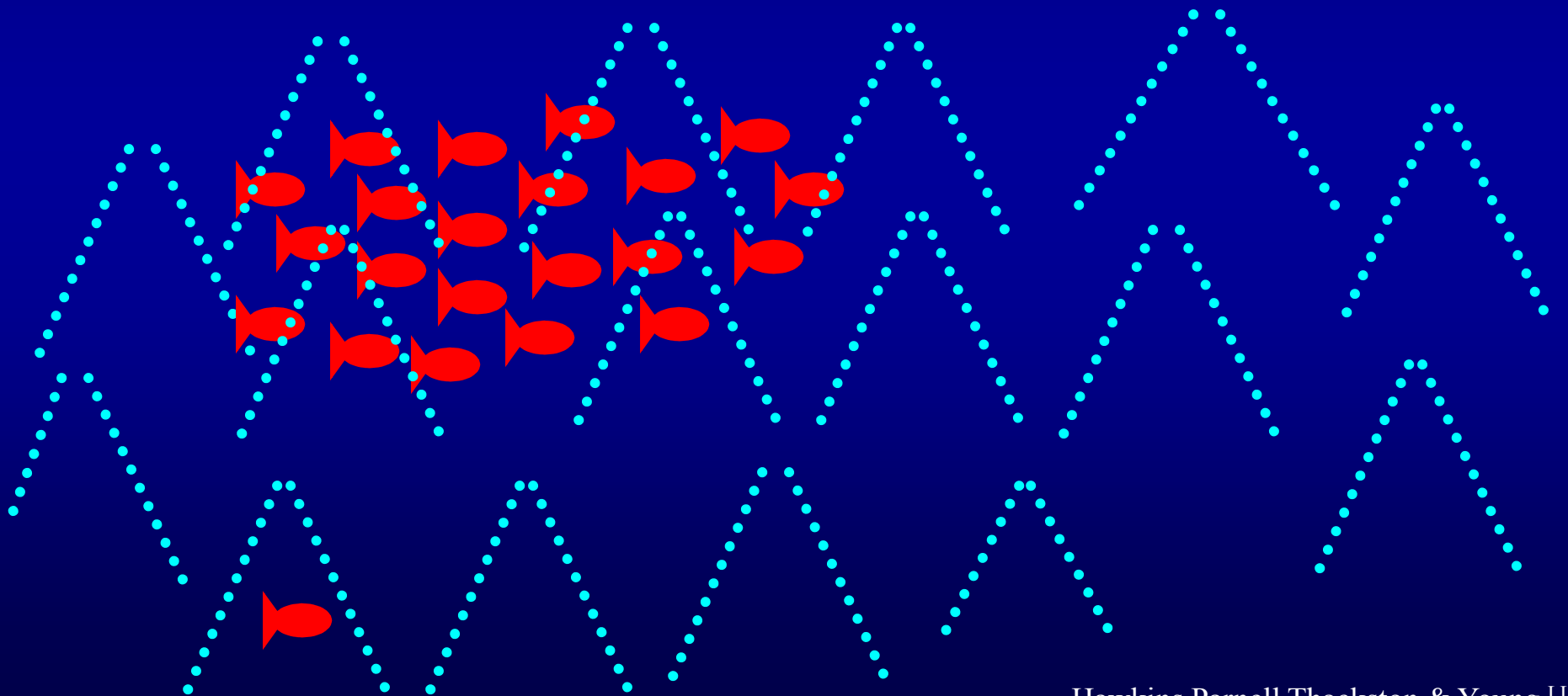


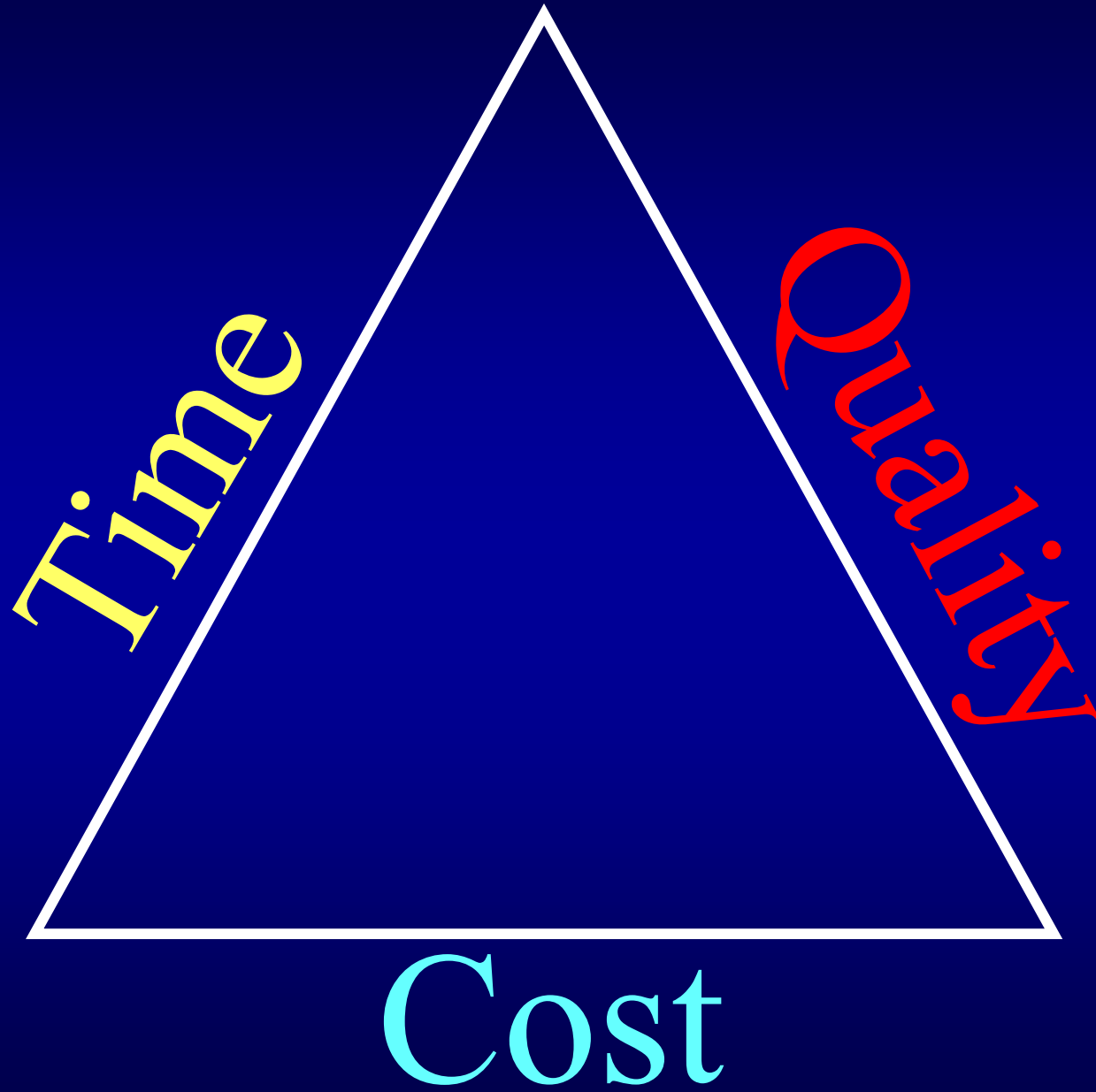
# Legal Project Management



Hawkins Parnell Thackston & Young <sup>LLP</sup>

