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FOCUS

President's Message

Paul G. Cushing

Dear Northeast members,

We are off to a great start in the new year.

The chapter has grown considerably in the last few years and membership is growing every month. It is exciting to have some new sponsors working with us, and to see new initiatives gaining traction. We have greatly expanded the amount of programming we offer, both in the Boston area and in Rhode Island, New Hampshire and Maine, and continue to make progress on new diversity and pro bono initiatives. We also had our first pure networking event for members in March with a focus on welcoming new members. It was a fun evening and, as a result of the positive feedback we received, we plan to have more of these events.

Our Law Student Ethics Awards dinner in April has become a sig-

nature event, demonstrating to the legal community that the in-house bar is committed to ethics in the practice of law and in business generally. This year we successfully expanded the awards program to include five new schools from the northeast, bringing the total number of participating schools to eleven, representing all of the geographic areas that we serve. Please see page 4 for the list of this year's award winners and other details on this exciting event.

On the advocacy front we proudly supported a successful initiative to increase funding for Greater Boston Legal Services. We welcome any ideas you may have for issues that may benefit from the chapter's advocacy efforts.



We are looking forward to the upcoming programs listed in this newsletter. Please remember that our sponsors and in-house panelists work hard to deliver pertinent content in an informative

and useful way, and always appreciate strong attendance and dialogue at the programs. We encourage all members to attend programs, particularly when registered. In addition to receiving helpful information for your practice, you will be contributing to the ultimate success of the program and the chapter.

Best wishes for a warm and pleasant spring.

Paul G. Cushing

(R)evolution in the Law Firm Service Market

Susan Hackett

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THESIS: Traditional law firm business models for providing legal services and law school training for lawyers are not necessarily aligned with what corporate clients want: value-driven, high-quality legal services that deliver performance for a reasonable cost and develop lawyers as both savvy counselors and efficient business partners.

THE PROBLEM: Sometimes I feel like the “old lady of the in-house bar” (even at 47) ... I’ve been at ACC for close to 20 years. If one thing has remained a constant, it’s that members are less than satisfied with their outside counsel relationships. They may like their outside lawyers (or at least some of them), and they may agree that there’s incredible expertise out there—there is no shortage of smarts or talent. They may even tell you about the 4,017 different metrics and mechanisms that they employ to assure themselves that they’ve got a handle on their outside spend. But still ...

... Even in the best relationships, in-house counsel often don’t feel their outside costs are predictable or value-driven. Somehow or another, for all that they like in their outside lawyers, they have a lot of concerns regarding the firms they employ. Somehow or another, more time often is spent arguing over the bill after the fact than in setting expectations and goals upfront that everyone can manage to meet. Somehow, they feel that more precious time is spent on process than on counseling.

Another thing that hasn’t changed is that clients aren’t happy about their in-house lawyers’ inability to get a handle on their ever-increasing legal spend. The “inelasticity” of the price increases in the law firm business is, frankly, mind-boggling. In every other marketplace of services, prices go up and down with the economy or as new efficiencies or ideas surface and talent moves about. At firms, especially bigger firms, prices go up 6 percent per year, and we all have a sneaking suspicion that even if we negotiate a 10 percent price reduc-

tion on our matter, they’ll simply bill us for 15 percent more “service.” And all this happens at the same time that in-house departments, across the board, have decreased their own expenses, while at the same time increasing efficiencies and productivity.

Accordingly, a lot of very unhappy corporate counsel tell me that their corporate procurement departments are closely scrutinizing the legal department and their spend. And increasingly pressured managing in-house managers counsel look for the fix: they host beauty contests, develop convergence strategies, apply collars and cuffs and whatever’s new in fee management, they set up dashboards and compare costs by firm and regions and matter type and turnaround time, and they spend lots of time training their lawyers to engage in early case assessment. While some have some success (and while none of these are “bad” ideas), at best, all this tinkering does little more than rearrange the deck chairs on the Titanic.

