April 2011 Vol. 32, No. 2

ILLINOIS STATE BAR ASSOCIATION

The Bottom Line

The newsletter of the Illinois State Bar Association's Standing Committee on Law Office Management & Economics

Mentoring—what we have to do

By Steven C. Lindberg

Mentoring a new attorney or hiring and bringing in an associate attorney to your practice can be a daunting task. There is so much for both of you to learn—where do you start? What do you need to do? What does the new attorney need to know? How will you go about teaching her?

The first issue that we must discuss is the new attorney, as in recently licensed, and the new attorney, as in new to your practice, although the attorney may have been practicing for some time. Each of these attorneys presents their particular challenges. There are some issues in common such as office procedures and learning the law in your practice area that we will touch upon. The newly licensed attorney needs more help and mentoring in the practice of law as well as the business of practicing law.

Mentoring a new attorney or a new associate in the office should be a process that is put in place by you, the owner of the business. You want to insure that the attorney will learn all the "right ways" to practice law in your office. In fact, you have an obligation to do this pursuant to the Rules of Professional Conduct, Rule 5.1. So what is mentoring, why do we do it and how do we do it?

The Merriam-Webster dictionary defines mentor as follows:

> Definition of *MENTOR*: *1. capitalized* : a friend of Odysseus entrusted with the education of Odysseus' son Telemachus 2*a* : a trusted counselor or guide *b* : tutor, coach

Homer in *The Odyssey* had Odysseus going off to fight in the Trojan War. He left behind his son Telemachus who still needed to learn much and asked his family friend, Mentor, to tutor Telemachus while he was gone. Thus came the term

Continued on page 2

Bill for your value, not just your labor

By Dan Breen

There must be a better way to do it than the billable hour. Aside from plaintiff contingency fee matters, however, the billable hour is the status quo that rules over how many law firms make money. It is also a vice grip on the way lawyers explain what they are entitled to for the work they produce. Time billing is open-ended; which renders it suited to the uncertainty inherent in most legal matters. But it is also unnatural and rigid. Clients dislike the lack of control or meaningful understanding over the potentially limitless expense and they prefer predictability and results-oriented invoicing that straight time billing simply cannot live up to.

We should be able to explain what we do more effectively than logging a gap in time for our clients. Many benefits could be realized by a system that allows us to increase revenue in a creative manner beyond simply either: 1) spending more hours on a project; or 2) raising the price. Lawyers sell much more than presence between two particular moments. Clients can contract for anything from prior experience and practical skills to courtroom savvy and reputation. We should think to charge our clients in a way that is more expressive and coherent than time as money.

Like other consumers, clients seek results. But

Continued on page 4

INSIDE

If you're getting this newsletter by postal mail and would prefer electronic delivery, just send an e-mail to Ann Boucher at aboucher@isba.org

Mentoring—what we have to do

Continued from page 1

mentor which means to tutor or to coach. We need to be a Mentor; we need to be a trusted counselor or a guide on how to practice law properly and professionally to the new attorneys in our practice as well as the rest of our professional community.

What are the benefits of mentoring? There are several. Mentoring will increase the likelihood that you will be able to retain the new associate that you hired. That hopefully you will be able to grow your business and because of the mentoring will be able to attract new talent. You may be able to develop some succession planning within the firm by growing that new associate into a leadership role. Finally, you may be able to feel better about your role in the firm, and the others around you, which translates into increased morale.

At the outset, you should have a manual, or a checklist of all of your office procedures. Any new employee to your office needs to learn the office procedures and a newly hired attorney is no exception. Who answers the phone, how are you going to get your messages, how are e-mails and faxes handled, how are the files set up, paperless or hard copy, who maintains them, who has the client contact, how are forms organized, where are the form stored, on what drive, who has access to them, how do you navigate the data base programs that the attorneys will be using regularly, who inputs time, who does the billing, etc…These are all very important facts for any staff member to know and this will serve you well as you hire new employees.

You should start the process of documentation by you and your support staff walking through a couple of routine files. Better still, start to document using files that are going to be handled by the new staff attorney. Write down the software and the hardware that the attorney will need to learn and the process as to how a file moves through the office in terms of who does what to the file. This quick process of documenting will allow the new attorney to work with the staff to fill in the blanks to insure that the process is fully documented.

Who is going to mentor the new attorney in "office procedure"? Is this something that you will have to undertake or can you delegate this to a staff member? If you delegate this to a staff member, how are you going to insure that the attorney is taught properly? What checks and balances are you going to employ to insure this? It can be very frustrating not knowing who to give a letter to in order to get it mailed. How is dictation performed, do I type my own pleadings or do I use a dictation device, dragon dictate, how do I use it etc…. It is not always the law that causes the problems but the practice of law that can cause the issues. The devil is in the details and you need to insure that the details are covered.

