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# FOCUS

## President's Message

**Nathan Nelson**

Greetings Fellow Members of the Mountain West Chapter of the Association of Corporate Counsel:

I hope you have been enjoying (or at least surviving) this incredibly busy and very interesting economic period. Some have labeled this extraordinarily challenging time a "crisis." I've heard the Chinese ideogram for "crisis" is made up of two characters signifying "opportunity" and "danger." Although technically this is a misconception of the Chinese characters and an etymological fallacy, I still like the concept.

When I last wrote, I acknowledged some of the dangers we face in these difficult times, as well as the opportunities we have to show that we truly add value to our corporate clients. I suggested that utilizing the many resources available to each of us by virtue of our membership in ACC would help us save money (adding value) and enable us to deliver a better quality legal representation (adding value). In this quarter's newsletter, I'd like to expound upon certain ACC membership benefits that can truly help us add value: the ACC Committees and the Member Knowledge Network benefits.

Our chapter is unique in that we comprise such a large geographic area (the largest of any single ACC chapter), including the states of Idaho, Montana, Utah and Wyoming, which together form a geographic area two and a half

times the size of the state of California (which, incidentally, has four ACC chapters and about six times the population). It is challenging to run a chapter in one major metropolitan area, let alone as many metropolitan areas as we have in our huge chapter. Imagine the difficulty of bringing our members together in any of the four major cities within our chapter, which are on average over 500 miles from each other.

In an effort to address some of these concerns, this year we instituted a programs co-chair position in the Boise metro area to equalize the lop-sided focus on events in the Salt Lake metro area. We are fortunate to have Jeanne Baughman from the Washington division of URS Corporation fill that Idaho programs co-chair position. We may also need to look for program chairs in Montana and Wyoming as well. If anyone is interested in filling these volunteer positions, please let me know. These types of efforts bring our membership together in a way that allows us to fully experience the social networking benefits that are a hallmark of membership in ACC.

We want the benefit of being able to meet and establish meaningful relationships with fellow in-housers who face similar types of legal issues. We want



to develop relationships within this network that allow us to pick up the phone without being shy and call each other when we need some advice on best practices, or when we need empathy, or when we just want to share war stories — in confidence

and in accordance with the professional rules, of course. The benefits of the ACC committees and the Member Knowledge Network offer some help in this regard. Not only do they provide opportunities for us to get smart and no or low cost (thus adding value to our corporate clients) but they also help us bridge the geographical gaps between us, connecting our chapter as well as unifying us with fellow in-housers from all over the world.

**ACC Committees.** ACC sponsors 16 different committees, each focusing on substantive legal practice areas or types of in-house practice. The committees are: Compliance and Ethics; Corporate & Securities Law; Employment & Labor; Energy, Environmental, Health & Safety; Financial Services; IT, Data Privacy & Ecommerce; Insurance Staff Counsel; International Legal Affairs; Intellectual Property; Law Department Management; Litigation; New to In-house; Nonprofit Organizations; Real Estate; and the Small Law Department Committee.

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# Alternative Fee Arrangements: Moving Toward Better Valuation of Lawyer Services

Susan Hackett

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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](http://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 timekeepers 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 let-

ters 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](http://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](http://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](mailto:accvaluechallenge@acc.com).

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Any ACC member can become a member of one or more committees. Their objectives are: to develop resources to share among members; to organize continuing legal education programs; to provide forums where members can exchange ideas and expertise; to organize conferences and other events around specific legal issues; to advocate public policy positions; and to comment on legislative, regulatory and other matters. Each hosts a monthly conference that committee members can join via telephone, and offers social networking opportunities that we might otherwise miss out on. Even better, your level of involvement in any committee is a function of your desire and ability to participate, with as little or as much time as you have available. They are free to join, they provide opportunities to learn and they are an incubator for meaningful career relationships.

P. S. I think they are full of people who are eager to get to know you and have your involvement. One aspect of these groups that I appreciate is the ability to make friends by sliding into the group, assimilating and then getting out of your shell. It is easier for some of us to do that than to network in the way I'll review next, which is more of a one-on-one approach. However, you'll see that ACC has also made this one easy by giving us the chance to take a "Hmm, Mr. or Ms. Expert, I have a question" lead-in approach to establishing social network relationships.

**Member Knowledge Network.** The ACC Member Knowledge Network (MKN) is another exciting way to develop helpful and meaningful relationships with other experienced ACC members. National's website describes MKN as "an exclusive service for ACC members who wish to contact other members who have expertise regarding a variety of legal issues including, but not limited to, retention of local counsel, benchmark-

ing, and obtaining corporation forms, policies, and procedures."