# Legal Depth Finder





*Time*

*Quality*

Waste

*Cost*

*Time*

*Quality*

○

Cost

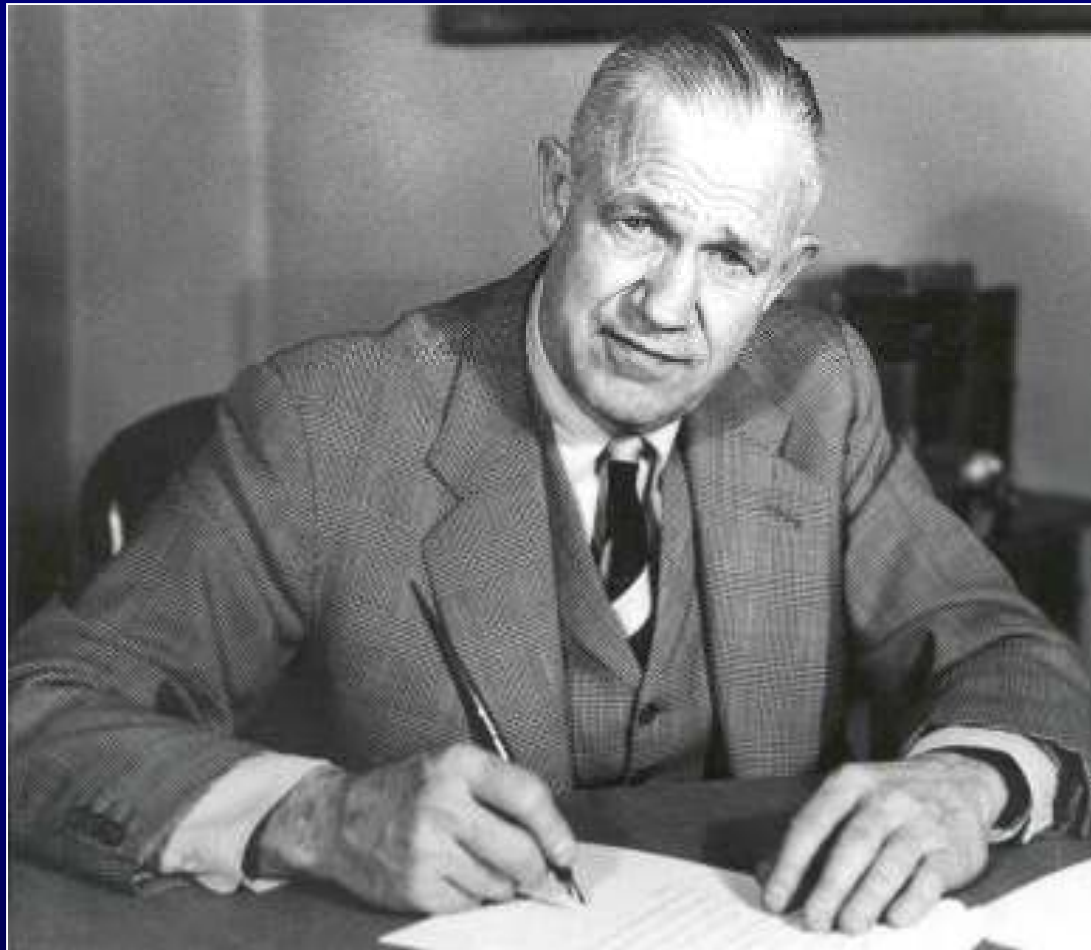
# ROLE OF EARLY CASE ASSESSMENT AND BUDGETING