In choosing a staff member as a mentor, it is important that you set the proper tone. It is not something that the staff member should take lightly. You need to emphasize how important it is that the new attorney feels comfortable in his working environment as that will mean less pressure on the rest of the office. Also, a lack of training will cause an office that is high functioning to slow down in its production as a result of the new attorney not knowing the proper office procedures. Incentivize the staff member to do a good job of training the attorney. Having them become invested with the outcome is very important. This also allows you to vest in that staff member some management responsibility. It allows you to nurture the staff member and have her grow so that you can delegate more tasks to her in the future. You are growing that staff member while training the new attorney.

In my practice, our new attorneys have told me that it has been very helpful sitting with staff. We have the attorneys rotate through the practice areas that they are going to be working in. They sit with one person from each area and learn how they do their job, how it relates to the other areas in the practice and specifically what they do to support the attorney and what the attorney can do to support them. The staff members also show the attorney the software programs that are used regularly in the office and how to navigate through them. The attorneys are given the office manuals on the procedures to perform certain tasks as well as the software. This gives the attorneys a reference manual of sorts as to the practice area. This creates a line of communication between the attorney and the staff. It gives the attorney a chance to learn what the front line staff are doing and helps to improve the delivery of legal services. The new attorneys and staff members have been very positive about this exercise. I would suggest that you have the attorneys and staff members circle back after a couple of months to examine if the work flow is being done efficiently. Perhaps they have learned that things could be changed to benefit everyone and the failure to have this second or third chat is an opportunity missed to improve the practice of law in your office.

The staff can only do so much in the nurturing and mentoring of the new attorney. You must take the attorney the rest of the way. It is our responsibility as professionals to teach the others in our profession the correct way to practice law as well as the law involved in our practice areas. If you have hired a newly licensed attorney, this task is a bit more daunting as the new lawyer in all likelihood will not have taken many, if any, classes in law practice management. The new attorney will have learned case law but not the cases relevant to your practice area. The new attorney knows about the Code of Civil Procedure but has never drafted or argued a motion to quash or a 2-615 motion. The attorney may have learned all the tax consequences of a marital deduction trust but has never gathered the information necessary to draft the document or has never learned the technique to interview a client. These are things that you have to teach. How do you go about this?

There has always been one school of thought that you throw the new attorney into the pool and say "swim." Trial by fire and then after the fire you discuss what worked and what didn't work. If it was good enough for me then it will work for her is the thought. I suggest that this is not necessarily a good idea. First of all, think about how you felt when you were put into that position. You were probably nervous, anxious and most likely didn't do a particularly good job on those cases. How is that properly representing the client? Were you put into that position because the other attorney in the office didn't have time to work with you? Are you thinking of doing this to your new attorney because you do not have the time to work

with her?

If you are going to bring someone in who has not practiced in your practice area(s) I suggest that it is not only respectful but professional to make sure that you have the time to teach and mentor them. This means reviewing the motions or briefs that they drafted. It means going to court to watch the attorney argue the cases. Help her and point out where things could have been presented in a better light. If you are in Court, the Judge will respect you as you are there as a safety net. It means sitting in on client interviews and interrupting if necessary. It is all of our responsibility to insure that the new attorneys are taught. The frustration of not learning, or not being taught properly, will lead to burn out and perhaps that associate leaving your firm or abandoning the practice of law altogether and may cause professional liability problems as well. The cost of bringing in a new attorney is not measured solely in the salary and benefits but also the "soft" costs of training. You do not want to bring someone in only to have him leave you in a couple of months or a year and then you have to start the whole process over again. The soft costs of your time and your staff in doing the training are now lost. Why not do it correctly and set the base for the attorney to stay with the firm?

There is another reason to do mentoring and that is to create succession planning. Mentoring helps to integrate the new lawyer into the firm culture. You can strongly influence what they learn, how they learn and how they mature and develop. You can teach them how to be leaders within your firm and as a result, how to take over the reins of the firm. The associate then sees the benefits of career advancement and perhaps, just perhaps, that is your succession plan.

How will you go about the task of mentoring the new associate? The new staff attorney will need access to all the case law, briefs and memos that relate to your practice area. Have you been saving these? Are they in one place on the firm hard drive? How have you been saving these documents? Are they searchable? If you have not been regularly saving this type of information now would be a good time to do so. Why reinvent your research or perhaps have a new attorney not know about important cases when she does her own research? It is better to have it on the firm hard drive and then allow the new staff attorney to update the work. It is more cost effective for the client and it serves as a learning tool for the attorney.