Some blame the ubiquitous billable hour and its perverse drivers toward inefficient and terribly expensive results. Some blame the morph of law firms (professional entities) to a business model (profit driven). Others point to the almighty “profit per partner” ratings, highly leveraged pools of stunningly inexperienced and overpriced associates, and an increasingly de-equalized middle class of partners. Indeed, one of the most disturbing trends in all of this mess and despite the tall stacks of money paid out by clients is the incredible number of lawyers who are either pushed out of the profession, or run screaming from the building, often before they’ve enjoyed any semblance of the career and professional fulfillment we all envisioned we’d have when we were in law school.

In-house counsel from large departments, small departments, and every kind of company in every kind of industry are very powerful people and we can choose to hire

whom we want—everyone says so, right? And yet, we just can’t seem to get outside counsel and their costs “under control.”

THE SOLUTION: So I say: Time to roll our sleeves up and talk about what we *can* do if we work together to create long-term institutional change, rather than railing that everything we try on our own doesn’t return results consistent with our expectations—nothing changes on the larger scale.

Revolution + Evolution = (R)evolution?

SETTING EXPECTATIONS: I recognize that nothing anyone can do will change everything overnight, and lots of different folks want lots of different things, so there’s not even consensus around what success might look like even if we could envision it. So here’s what we ask and what we think is a reasonable expectation: join ACC in thinking like a revolutionary change agent (that is, thinking big picture and out of the box), but also help us implement real reform by working on evolutionary advances over time (that is, focus on practical solutions).

The Proposition: ACC’s Value Challenge—Re-connecting value to the cost of legal services.

What ACC’s Value Challenge is and isn’t: The value challenge is not an answer, but a movement. It’s not about laying blame; it’s about creating responsibility for change.

So let’s all agree that firms need to be responsible for addressing client dissatisfaction. And let’s recognize that no one’s saying that firms shouldn’t profit; on the contrary, firms must be sustainable entities. Let’s also get it straight: a focus on connecting cost to value does not mean that everything should be cheap or that we’ll lose our commitment to quality. There are lots of expensive lawyers out there who are worth every penny (the problem is the expensive lawyers who aren’t), and there are many high quality

lawyers who don't cost what some of their peers in big firm practices charge for the same services.

On the corporate counsel side, if firms are providing services we aren't happy with, why do we keep buying those services, thereby enabling inefficiency, inflated cost structures and poor practices? It's in-house counsel's responsibility to better manage their spend, help firms understand what we and our clients want, and reward outside counsel who deliver the outcomes we've asked for. If we're to convince corporate management that we know what we're doing, we better start recognizing that in 2008, no one gets hired or promoted just for retaining the expensive firms with big reputations. Regardless of their ranking status, in-house counsel will be evaluated for managing firms that provide value and results.

Accordingly, ACC will:

- promote intelligent and facilitated dialogue among corporate counsel, law firms, and eventually other stakeholders, including law schools, to help drive alignment and focus on value;
- develop methodologies and metrics that corporate counsel can use to assess the strengths and weaknesses of law firm vendors;
- create tools that in-house counsel and firms can share to drive change in the performance of valued legal services; and
- enhance awareness and promote communication of success stories in achieving value and alignment—creating practical benchmarking.

To accomplish these goals we're prepared to really dig in, dig deep, and commit ACC resources and stake our reputation for delivering results. While we have lots of ideas on tap and will be working on several plans concurrently, I wanted to use this forum to discuss an early role for chapter leaders and members:

WHAT CAN YOU DO?—Getting Started. We hope to engage members, local law firm leadership, ACC chapters, local and national bar groups, law schools, and other stakeholders to discuss what we should

do and how we should do it in a highly interactive discussion format involving small groups focused on delivering recommendations and direction. These conversations will cover a variety of topics, discuss best practices at work, help define "value" in legal services, discuss alternative models for law firms to use to conduct their business and to cost/bill their work, and really drill in on retention, training/development, and promotion of talent (at the entry level, in the middle ranks, and at the highest end of business). We will use the resulting intelligence to help shape more and better tools, resources, models for consideration, best practices and so on. In other words, we'll evolve together.