You can search the MKN database by geographic location and by practice expertise. Results from the searches are randomly displayed in a set of 10 names of member experts that are drawn from the names in the database for that practice area/geographic area.

Member experts are members just like you and I who have volunteered to be available to other ACC members to share their specialized knowledge related to certain practice areas. For example, if you want to discuss international market entry considerations with me, I hold myself out as a member expert with significant experience in this field. Who else can help you with certain issues that you face? Log on and perform a search through the various member experts listed in the MKN database to find out. You can search it as much as you'd like—there is no limit. I've used MKN a number of times and developed relationships with in-house lawyers at Microsoft, Yahoo and Coca-Cola to name a few. I've received questions, as well. For example, I was recently contacted by a large medical device company out of the Midwest, and asked my views and opinions about whether it was better to set up an employed sales force in various European states versus independent sales representatives.

Obviously, each of us must use MKN with proper care—we DO NOT give formal legal advice or opinions, and we DO NOT expect that the information we get from member experts is legal advice or an opinion on which we can rely. The real benefit comes in the form of someone to talk to who has been there or who has dealt with the issues that we are curious about and who can act as a sounding board or just help us talk through the issues.

It is comforting to know that when I'm confronted with certain issues as an in-

houser, I can search the MKN database to see if there is a fellow ACC member out there who has agreed to share his or her knowledge on the subject. Although there are some bugs in the search results that still need to be worked out (mainly related to the occasional repetition of a member expert name in the search results), the MKN database is a valuable tool to those who make the effort to use it. Search it now at [www.acc.com/community/findamember](http://www.acc.com/community/findamember). You can log in with your ACC username and password and start searching. I hope you find the expertise you're searching for and I hope you find some new friends too! If you would like to be a part of the MKN peer-to-peer network, you can sign up and edit your areas of expertise to help others find you.

In summary, during these tough economic times (or "crisis" if you will) now, maybe more than ever, we need to use all the resources available to us to assist the organizations we represent. There are wonderful opportunities available to us to shine, and there are dangers if we do not. I'm grateful that even though our chapter is spread so far apart geographically, certain ACC benefits give us instant access to relevant information and meaningful relationships that give each of us the opportunity to be better counselors to our corporate clients. Check out the ACC Committees and the MKN online at [www.acc.com](http://www.acc.com) or feel free to give me a call anytime to discuss. I hope that the above mentioned ACC benefits will help each of us stay connected, stay smart and stay valuable to those whose interests we represent.

Until next time,  
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## Welcome to Our New Board Member

We'd like to welcome Alison Pitt, Assistant Vice President - Legal Affairs, Nutraceutical Corporation, as a new director serving on the Mountain West Chapter Board of Directors. Alison is an incredibly enthusiastic in-house lawyer who is very responsible. She is involved in numerous activities in the community that are both professional and non-professional and ends up in a leadership role in almost every activity she engages in. Committed to professional and civic involvement, Alison has been and is a volunteer with various groups and associations. Alison has served on and is serving as a board

member of the Park City Bar Association (and as CLE & Ethics Coordinator since 2002), a Volunteer Ski Patroller at Park City Mountain Resort since 2001, an Aid Station Volunteer Coordinator with the Park City Marathon and Half Marathon, a member of the Board of the Peace House (a shelter for battered women and children), and a member of the Summit County Board of Adjustments since 2005. All of this is volunteer work and it all improves our lives in the community. This list of specific activities below does not include the general service Alison has provided to individuals around her

without pay, including helping a friend who became a paraplegic in a skiing accident (Alison helped him for many months doing his budget, helping him obtain medical care, working out all of his housing and transportation options, etc...) and various pro bono legal projects for individuals with needs. Alison holds a JD, MBA and BS in Accounting, all from the University of Utah. We are grateful for Alison's willingness, enthusiasm, and commitment to serve with the other directors of our Chapter. Please join me in welcoming Alison to our Chapter leadership.

## Welcome to Our New Intern

We would also like to welcome Kristie Marshall as an intern to help the Mountain West Chapter with various Chapter administrative matters. Kristie is a very competent executive administrator who is very detail and planning oriented. Kristie's previous experience includes:

- Administration Manager for the Miller Motorsports Park Project in Tooele, Utah
- Personal Assistant to Larry H. Miller (late Utah businessman, philanthropist and owner of the NBA's Utah Jazz)

- Salt Lake County Federal Liaison
- Salt Lake County Zoo, Arts and Parks Program Manager
- Assistant to the Salt Lake County Deputy Mayor
- Staff for the creation of the Unified Fire Authority of Salt Lake County
- Staff to Salt Lake County Executive Policy Boards

Kristie has also served as staff for several policy making boards that benefit the community such as The Clark Planetarium

Board, Salt Lake County Open Space Committee, Business Government Alliance, Zoo, Arts and Parks Tier I Board and Tier II Board.