It is important that you give the new attorney some research projects to work on in the practice areas that you concentrate your practice. This forces them to learn "the law." The new attorneys in my office have remarked how invaluable such projects have been to reinforce what they thought that they knew or to heighten their awareness of some aspect of the law that they are arguing on a regular basis.

Who is going to mentor the new staff attorney on the legal issues? Is this something you will be involved in or another attorney in the office? The same issues dealt with above regarding office procedures should be followed here. The problem is that we have had to hire another attorney because we have been so busy and we do not have time to train the attorney. If we had time to train we would not have needed the new attorney, right? If you fail to properly mentor the new staff attorney you will cause a disconnect. That disconnect will mean that the attorney can become disillusioned, stressed out, make mistakes, even possibly commit malpractice, and perhaps leave the firm as a result of the frustrations and problems that she encounters. This then leaves a hole in your workforce and more pressure on the other team members. It may also result in professional liability, resultant monetary damages and loss of reputation not only to the affected attorney, but to you and your firm too. It also means that you now need to begin the entire hiring process over again and lose productivity. It is better to spend some up front time, no matter how painful it might seem.

There are several things that we are doing in my firm to advance the mentoring concept. Albeit they are being done in small steps, but at least they are steps. We recognized the need to bring some learning to the table for our new attorneys and to provide them with a reference point when we might not be available. We had been doing this for our staff for awhile and we knew we needed to bring it to the attorney discussion.

We have several directories set up on our network. One directory is called the "attorney folder." It has all sorts of information dealing with office procedures and issues specific to the attorneys. The directory has items such as expense sheets and how to properly fill them out, when they have to be turned in and to whom along with what periodicals and trade

The Bottom Line

Published at least four times per year.

Annual subscription rate for ISBA members: $20.

To subscribe, visit www.isba.org or call 217-525-1760

Office
Illinois Bar Center
424 S. Second Street
Springfield, IL 62701
Phones: 217-525-1760 OR 800-252-8908
www.isba.org

Editor
Jeffrey M. Simon
230 W. Monroe, Ste. 2110
Chicago, IL 60606

Managing Editor/ Production
Katie Underwood
kunderwood@isba.org

magazines might be helpful to them and how they can subscribe to them. How to log into the Westlaw, how to log into specific research data bases specific to our industry, can also be found there.

We have another directory where all the briefs, articles, memorandums and case law are stored. They are organized by topic and can be searched. For example, perhaps an attorney was given a motion to quash service. All the cases where briefs have been submitted on this point are in a folder called service issues. Thus, an attorney can review the cases and arguments in past matters and use those as a jumping off point in preparing his arguments on the case at hand.

We have instituted a training program for our staff. We wanted to improve the knowledge of our staff so we ran a "LUNCH AND LEARN" program. The program was such that the staff could attend a session and learn about service or preparing complaints or reviewing titles etc… During these lunch and learns sessions, we videotaped them. They have been put into a directory on the network. Thus, any new staff members who may come into the department in that area can watch the videos and get a basic understanding of the information. It eliminates a portion of the side by side training that is usually done when a new person comes into the firm. These videos also include staff talking about their jobs and a task as well as the attorneys talking about the legal ramifications of the actions that staff is taking.

We found that these videos were also helpful for the new staff attorneys. It allowed them to learn the basics of the areas as well as the firm philosophy on what is needed in each area. It creates a common vision for all members of the firm. There are no mixed messages. It is important that all members of your staff, attorneys or support staff, all need to be aligned with the common vision of the firm. This allows for all to get the vision.

Mentoring for all staff is an important task that we need to recognize. We need to learn how to do it properly and we need to do it. As more-experienced attorneys, it is our job, our professional obligation to teach the younger or more inexperienced members of the bar how to practice law. ■

Reference Materials:

Cordell Parvin LLC, <www.cordellparvin.com>. Articles on Mentoring

Abbott, Ida O., *Being and Effective Mentor: 101 Practical Suggestions for Success,* NALP, 2nd Edition 2006

Abbott, Ida O., *The Lawyers Guide to Mentoring*, NALP 2000.

J.Ferm, LLC "In-House Law Firm Mentoring Programs: Worth It?," by Matthew Krejci, 2009

"Finding Great Resources about Mentoring on the Internet May Be Even More Difficult Than Finding a Great Mentor On Your Own" by Dennis Kennedy. Law Practice Today. 2004.

Steven C. Lindberg is the Managing Member of the firm of Freedman Anselmo Lindberg LLC. He oversees all management functions of the firm which includes the training of all attorneys.