# Early Case Assessment

- Develop a model for assessing risk prior to getting involved in throws of litigation
- Estimating risk to benefit (cost of time and money) to prosecute or defend a case and each component part
- 80% of the facts should be known in 60 days
- Customized for client/case

**“Estimating is what you do when you don't know.”**

- Sherman Kent, Father of Intelligence Analysis for the CIA



# Early Case Assessment and Cost Benefit Analysis

HAWKINS PARNELL THACKSTON & YOUNG LLP

## Early Case Assessment and Cost Benefit Analysis

Prepared by: \_\_\_\_\_

Date Prepared: \_\_\_\_\_

Submitted to: \_\_\_\_\_

### A. IDENTIFICATION DATA

#### 1. Brief description

- Parties
- Cause(s) of Action
- Salient Facts
- Damages Sought or Estimated
- Client's Position
- Opposing Party's Position
- Court/Location
- Judge (with evaluation)
- Jury Pool (with evaluation)
- Players List
- Deadlines (by rule or order)

#### 2. Players List

Identification	Our Team	Role	Contact Information
Client			
Attorneys and Staff			
Other			

### B. INITIAL INFORMATION ASSESSMENT

#### 1. Collect and Digest In-house Information

- Collect and digest relevant documents
- Identify and interview people with relevant knowledge inside the team
- Identify prior experience within company, firm and other sources

#### 2. Collect and Digest Public Information

- Documents
- Persons with knowledge

# Early Case Assessment and Cost Benefit Analysis

## 3. Identify and Assess Potential Witnesses

- Fact witnesses
- Expert witnesses
- Provide a summary of the interviews with witnesses

## 4. Confer with Opposing Counsel

- Solicit perspective
- Plan informal discovery or information exchange
- Explore early resolution, if appropriate

## 5. Identify Useful Prior Work Product

- Within firm
- Within company
- Public information
- From peers
- Relevant company files and/or databases

## 6. Identify Key Defenses/Response to Defenses

- List defenses to defeat claim, if any
- List argument to minimize loss

## 7. Create Discovery Plan

- Identify information that controls defenses
- Identify information that assists the defense
- Determine method of collecting data in admissible format

## C. IDENTIFY CLIENT'S PRIMARY AND SECONDARY EXPECTATIONS/GOALS

### 1. Identify Client's Goals/Concerns

- Acceptable financial resolution
- Protecting Data or People
- Timing of resolution
- Publicity
- Business relationship at stake
- Repetitive claim
- Legal precedent
- Location of proceedings: forum, venue, jury issues