You will also be receiving an email soon (depending on publication dates, some of you may have already received it) from ACC's Value Challenge Steering Committee that asks you some simple survey questions that will allow us to collect some baseline information and feedback to target meaningful dialogue in these first sessions. Please watch for it and invest the 3-5 minutes it will take to complete this survey (it's online, so it's simple to do).

WHAT WE HOPE TO ACCOMPLISH: Desired Outcomes

1. Create a national dialog about the need to reconnect value to costs, especially within the law firm community, with a common language and framework that ACC will have helped define and that our members will help drive.
2. Identify and empower core groups of leaders in the in-house and outside firm communities, as well as in consulting houses, vendor organizations, legal and business media, and the law school community: engage them and then solicit more participants every year.
3. Offer a tool kit for use by in-house counsel and another for outside firms (and shared resources, as well, of course), containing leading practices, management tools, models for managing value, and networks by which participants in this process can communicate their experiences and ask questions of each other, including "who do you use and how do you do this?"

4. Nourish the development of an in-house client community that gives law firms reasonable comfort that their efforts to implement change will be supported and rewarded.
5. Encourage law firms that are more focused on retention of talent valued by clients, and matter management driven by the client's expectations and needs.
6. Foster greater satisfaction and pride in their work for both inside and outside lawyers—spending less time bickering over bills and more time focused on solving client problems.
7. Ensure recognition by senior (non-legal) management that in-house counsel are taking the lead, rather than simply being reactive, and that they are exercising strong business skills in balancing their inside and outside legal spend—targeting results and outcomes, rather than just hoping to manage an unpredictable process.

All of this is in pursuit of perhaps the most important outcome: a legal profession in which all attorneys deliver value.

As the "increasingly mature" lady of the in-house bar, I see this initiative as the culmination of my career with this organization to date; yeah, I guess that makes it personal for me. But if these problems, and your dissatisfaction with the way things are is personal to you, too, please join me in starting the ACC Value Challenge (R)evolution. We here at ACC can think of nothing that's more *valuable* that we can offer you, your clients and our profession.

Susan Hackett: hackett@acc.com

Congratulations Law Students!

The chapter held its fourth annual Law Student Ethics Awards dinner on April 10. It was a festive evening, with an inspiring keynote address from Ben Heineman, Jr., former senior vice president and general counsel of General Electric Company. It was attended by many prominent judges of the state and federal trial and appellate courts in Massachusetts, as well as deans and faculty from the participating schools, the presidents of the Boston Bar Association and the Massachusetts Bar Association, general counsel from local companies such as Fidelity, CVS, Biogen, Hasbro, Timberland and Hood, and managing and senior partners from law firm dinner sponsors. The presence of so many distinguished members of the bench and bar, the inspiring stories of the award-winning students, and the collegial atmosphere, all made for a very memorable celebration.

The following New England law students were honored and received a \$1,000 award:

Margaret Bichler
Boston College Law School

Christiaan Highsmith
Boston University School of Law

Joseph Tessier
Franklin Pierce Law Center

Rebecca Lobenherz
Harvard Law School

Megan Brinster
New England School of Law

Aisha Collins
Northeastern University School of Law

Bill Farias
Roger Williams University School of Law

Rachael MacKenzie
Suffolk University Law School

Julie Carp
University of Maine School of Law

Mee Soon Langohr
Vermont Law School

Stephen Sloan
Western New England College
School of Law

Chapter News

Member Networking

On March 12, we held our first ever purely networking evening for members, and especially wanted to reach out to the new members in the chapter. We met at the DoubleTree in Waltham, and all had a delightful evening. Attendees were asked to write their hobby or passion on their nametag (we have a beekeeper among us), and everyone posted something interesting or unusual about themselves on a board (traded to the United States for Russian grain). It certainly got the conversation going! Members commented that it was nice to have an opportunity to talk and network with other in-house counsel without having a law firm sponsor around. The response to this evening was so positive that we are planning another networking evening in the fall. Watch the chapter website at www.acc.com/chapters/ne.php for details!

Chapter Programs

We have a busy season and excellent programs for the chapter!