Bill for your value, not just your labor

Continued from page 1

it is, of course, unethical to guarantee results in our profession. Nonetheless, we should sell the performance rather than just the labor. But how do we stray from straight time billing when time is such an important part of our stock in trade? And while time is an important commodity to us, as it is to everyone, it is not as important as our other stock in trade; advice. So we need to get from packaging the time to packaging and distributing the advice.

We must recognize that time is a relatively simple and therefore effective concept to implement and explain. Attorneys also have many time-consuming responsibilities that impart no legal knowledge, but still require compensation such as time spent waiting or traveling and all non-legal tasks necessary to complete the matter for which the client has agreed to pay. However, straight time billing can be viewed as lacking examined forethought on one end and sufficient detail on the other.

Billable hours were not always the status quo. As the practice of law became more complex beginning in the early 1900s, fee schedules and other flat-fee arrangements like retainers, however proved increasingly unworkable. The Federal Rules of Civil Procedure were reformed in 1938 and dramatically expanded lawyers' workloads in civil cases due to implementation of complex pretrial discovery rules. These changes created litigators out of trial lawyers and sucked the predictability out of calculating how much time one might spend on a case. The next few decades brought waves of regulation over business activities. Many of the most successful firms in the world today began selling their services during these years and the billable hour took hold over the legal marketplace.[1]

In 1992, DuPont, in a public and widespread manner, refused straight hourly billing when it introduced the DuPont Legal Model.[2] The Model boasts a "solid, dynamic, integrated approach to providing services to the DuPont Company…derived by applying business discipline to the practice of law."[3] Within both the corporate and legal worlds, the DuPont Model is credited with pioneering presumptive use of the following approaches:

- Flat fees for repetitive and predictable services.
- A higher ratio of performance bonus to total fee, with the performance bonus based on cost saving.
- Blended rates that push firms to use lower level employees when possible.
- Volume discounts that decrease hourly rates as volume increases.
- Capped fees.

Lewis Greenblatt, partner at Reed Smith LLP, who has represented law firms and lawyers regarding issues involving their own legal practices feels that alternative billing is great marketing if it can be done correctly. He notes that any alternative agreement must be fair, reasonable, and completely transparent. He also recognizes some pitfalls which have, to this point, left him unimpressed with many forms of alternative billing. When disputes arise, these include unconscionability issues that occur in instances where the lawyer becomes entitled to a lot of money for expending very little labor or legal knowledge. In these cases, either contract theory or quantum meruit rarely work in the lawyer's favor.

Other methods beyond hourly billing include:

- Retrospective billing based on value. Here, the attorney's work is assessed after the fact and an appropriate value is assigned to the work completed by that attorney. Again, in theory, this idea seems fair and might best capture the essence of the optimal billing model. However, the practical implications are immense. Good luck even beginning to negotiate the value of a service after that service is complete, and bless your heart if you want to trust that your clients will pay promptly after all of the work is done.
- Equity based fees. In this arrangement, a client pays the attorney with a vested interest, like shares of stock. Equity billing is best suited for business clients, and is most common among startups who have limited capital to spend. While limited in their scope, equity based fees are nicely able to align the interest of the attorney who wants to be paid for his or her work and the client's desire to do so. Attorneys must be careful with the potential conflict scenarios that can arise. Aside from the traditional contingency fee arrangement, equitable fees are not ethical in litigation.[4] Before a lawyer enters into an equitable fee arrangement with a client, a full analysis under the Illinois Model Rule of Professional Conduct 1.8(a)-(f) is necessary.[5] Generally speaking sound practice at the outset of an equitable fee arrangement with a client includes going through the steps spelled out in Rule 1.8(a), which are: 1) Ensure that the terms are fair and reasonable to the client and reduce such terms to writing; 2) Inform the client in writing that the client may seek independent legal advice on the transaction and is given a reasonable opportunity to do so; 3) Have the client give an informed consent in writing to the terms of the transaction, including the lawyer's role in the transaction. (Note: This is a summary. Readers are urged to read the rules and comments thereto in their entirety).
- Hybrid contingency fees. Hybrid contingency fees involve modifying one's fees in such a manner that the client and attorney are similarly incentivized. In litigation, the plaintiff's attorney absorbs more risk and does more work with a file that takes a long time to close so a plaintiff's attorney might increase contingency fees or bill a reduced hourly fee plus a contingency fee based on success. However, a defense attorney paid regularly for the amount of work he does on a file is, in many ways, incentivized to lengthen a big case so in order to bill on it. Few clients seem to enjoy protracted litigation. So, even while, of necessity, continuing to maintain the same level of representation, a defense attorney might gradually decrease the applicable *hourly fee* as a particular matter wears on. Whether on the plaintiff, or the defense side, these types of hybrid arrangements like all fee arrangements must, of course, be conformative with the applicable rules of professional conduct.
- Codification of all particular tasks. This billing method involves applying a unique financial value to all distinctive tasks an attorney does for the client. This requires a great deal of forethought and assessment (including a disciplined look at how much value is generated by regularly conducted tasks) at the implementation stage, but if it is implemented properly it can be executed with minimal complication. Codification is limited when you enter uncharted territory and agreements must include clauses that can trigger renegotiation or revert to systems like straight time.[6] Some instances where time billing clauses might be appropriate include emergency hearings, unexpected travel, and may other unforeseen (and possibly unwanted) situations that a particular case may present.
- Flat fee billing is due some mention in this article, because it is likely the easiest and most common non-hourly method used by law firms. Because flat fees are conventional, though, we can avoid discussion of the nuances.