## D. COST/BENEFIT ANALYSIS

### 1. Estimate Verdict Range

### 2. Estimate Settlement Range

### 3. Estimate Fees and Expenses

### 4. Estimate Value of Work via Budget with Risk Analysis

- See spreadsheet

# “Do Less.”

- Koonu, Surfing Instructor,  
Forgetting Sarah Marshall

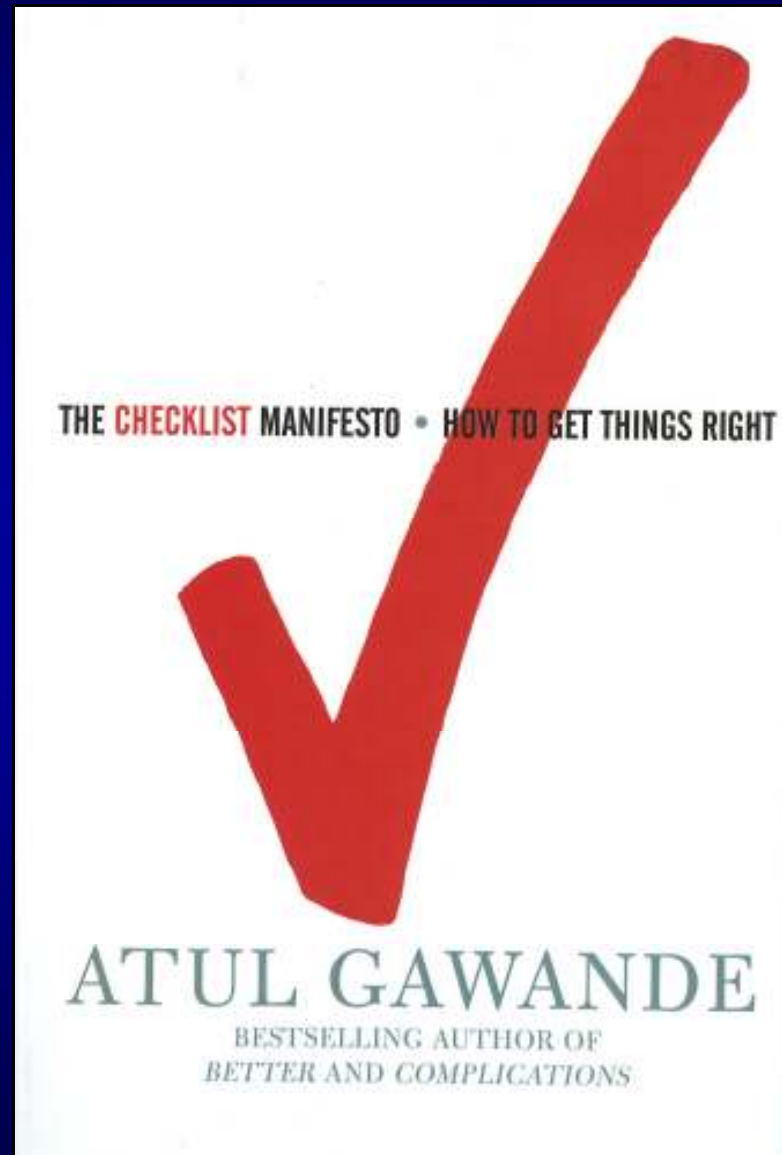


# Develop A Play Book

- Expectations
  - What outcomes client seeks
- Authority for Decision Making
- Strategy
  - Clarify what impact services will have on future goals/needs
- Specific tasks



# The Checklist Manifesto • How to Get Things Right



# Master Case Preparation Checklist

## EXAMPLE CASE PREPARATION CHECKLIST

CASE NAME:

Plaintiff's Counsel:

Date Active:      Filed:      Served:      Answered:

TASK	PERSON ASSIGNED	DUE DATE	RESULTS
<b>REVIEW SPECIAL RULES APPLICABLE TO CASE</b>			
Standing Order			
Local Rules			
Case Management Order			
Prepare Basic Jury Charge			
Evaluate Judge and Venue			
<b>PREPARE REPORTS (see exemplar)</b>			
Early case evaluation			
90-Day Report			
60-Day Report			
30-Day Report			
<b>REVIEW COMPLAINT/PETITION/ANSWER</b>			
SOL/Repose/Time Bar			
Forum Non Conveniens			
Venue Challenge			
Removal/Jurisdiction			
Foreign Law Analysis			

EXAMPLE CASE PREPARATION CHECKLIST

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# Venue Checklist

Case Name:		Trial Date:	
Client:		TSO or Code:	
Pltfs Counsel:		Judge:	
Disease:			

## VENUE CHECKLIST

Task	Person Assigned	Comments/Status	Date Complete
1. Plaintiff's residence			
2. Is there a Los Angeles County defendant?			
3. If so, which one? Is the defendant named in the complaint or discovery?			

# Plaintiff Chart

Plaintiff: PLAINTIFF  
 Group: PLAINTIFF  
 CauseNo: BC 999999  
 Court: Central Civil West, Los Angeles Superior Court  
 Judge: Carolyn B. Kuhl, Dept. 323

Law Firm: Metzger Law Group  
 Updated: 09/22/2009 12:14 PM  
 Attorney Work Product  
 Trial Date: October 19, 2010  
 Coordinator:

Plaintiff	Exposure History	Trade	Product ID	Plaintiff's Diagnosis/ Smoking History	IME/Litigation History
<p><b>PLAINTIFF</b>  <b>DOB: 09/09/09</b>  <b>SSN: 999-99-9999</b>  <b>Resident: Rosemead, CA</b></p> <p><u>Spouse:</u> Married SPOUSE on 7/09/83.</p> <p><u>Education:</u>            HS - China (graduated)            Trade Tech College - Los Angeles, CA</p> <p><u>Military:</u> None</p> <p><u>Workers' Comp:</u>            Case No. MON999999999            Injured left shoulder, right shoulder, back, sleep disorder &amp; internal (liver).            Received compensation.</p> <p><u>Unions:</u> N/A</p>	<p>1. <b>BAE Systems Aircraft Controls</b> - Los Angeles, CA (2/1983 - 2/2007)</p>	<p>1. <b>Experimental Machinist</b> - Fabricated parts and worked with engineer support, manufacture and work. Worked with metals, plastics, fiberglass, and a material was brown in color similar to fiberglass. Worked with aluminum, stainless steels, magnesium, copper, beryllium, etc. Operated lathe, milling machines, CNC, service grinder, cut off saws, band saws, shears, etc. Did chemical treatment. Aluminum was treated with premixed Chem-film to prevent corrosion.</p>	<p><u>Witness Product ID:</u>  <u>Specialty Coatings</u>            Blue Bkg En #14180;            Flat Black Baking Enamel #37038;            Flat Grey B/E 36231;            Flat Grey Enamel #36440;            Lt Grey Gloss Bkg En #16440;            Reducer;            S/G Black B/E #27038;            S/G Blue Bkg EN #25109;            White Gloss Baking Enamel</p>	<p><b>D/x with chronic hepatitis on October 16, 2006</b> (per complaint).</p> <p>Worked with and was exposed to contained significant concentrations of organic solvents, metals and other hepatotoxins. Has been hospitalized and undergone surgery and other treatments and will require organ transplantation (per complaint).</p> <p>No known allergies </p> <p>Denies alcohol/drug/smoking.</p>	<p><b>08/24/2009</b> at 10:00 am in Department 323, Carolyn B. Kuhl, Presiding Further Status Conference - <b>Held-Continued</b></p> <p><b>06/11/2009</b> at 11:00 am in Department 323, Carolyn B. Kuhl, Presiding DEMURRER (1) DEMURRER TO PLAINTIFFS' FIRST AMENDED COMPLAINT; 2) MOTION TO STRIKE PORTIONS OF PLAINTIFFS' FIRST AMENDED COMPLAINT;) - <b>Demurrer overruled</b></p> <p><b>05/27/2009</b> at 01:45 pm in Department 323, Carolyn B. Kuhl, Presiding DEMURRER (TO PLAINTIFFS FIRST AMENDED DEMURRER) - <b>Continued by Defendant</b></p>

Title: Plaintiff Chart  
 Purpose: To be used as a quick reference for the case with information on plaintiff's work history, exposure history, product identification and diagnosis.  
 Client: Specialty Coatings counsel eyes only  
 Who Responsible: M. Smith

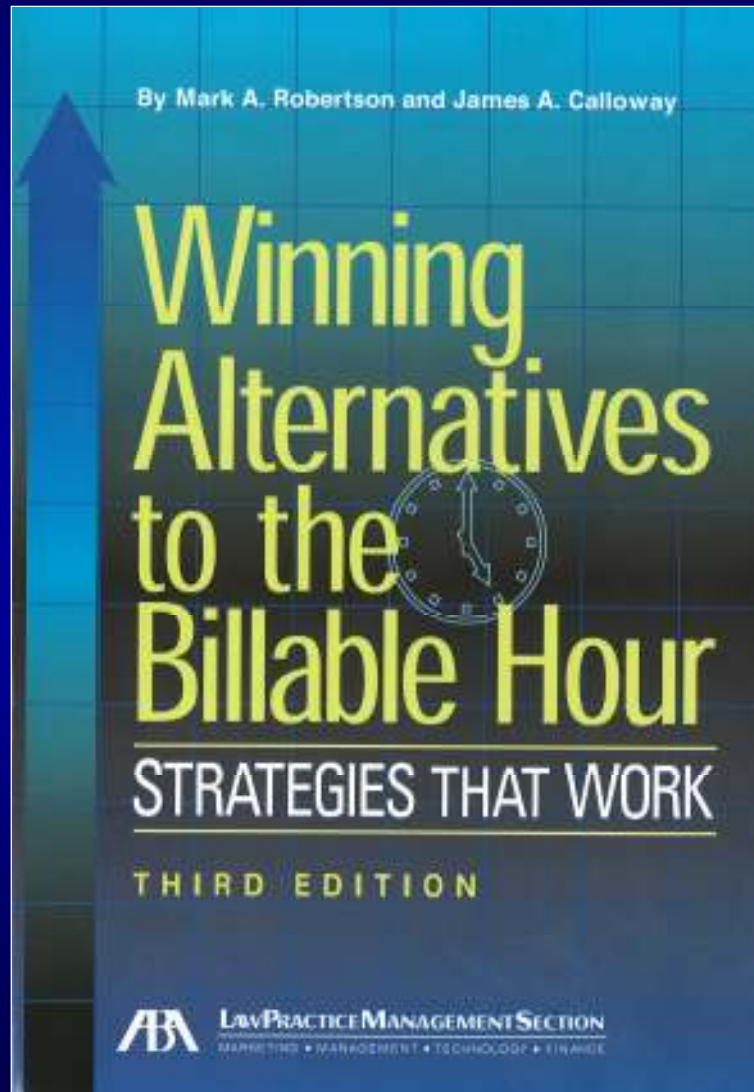
**“No plan survives contact with the enemy.”**