So far we've covered intellectual property due diligence (Fish & Richardson); the "minefield" of employment law for 2008 (Jackson Lewis); crisis management (Nutter, McClennen & Fish); and preparing for and managing litigation (Choate Hall & Stewart). Upcoming programs include:

May 20—"Going Green: Practical Considerations and Creative Ideas," sponsored by Nixon Peabody

June 12—"Notebook & Record Keeping Imperatives," sponsored by Hamilton Brook Smith & Reynolds

July 10—"Jeopardy or something equally entertaining," sponsored by Goulston & Storrs

Additionally, we will be offering programs on "Corporate Social Responsibility" in Manchester, NH on June 19, sponsored by

Nixon Peabody, and a primer on "Managing the Recession" in the Andover, MA area, sponsored by McDermott Will & Emery. We look forward to seeing you at these programs!

For more information on chapter programs, go to www.acc.com/chapters/ne.php.

Advocacy

On the advocacy front, the chapter supported an initiative to increase funding for Greater Boston Legal Services. We are pleased that this has passed and they've received the additional funds they need to continue their important work.

Check Out the Resources!

The "resources" section of the chapter website is growing! We post materials from our programs there, and are beginning to also post webcasts of selected programs. Additionally, useful articles from our sponsoring law firms are available for your review, and these are updated regularly. Make checking out the resources section a "weekly to-do."

Chief Restructuring Officer: Coming to a Company Near You?

John F. Ventola & Douglas R. Gooding, Choate Hall & Stewart LLP

The use of financial advisors or “crisis managers” is becoming a more routine feature of loan workouts and bankruptcy proceedings and the number of appointments by boards of directors of crisis managers as “Chief Restructuring Officers” is likely to accelerate. As a company’s business encounters financial liquidity and/or operational difficulties, the company’s lenders often will demand the retention of outside professionals as a condition of forbearance or other accommodations. The company’s owners or other stakeholders also may recognize that the company’s problems require the specialized expertise of outside consultants to help engineer a turnaround.

Traditionally, turnaround consultants are retained by their corporate clients as financial advisors through standard consulting agreements. The consulting agreements often spell out relatively narrow scopes of duties, often for a fixed period of time. Recently, however, it has become increasingly common for outside professionals to be hired by troubled corporations — particularly those in the middle market—as “chief restructuring officers.” CRO retentions are characterized by broad scopes of duty comparable to those held by a chief financial officer or even chief executive officer, and CROs may be charged with implementing sweeping changes to the corporation’s business and operations. Further, the retention period for a CRO can be much longer than customary for a financial advisor.

There can be clear benefits to the retention of a CRO compared to a financial advisor, as discussed below. But the installation of a CRO has legal implications both for the corporation and its board as well as the outside professional who accepts such a role. It also may raise some legal risks for the company’s lenders. Some important considerations for all parties to such a decision are discussed below.

The increased utilization of chief restructuring officers seems to have been driven primarily by the dramatic increase of middle market companies owned by professional investors, such as private equity

firms. The move away from family-owned middle market companies has resulted in increased amounts of leverage maintained by middle market companies and an increased willingness of equity owners to make substantial (and sometimes permanent) changes in management. Consequently, the primary decision makers in a troubled company in today’s climate may be far more willing to install a CRO as compared to a family-owned middle market company from years past.

The availability of a CRO can be extremely beneficial to a troubled company and its stakeholders. Experienced turnaround professionals are used to dealing with unhappy creditors and managing crises while maximizing available value. From the standpoint of lenders contending with a troubled borrower, the appointment of a CRO can be exceedingly important. The occurrence of a significant event of default quite often strains communication and jeopardizes the relationship between existing management and the company’s lenders, and lenders may view a fresh set of eyes as a precondition to any further accommodations to their borrower.

A well-regarded CRO will open the lines of communication, bring credibility and can implement strategic changes rather than simply making recommendations to management that often is entrenched. Other times, a CRO will serve to verify management’s strategic direction and projections, and thus break impasses between the company and its lenders. A CRO also can serve to insulate management to a certain extent in a difficult turnaround by implementing the changes and doing the “dirty work” necessarily accompanying the restructuring process, so that management is not tainted in the eyes of employees. CROs also can play a critical role as a facilitator or mediator between competing stakeholders in a manner that existing management simply cannot.