Most of the approaches described above, as well as other "alternative" billing methods necessitate that the attorney and client are armed with as much information as possible about the case. Consequently, implementation would likely be more manageable with longstanding clients and then in a calculated and deliberate manner. Slow implementation incentivizes loyalty and is premised on a backdrop of a mutual comprehension and enough trust to look past an occasional advantage on either side.

Offices that choose to implement alternative billing methods must keep some things in mind. Amongst a myriad of other requisites for their proper uses, retainer agreements must allow for full disclosure of all aspects of legal services rendered. Additionally, these agreements, like all attorney-client agreements, need to be fair and reasonable. Reasonableness of legal fees depends on the circumstances of a particular matter, and the factors considered are discussed in Rule 1.5 of the Illinois Rules of Professional Conduct.[7] These agreements must also provide explicit instructions on how to deal with situations that go beyond those originally contemplated and, as discussed above, have clauses that revert back to straight time billing for certain instances.

It is vital for offices, especially early on, to constantly evaluate the performance of a new billing method. Alternative billing structures should allow you to enjoy a fair and reasonable profit, and, at the same time, allow your clients to pay for services in a more predictable and results-driven manner. Putting successful alternative billing structure(s) in place provides an obvious benefit to the client(s). In regard to one's own practice, the goal is for you to be able to work more efficiently and economically. Thus, over the course of time, this should enable you to market for and take on more work than before either from the same client(s) or others that you are now able to serve. If you billed hourly before, then keep track of the money you should be making hourly to make sure the new system is economically rational.

Look at the world around you and you will notice that the top down approach of doing business is beginning to change in the legal world and has already substantially changed in the larger business world. User-generated models are taking over the way we use our phones, order our coffee, and gather the news. This seismic shift is that of industries that allow their customers or clients to play a role in creating the end product. Along with excellent legal advice, clients are beginning to expect this kind of service and billing flexibility from their attorneys. Finally, the examples mentioned in this article are but a mere scratch on the surface of the ways we can begin to bill more effectively. The greater concept of client-first billing is one that is here to stay and must be embraced by law firms in order to not only survive but thrive now and in the future. ■

---

1. A famous 1958 ABA pamphlet titled "the 1958 Lawyer and his 1938 Dollar" described an economic plight among lawyers because too many lawyers were poor businessmen. In doing so, the ABA inspired a generation of office managers to aggressively maximize profit of time billing, which the article called that lawyer's "sole expendable asset. The Supreme Court eliminated common minimum fee schedules in 1975, be-

cause they were a "classic illustration of price fixing" that violated federal antitrust laws. *Goldfarb v. Virginia State Bar* 421 U.S. 773, but well prior to this many clients expressed dissatisfaction with what seemed like an eyeball technique of legal billing to only add to the backdrop of the shift in billing methods. <http://www.legalaffairs.org/issues/September-October-2002/review_kuckes_sep-oct2002.msp>

2. There is an excellent description of the model at <www.dupontlegalmodel.com>. Highlights from the Web site include motivation for the Model, described by then VP and Assistant General Counsel Thomas L. Sager's proclamation that "DuPont, like other clients, does not want to buy time, it wants to buy results." The Web site describes the organization of the model down to listing the general duties of each law firm the company retains.

3. <www.dupontlegalmodel.com>.

4. Illinois Rule of Professional Conduct 1.8(i)

5. Rule 1.8. Conflict of Interest: Current Clients: Specific Rules (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (2) the client is informed in writing that the client may seek the advice of independent legal counsel on the transaction, and is given a reasonable opportunity to do so; and (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction. (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules. (c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship. (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation. (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client. (f) A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6.

6. Straight time triggers are probably sound advice for almost all alternative billing arrangements.

7. (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

Dan Breen's practice concentrates on personal injury and other plaintiff litigation. Dan is a member of the ISBA's Standing Committee on Law Office Management and Economics as well as the John Marshall Law School Alumni Board. You are welcome to reach him with comments at danbreen@breenlawchicago.com.