- Helmuth von Moltke The Elder, German Field Marshal, WWI

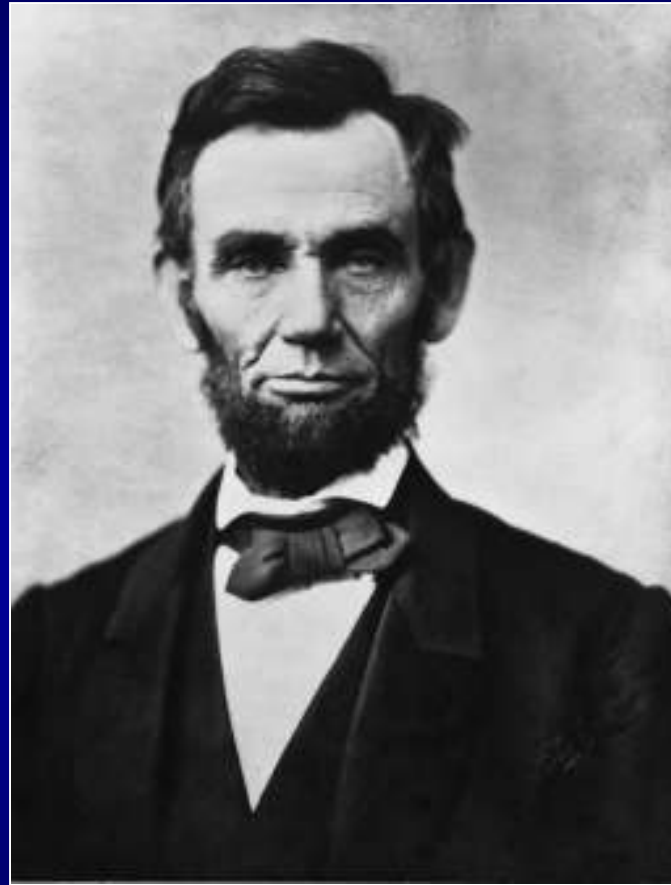


# ALTERNATIVE FEES, BUDGETS AND COST CONTROL

# Winning Alternatives to the Billable Hour



# History of the Billable Hour



“A lawyer’s time is his stock in trade.”

*-Abraham Lincoln*

# Leading to the Billable Hour

- 1930 - State bars issue recommended/statutory minimum fee schedules
- 1960 – Bills for “services rendered” – and estimation of perceived value
- Mid 1960s to early 1970s – Anti-trust concerns, accountants and insurance carriers require more detailed information and a better way to track it – Thus the billable hour is born

# The Billable Hour

## ➤ Pros

- Simple to apply
- Simple to understand
- Provides detailed information about all work performed
- Reduces the risk of price fixing

## ➤ Cons

- Discourages attorney client communication
- Discourages early case planning and use of resources
- Based on work performed instead of value obtained

# Curing the Flaws of Hourly Billing

- Some amount of communication must be free and regularly scheduled - with a penalty for failure to communicate
- Early case assessment should be mandatory and paid on a flat fee with quality bonus
- Value must be assigned to the project and the plan and budget must reflect it

# Work Performed and Value Obtained

Example #1: Slaughter prepares to depose hazard communication expert

<u>Task</u>	<u>Time</u>
Read opinion, report, and salient reliance materials;	6 hours
Collect and review published literature with differing view;	12 hours
Collect bias materials for cross;	3 hours
Depose witness in person with documents;	12 hours

# Work Performed and Value Obtained

Example #2: Slaughter deposes same witness second time

<u>Task</u>	<u>Time</u>
Read opinion, report, and identify new reliance materials;	2 hours
Update opposing literature;	.5 hours
Depose witness by telephone;	2 hours