At the same time, the use of CROs has enjoyed growing acceptance by bankruptcy courts after initial periods of skepticism toward the concept. Whereas in the past the United States Trustee or the court itself

often would reject the installation of a CRO as an unacceptable alternative to the appointment of a trustee, in many important districts the appointment of a CRO has become routine. *See, e.g., In re: The 1031 Tax Group, LLC*, 374 B.R. 78, (Bankr. S.D.N.Y. 2007). The bankruptcy courts in the District of Delaware essentially have endorsed the retention of CROs through the adoption of a Protocol for Engagement of CROs.

Legal Implications

The ramifications of installing a CRO during an out of court workout phase are legally significant. As the name implies, a CRO is just that; an officer of the company subject to personal liability in many states for unpaid payroll, trust fund taxes and possibly other unpaid liabilities of the corporation. One of the first matters to be investigated is whether the company’s directors and officers insurance, if any, and indemnification provisions of its charter documents will extend to such a newly appointed party. The CRO will then have to make professional determinations of the company’s prospects and his or her ability to help effect a turnaround.

From the board of directors’ standpoint, issues of comparable magnitude also have to be considered. A company contemplating the appointment of a CRO in most circumstances will either be in or near the amorphous “zone of insolvency”, at which time the board of directors at least arguably assumes fiduciary duties to the company’s creditors. Nonetheless, it seems indisputable that even a board in the zone of insolvency enjoys the expansive protections of the business judgment rule. Further, in many instances the selection of the CRO clearly will be consistent with a board properly discharging its duties to creditors and other stakeholders, as the party selected for CRO likely will have professional experience and skills not held by other members of management. That is particularly the case when existing management may not be disinterested or may have its own agenda.

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An important legal issue from the lender's standpoint, of course, is the danger of exerting undue control over the borrower. While lender liability cases have been few and far between in recent years, lenders must remain cautious lest they find themselves subject of an affirmative action or the target of a recharacterization or equitable subordination claims in bankruptcy. Consequently, lenders must balance the reasonable wish for information and an independent party with the risk of being accused of directing a borrower's operations.

Practical Considerations

Once a decision is made to retain a CRO, the two most critical items likely will be the scope of the CRO's duties and the compensation to be paid. The delineation of the CRO's duties is vitally important. The engagement of a CRO whose duties are uncertain likely will be doomed to failure or at best substantial inefficiency, as territorial squabbles break out between the CRO and existing management. It is therefore critical that the board define the CRO's duties either through the engagement letter signed with the CRO or through a specific board resolution creating the CRO position and defining the officer's duties.

The parties next will of course need to agree on the compensation to be paid to the CRO and, in many circumstances, the CRO's consulting firm. Compensation arrangements vary widely, but some conventions have been established. Often the CRO will charge a fixed amount per month, but members of the CRO's firm working on the engagement will bill by the hour. Incentive compensation such as "success" or "deal fees" are not uncommon, and increasingly CROs will request compensation for improved performance by the company. CROs generally should not be paid through equity stakes in the company, as such compensation will prevent the CRO from being "disinterested" if the company must file bankruptcy, and thus require the termination of the CRO's service.

Conclusion

In light of the apparent recession and economic pressures facing all companies and tightening liquidity, corporate restructuring and bankruptcies are on the rise. For the reasons set forth above, Chief Restructuring Officers are likely to be a central feature of many restructurings.

Douglas R. Gooding is the chair of Choate's Finance & Restructuring Group. Doug has extensive experience in bankruptcy, insolvency matters and out of court workouts as well as advising boards of directors on "zone of insolvency" issues and pre bankruptcy planning. He represents creditors' committees and individual creditors, including several Fortune 500 financial institutions and insurers as well as second lien and mezzanine debt in complex restructurings.

John F. Ventola is a partner in Choate's Creditor's Rights & Bankruptcy and Specialty Finance Groups. John has experience in all aspects of workouts, restructurings and bankruptcy proceedings, including cash collateral disputes, equitable subordination and recharacterization, Section 363 and contested plans of reorganization.