Health care reform—Guidance and then some

By Michael J. Powers

So you thought that the well-publicized, 2,700 pages of legislation would cover every aspect of healthcare reform. The avalanche of guidance issued by the various government agencies involved with implementing healthcare reform since the legislation was passed last March would indicate that the legislation was only the beginning of the process. We still have a long way to go.

This article will focus on those aspects of the Patient Protection and Affordable Care Act and the related Health Care Education and Reconciliation Act of 2010 (collectively the "Act") that are most important to employers who sponsor healthcare plans for employees and have been the subject of significant guidance since the Act first was passed. While legislative and court challenges seeking repeal may provide the Act's opponents with hope for its demise, employers should be gearing up for full implementation or they will be caught on the wrong side of compliance when the agencies in charge of implementing the Act turn their attention from guidance to enforcement.

What Most Employers Should Have in Place Now

The first leg of the Act required certain provisions, primarily impacting coverage-related limitations, to be implemented by employer plans as of the first plan year beginning on or after September 23, 2010, or six months after passage of the Act. For employers who sponsor calendar year plans, this means that these provisions were required to be in place no later than January 1, 2011. For fiscal year plans, the implementation deadline will depend on the beginning of the plan year, e.g., a plan year that begins on April 1 will not have to implement these provisions until April 1, 2011.

For all plans, the following significant changes must be in place:

- Coverage for children up to age 26, subject to a limited exception for grandfathered plans.
- No lifetime limits on essential benefits.
- Annual limits on essential benefits are restricted.
- No preexisting condition exclusions for children under age 19.
- No rescission of coverage for reasons other than fraud or intentional misrepresentation.
- No tax-free reimbursement for nonprescription medicine (other than insulin).

For those plans not "grandfathered" (discussed below), the following significant changes must be in place:

- Revised benefit claims review and appeal procedures, including an external review of a final adverse decision.
- First dollar coverage for preventive care.
- Nondiscrimination testing for insured plans.

Grandfathered Plans

In an effort to allow individuals to keep the insurance coverage they had under em-

ployer plans prior to the Act, a plan in place at the time the Act was passed (March 23, 2010) is deemed "grandfathered" and exempt for the time being from several significant provisions of the legislation. These provisions include changes to claims review procedures and nondiscrimination testing as applied to insured plans. What sounded like a simple concept became very complicated when guidance was issued with respect to how a plan could lose grandfathered status. In accordance with this guidance, if benefits are reduced or costs are shifted to employees, a plan's grandfathered status is at risk. For example, an increase in any percentage-based co-insurance amount will cause a plan to lose grandfathered status. The level of restrictions on plan design changes imposed by the guidance surprised many. For this reason, it is estimated that only about half of employers will attempt to maintain grandfathered status. In light of the many changes made to employer-sponsored insurance policies annually and the trend of employers shifting coverage-related costs to employees, care must be taken in the event an employer desires to maintain grandfathered status. Due to the complexities inherent in the guidance, employers should seek expert assistance to determine whether a change could result in a loss of grandfathered status, thus requiring full compliance with all of the Act's current requirements. Recent additional guidance provided that a change of insurance carriers alone would not result in a loss of grandfathered status. Notice regarding grandfathered status must be provided to plan participants whenever a summary of plan benefits is provided. Such notice should be included with open enrollment materials and the plan's summary plan description. A model notice is available on the Department of Labor (DOL) Web site at <www.dol.gov/ebsa/grandfatherregmodelnotice.doc>.

Lifetime and Annual Benefit Caps

The Act prohibits all plans from imposing a lifetime benefit limitation with respect to "essential health benefits" and imposes a phased-in restriction on annual limitations. Guidance has provided that exclusion of all benefits for a particular condition will not violate these rules. Although the Act provided general categories of services, such as hospitalization, emergency services, prescription drugs, and maternity-related care, that are considered essential for this purpose, formal guidance has yet to be issued regarding what services within these categories will be considered essential. In the meantime, recent guidance in the form of FAQs provides that good faith efforts to comply with a reasonable interpretation of essential health benefits is acceptable. An employer is required to provide notice to participants who previously reached a plan's lifetime benefit maximum that they are again eligible for benefits and may re-enroll in the employer's plan. A model notice for this purpose is available on the DOL Web site at <www.dol.gov/ebsa/lifetimelimitsmodelnotice.doc>.

Discrimination Testing for Insured Plans

Employer sponsored, self-insured plans have been subject to non-discrimination testing with respect to eligibility and benefits for some time. Failure to pass these tests requires that a portion of the benefits available to highly compensated employees be included in such employees' income. Surprisingly, these rules did not apply to insured plans prior to the Act. An employer could provide executives with tax-free insured benefits to the exclusion of rank-and-file employees with little worry.