# Budget Example

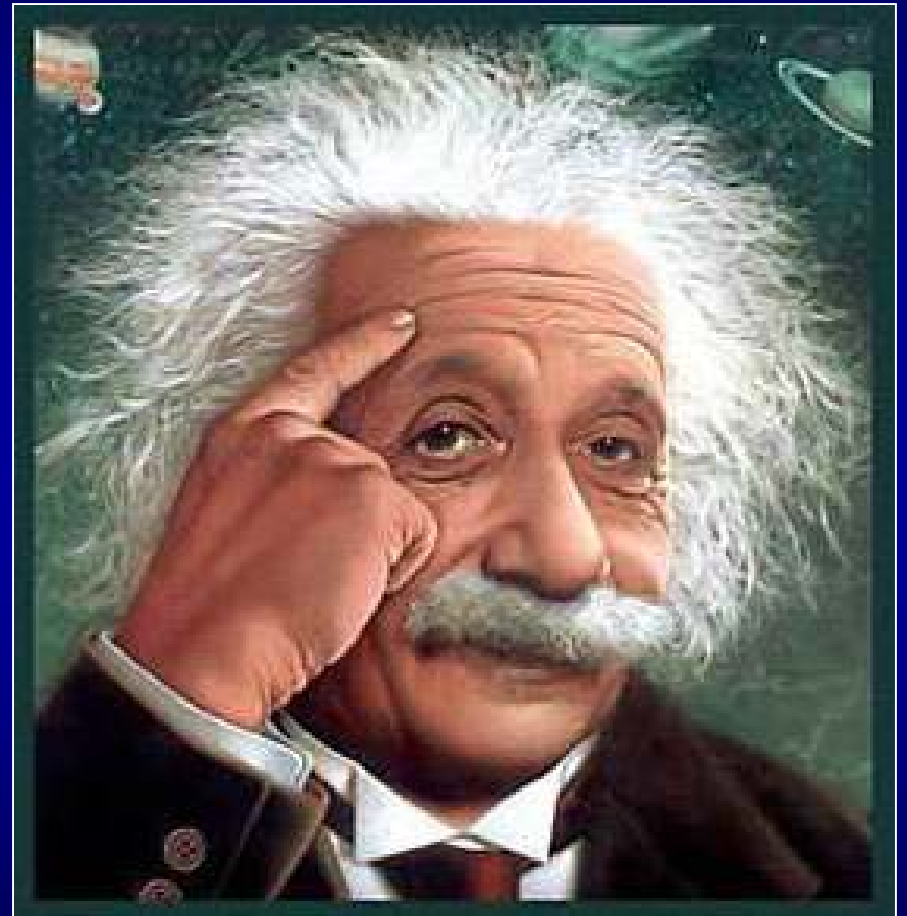
	Timekeeper Rank	Estimated Hours						
		Sr. Partner	Partner	Of Counsel	Sr. Associate	Associate	Sr. Paralegal	Paralegal
	<b>Rates</b>	350	300	300	225	200	125	100
L110	Fact Investigation/Development							
L120	Analysis/Strategy							
L130	Experts/Consultants							
L140	Document/File Management							
L150	Budgeting							
L160	Settlement/Non Binding ADR							
L210	Pleadings							
L220	Preliminary Injunctions/Provisional Remedies							
L230	Court Mandated Conferences							
L240	Dispositive Motions							
L250	Other Written Motions and Submissions							
L260	Class Action Certification and Notice							
L310	Written Discovery							
L320	Document Production							
L330	Depositions							
L340	Expert Discovery							
L350	Discovery Motions							
L360	On Site Inspections							
L410	Fact Witnesses							
L420	Expert Witnesses							
L430	Written Motions and Submissions							
L440	Other Trial Preparation and Support							
L450	Trial and Hearing Attendance							
L460	Post Trial Motions and Submissions							
L510	Appellate Motions and Submissions							
L520	Appellate Briefs							
L530	Oral Argument							
	<b>Total Estimated Hours</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>
	<b>Total Estimated Fees</b>	<b>\$ -</b>	<b>\$ -</b>	<b>\$ -</b>	<b>\$ -</b>	<b>\$ -</b>	<b>\$ -</b>	<b>\$ -</b>
	<b>Total Fees</b>	<b>\$ -</b>						

# Benefits to Uniform Budgeting

- Easier to predict legal expenses
- More accurate measures of value
- Matches value to expense
- Holds counsel accountable

**"We can't solve  
problems by using the  
same kind of thinking  
we used when we  
created them."**

- Albert Einstein



# Alternative Methods of Billing

Fixed or Flat Fee

Contingent Fee

Blended Hourly Rate

Relative-Value Method

# THE VALUE EQUATION

$$\text{VALUE} = \text{Result} - \text{Cost}$$

Value is realized when a client's expectations are met (or exceeded) at what *they* consider a reasonable price. It is subjective assessment of the overall worth of a product or service.

# Fixed or Flat Fee

**PRICE = BUDGETED VALUE**

- Price charged for defined services
- Shifts some of the risk of cost overrun to law firm
- A total fee or segments of the service
- Often a modified hourly rate structure
  - How many estimated hours\*rate = flat fee
- Useful where there is litigation is most consistent and predictable

# Model for Determining Appropriate Flat Fee For Individual Matter

- Based on ABA UTBMS codes
- Customized by inputting rates, % of cases or likelihood of reaching certain phases and whether the firm has experience with similar cases
- Results – Flat Fee/Case with similar variables



# Hybrid Contingent Fee/Blended Rate

- Counsel gets a reduced rate plus percent of value generated
- Initial flat fee for early case assessment
- Determine value sought and risk involved
- Prepare budget against hourly rate
- Pay a reduced rate plus percent of value generated