We are grateful for Kristie's capabilities, experience and excitement and the support she has already given us to date. Please join me in thanking Kristie for her assistance and welcoming her to our group.

## Welcome to Our New Members

**Kirk B. Barton**, Sonic Innovations, Inc.

**Chris Brookhart**, The Generations Network

**Wayne Farnsworth**, Woodside Group, LLC

**John E. Hayes**, Coldwater Creek Inc

**Kai P. Larson**, The Sun Products Corporation

**Patrick V. Lindsay**, XanGo LLC

**Donald B. Olsen**, Provo Craft & Novelty, Inc.

**Troy Peterson**, Riverbend Holdings

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Corporate Counsel, Nature's Sunshine Products, Inc.

#### Chris Patterson

Vice President, Business Strategy Development,  
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#### Garry Pay

V.P./Assistant General Counsel, IdeaSphere, Inc.

#### Alison Pitt

Assistant Vice President - Legal Affairs,  
Nutraceutical Corporation

#### Stanley Soper

Vice President - Legal Affairs, Nutraceutical Corporation

#### Terry Uhling

Senior Vice President, Secretary and General Counsel,  
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#### Gordon Walker

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#### Michelle Wilson

General Counsel, Xango LLC

### Chapter Executive Administrator (Intern)

#### Kristie Marshall

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## ACC News

### The ACC Value Challenge: Getting Started— “Meet. Talk. Act.”

Many traditional law firm business models and many of the approaches to lawyer training and cost management are not aligned with what corporate clients want and need. ACC Value Challenge seeks to reconnect value and costs for legal services. Part of ACC Value Challenge initiative, “Meet. Talk. Act.” encourages in-house counsel, law departments, and outside law firms to take action in connecting value to the costs of legal services. Participation is easy: attend a live event or join the discussion through webcasts. Visit [www.acc.com/valuechallenge](http://www.acc.com/valuechallenge) to learn more.

### Get Your Daily Legal Updates from ACC Newsstand

ACC Newsstand, a daily email newsletter, allows you and your legal staff to stay fully briefed on legal developments by customizing the content according to your legal responsibilities. Transmitted to you electronically each day, it provides up-to-date information about changes in the business and legal arenas, which can be tailored for 40 specialty areas and 40 jurisdictions. On the go? You can read it on your BlackBerry<sup>SM</sup> or iPhone<sup>TM</sup>. Learn more at [www.lexology.com/?about=c&b=acc](http://www.lexology.com/?about=c&b=acc).

### Free “Ethical” Phone Message on Fraud in the Workplace

ACC and ACC Alliance Partner WeComply are making available a free “Ethical,” a two-minute phone message intended to alert your organization’s employees to the phenomenon of fraud in the workplace. Both the message and the call are provided free of charge on a limited basis to ACC members. Learn more at [www.wecomply.com/home/pages/summaries/ethical4.htm](http://www.wecomply.com/home/pages/summaries/ethical4.htm)

### On Your Mark. Get Set. Get Credit!

Looking for a fast and cost-effective way to learn the latest developments that affect your in-house practice? Try ACC Webcasts. With live sessions offered weekly and plenty on-demand, ACC Webcasts is the smarter and better way to stay informed. Go to [webcasts.acc.com](http://webcasts.acc.com) for upcoming sessions and to register.

### Recruit a Member and Win A Prize—Guaranteed!

Each time you use the ACC network, you gain valuable skills and experience only available through ACC. More members in ACC translate into improved educational opportunities, enhanced networking, increased online resources, and advancement of the profession worldwide. Help expand your ACC network by taking part in the “Everybody Wins” membership drive! When you recruit new members to ACC, you will win prizes ranging from complimentary \$5.00 Starbucks’ cards and cutting edge electronics including portable DVD players, digital cameras and video recorders, to free ACC Annual Meeting, CCU, or ACC Europe Meeting registration with a \$750.00 travel stipend. ACC’s “Everybody Wins” membership drive ends on July 31. Don’t delay, recruit today! Learn more at [www.acc.com/everybodywins](http://www.acc.com/everybodywins).

### Invite your Colleagues to AM09 and Win a Free Registration

Bring the most members to ACC’s 2009 Annual Meeting in Boston, October 18–21, and you could win a FREE Annual Meeting registration. Recruit your fellow chapter members to attend, your chapter could also win a complimentary registration. The competition is on! Get in the game and have some fun! To learn more, visit [am.acc.com/contest](http://am.acc.com/contest).