The Act addresses this dichotomy by subjecting non-grandfathered insured plans to non-discrimination testing. However, violation of testing does not result in taxable income to the favored highly-compensated employee. Rather, the employer is subject to civil action to compel the provision of non-discriminatory benefits and a stiff penalty of $100 per day for each participant that is the subject of discrimination, i.e., a non-highly compensated employee. Ouch! Testing is to be based on the rules applicable to self-insured plans. This can be fairly complex and will require the assistance of outside advisors. Significant relief regarding compliance was provided in December 2010 when the IRS announced that these rules would be suspended pending the issuance of formal guidance regarding testing methodologies. In the meantime, employers should run preliminary "eye-ball" tests in accordance with the rules applicable to self-insured plans to gauge whether their plan design disproportionately favors highly-compensated employees.

First Dollar Coverage for Preventive Care

The Act requires non-grandfathered plans to provide first dollar coverage, i.e., no copay, co-insurance, or deductible for certain preventive care. In accordance with guidance, first dollar coverage is required only for "in-network" preventive care. Some of the services considered to be preventive care in accordance with guidance include routine vaccinations, blood pressure, cholesterol and diabetes tests, many cancer screenings, and certain wellness counseling. Detailed information regarding covered preventive care services is available at <www.healthcare.gov/center/regulations/prevention/recommendations.html>.

Planning

Whether the Act ultimately will survive legislative and court challenges remains unclear. Despite this uncertainty, employers should proceed with compliance measures. Employers should continue to review whether grandfathered status is desirable and whether it can be maintained in light of applicable restrictions on design and cost structure changes. Any notices and information regarding changes implemented by the Act should be incorporated into plan materials and provided to plan participants on a timely basis. Additional guidance regarding many of the Act's provisions continues to be developed. For example, employers should be on the alert for guidance regarding abbreviated plan summaries and 60-day prior notice of plan changes. As such guidance is issued or provisions of the Act reformed or repealed, employers must react and plan accordingly in order to ensure they are in full compliance with surviving provisions and related guidance. Human resources personnel should be properly trained with regard to the Act's compliance requirements. Such training should also assist them in answering employee questions. Regardless, employers likely will need the assistance of outside advisors to navigate the maze of ever increasing guidance issued by the agencies charged with implementing the Act. ■

Michael J. Powers is a member in the Chicago office of Howard & Howard and concentrates his practice in employee benefits, taxation and ERISA matters.

Editors Note: This article was originally published in the February 2011 issue of InterBusiness Issues published by Peoria Magazines. Several minor revisions were made to the article subsequent to its publication there and prior to its publication here.

Establishing a corporate giving program

By Leonard W. Sachs

Genesis of a Giving Culture

In 1858, at the age of 12, William G. Howard lost his left arm to a McCormick Reaper. No longer able to farm, he returned to school as the only student to study beyond the eighth grade. Neighbors pooled their money and sent William to Kalamazoo College. After earning the privilege to practice law, William returned home to serve the community of friends who had supported him in his time of need.

After William's son and grandsons joined the practice, Howard & Howard's culture of giving continued to evolve. The firm pursued unpopular causes such as the Kalamazoo desegregation case, took pro bono cases and matters by court appointment, encouraged community service, and supported charitable causes.

Like most organizations at the time, our financial contributions followed the "checkbook charity" paradigm. We made contributions on an ad hoc basis to what we believed were worthwhile causes without focusing on accountability, efficiency, outcomes, or advancing the business interests of our firm. Like many small and mid-sized organizations, we failed to recognize the opportunities offered by a focused program of targeted giving.

As the business of law became more sophisticated and competitive, our giving philosophy evolved into a formal corporate giving program (CGP). In 1986 we established the Howard & Howard Community Reinvestment Fund (H2CRF). The H2CRF is an employee funded, donor-advised fund, administered by a community foundation. The program maximizes our human capital and financial resources, enhances job satisfaction, aids in employee recruitment and retention, increases brand awareness, and promotes profitability. Since its inception, the H2CRF has distributed nearly three million dollars to not-for-profit organizations that are important to our employees, clients, prospects, and referral sources in the communities we serve.

CGP Program Structure

Giving programs can take on many forms and be funded in several ways. A well-run United Way campaign always offers a good introduction to the giving community. The most effective campaigns fully utilize the promotional resources of the United Way staff and volunteers to educate attorneys and staff about the myriad of giving opportunities and the impact each individual can make on the community. A matching grant program consistently increases employee involvement and plays a critical role in maximizing participation.