# Contingent Fee

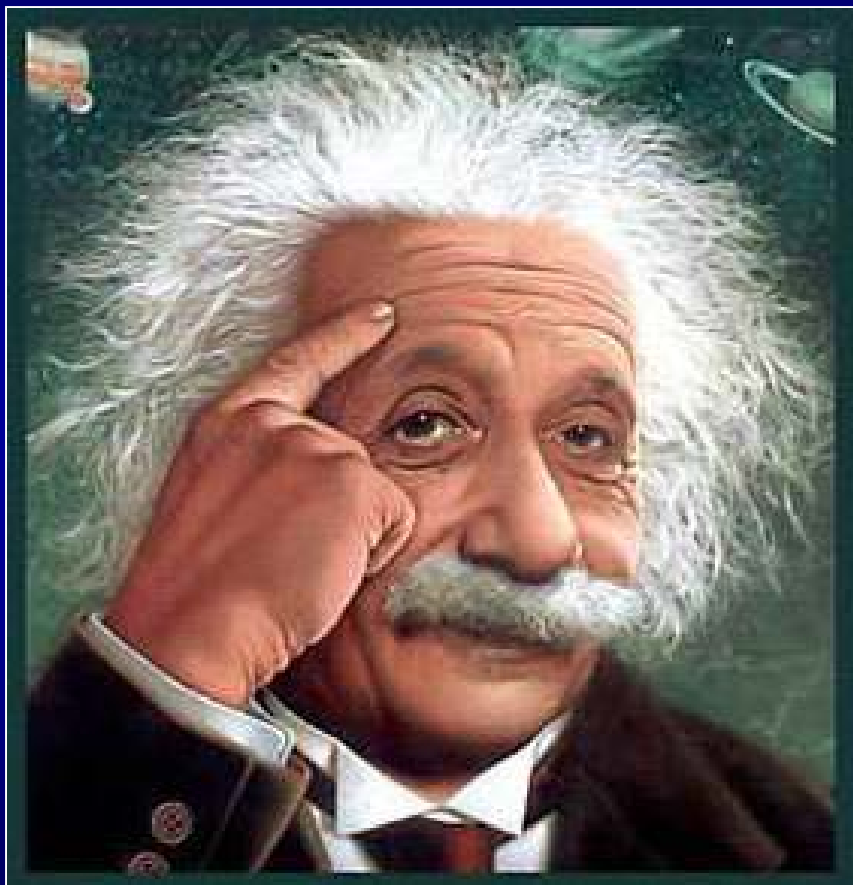
**PRICE = RESULT X AGREED PERCENT**

- Depends on Results Achieved
- Requires explicit agreement of what results are expected
- Price reflects different incentives for firm and client
- Useful in cases where there is expected recovery of damages

# Blended Hourly Rate

$$\text{PRICE} = \text{TIME} \times \text{AVG}(\text{ALL RATES})$$

- One rate applies to all hours
- Rate usually negotiated by the client but can reflect weighted average of timekeepers rates
- Risk that firm may not use the high value/experienced attorneys - can be seen as reducing profit



**"Not everything that  
counts can be  
counted, and not  
everything that can  
be counted counts."**

- Sign Hanging in Albert Einstein's Princeton Office

# Corporations Want Value Lawyers Want Business

- Spread risk between both firm and client
- Look for incentives to balance risk
- Agreements about flat fees/alternative fees
- Value of success/failure
- Relationship with national counsel aids efforts to spread risk

**“Prediction is difficult, especially about the future.”**

- Yogi Berra



# Hybrid National Counsel Model

- Retain National Counsel to manage/try essentially all cases
- Prepare a budget (fees and expenses) based on past experience and predict trends
- Allow limited retention of local counsel as part of the budget
- Pay NCC a flat fee with high and low collars to encourage efficiency
- Pay bonus for meeting identifiable goals that are most important
  - » 50% of expense reduction paid as a quarterly bonus

# Hybrid National Counsel Model

## Example:

- 2007 – 2009 average spending: \$3,000,000
- Analyze for waste and set 2010 budget: \$2,600,000
- NCC allocated for all services nationally: **\$2,600,000**

NCC bills against a blended rate of: \$250/hour

$$\underline{\times 7,200} = \$1,800,000$$

Local counsel bills at rate of: \$200/hour

$$\underline{\times 4,000} = \$ 800,000$$

**TOTAL: \$2,600,000**

# Case Study # 2

## Shared Risk Contingent Fee



HPT&Y represents product manufacturer in \$50,000,000 fire loss

# Case Study # 2

## Shared Risk Contingent Fee

Claimed damage:	\$49,000,000
Fair estimated damage:	\$30,000,000
Client's reasonable potential share:	\$15,000,000
Liability dispute:	\$10,000,000

Real Risk:	\$ 5,000,000
Settlement:	<u>\$ 50,000</u>
20% fee on saved value:	\$ 4,500,000
X 20% =	\$ 900,000

Regular hourly rate and actual fees: \$ 1,300,000

Reduce rate 20%:	\$ 1,040,000
	+ <u>\$ 900,000</u>
	<b>= \$ 1,940,000</b>

# Case Study # 3

## Reduced Hourly With Bonus

➤ Our client sued defendant for false advertising and Lanham Act violations

- Amount of potential damage claimed: \$ 25,000,000
- Annual sales of product: \$100,000,000
- Injunction granted, false advertising stopped
- Value ? \$1,000,000 - \$10,000,000

▪ How much will company actually lose if defendant isn't stopped?

- Full contingency fee (1/3<sup>rd</sup>): \$333,000
- Blended hourly rate at 80%: \$ 50,000
- 10% bonus on agreed value: \$100,000

**TOTAL FEE: \$150,000**

# Conclusion

- Alternative fees arrangements vary and are customized
- Counsel and client share the risk and the reward
- Often must use a hybrid model
- Balance value for client v. revenue for firm



**“The best way to predict  
the future is to invent it.”**

- Immanuel Kant, 18<sup>th</sup> Century Philosopher

**Hawkins Parnell Thackston & Young <sup>LLP</sup>**

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