A formal program to encourage volunteerism also serves a vital role in many CGPs and directly promotes the business interests of an organization. Some law firms loan attorneys to specific organizations for discreet projects or extended campaigns. Some include more general volunteering obligations as a component of job descriptions and performance appraisals. Some compensate attorneys and staff who volunteer for causes that advance the firm's interests in the form of salary increases, bonuses, gifts, and extra paid and unpaid time off work. Some make financial contributions to organizations for which employees volunteer. Most acknowledge volunteer contributions through internal communications, newsletters, bulletin boards, and websites. All successful organizations recognize that community service fosters the relationships that drive business development and creates leadership development opportunities for young professionals.

Another giving model is the direct giving program. In this model, the firm funds charitable gifts and takes a direct tax deduction, subject to limitations imposed by the IRS. Sponsorships and gifts that do not qualify as charitable contributions may nevertheless be deducted as a business expense when computing corporate income tax obligations.

Many large organizations establish a corporate funded foundation that operates as a distinct entity with an independent board of directors. This model generally is too complex and expensive for small and mid-size law firms to administer.

Such organizations, like Howard & Howard, are better served by establishing a donor-advised fund administered by a community foundation or other third party that, for a modest fee, assumes responsibility for satisfying tax and regulatory requirements. A donor-advised fund may be funded by individual attorney and staff contributions, firm contributions, or a combination of both. Under this model, the firm makes recommendations for gifts from the fund to the third party administrator who is free by law to accept or reject each proposal. As a practical matter, assuming the recommendation is to a 501(c)(3) organization, the foundation funds it. The donor-advised fund model has well served our philanthropic needs.

Establishing the Decision Making Process

Determining who decides what to give, to whom, and why is critical to a successful CGP. Some organizations charge a single corporate giving officer with responsibility for making the business case to the CEO or management team for recommended gifts. Other organizations enlist a committee to make such recommendations. Some, like Howard & Howard with multiple office locations, establish an allocation committee comprised of senior management and representatives of each location who make recommendations to the committee based on the consensus of the employees at each particular office. In our experience, an effective CGP benefits from a large and diverse allocation committee.

A successful CGP also includes specific themes and rules that govern distributions. This approach focuses giving and maximizes the overall impact of charitable dollars. For example, a firm that may be perceived as fostering environmental problems may adopt a "karmic credit" approach and target "green" projects to offset these perceptions. A firm that uses recycled products, might focus on projects encouraging recycling. At Howard & Howard we focus our giving to organizations that benefit children, education, and the arts.

The H2CRF rules include the following:

- All donations must be given to a 501(c)(3) authorized agency.
- No donations may be made to solicitations that return monetary value to the firm (*i.e.*, candy, tickets, golf, or meals).
- Only Howard & Howard employee solicitations will be considered.
- The employee proposing the donation

must make a written recommendation that includes his or her connection and involvement with the organization or a client, prospective client, or referral source's connection to the organization, the potential benefit to the firm or the pure philanthropic purpose of the gift, and how the employee intends to follow-up on the efficacy of the gift.
- No donations are given to religious or political institutions or alma maters.
- Gifts must be for present use rather than for endowment or building funds.
- Substantial gifts that "make a difference" are preferred.

Institutionalizing a Corporate Giving Program

Maximum engagement of participants in a well-communicated, transparent CGP is critical to its success. Securing attorneys and staff engagement starts before the first day on the job. Studies show that the generations following the "baby boomers" place a higher emphasis on working for socially conscious organizations. Include information about your CGP in help wanted ads, employment applications, and job interviews. You will maximize participation by addressing your giving philosophy at the inception of the employment relationship. At Howard & Howard we encourage our attorneys to donate one percent of their income to the H2CRF and ask our non-attorney colleagues to give what they can. The best opportunity to obtain buy-in to a corporate giving program like the H2CRF is when the applicant is asking for a job. One hundred percent of my colleagues in Peoria participate.

After hiring, include additional information about your CGP in the orientation process. Strongly encourage and incentivize participation. Modify self-evaluation forms and performance appraisals to acknowledge employee contributions, through community service and volunteerism, to the firm's mission, core values, and strongly-held beliefs. Utilize all of the organization's communication resources from newsletters, e-mails, Web sites, and bulletin boards to constantly remind employees about the positive outcomes resulting from their commitment to share.

Increasing Brand Awareness

Small and mid-sized firms spend thousands of dollars annually on advertising to obtain positive name recognition. Many of the same firms spend thousands more on ad-hoc charitable giving. While giving to the less fortunate anonymously represents the purest form of philanthropy, increasingly organizations are taking advantage of increased brand awareness offered by a targeted giving program in their public relations and advertising business plans.

If you establish a foundation or donor-advised fund, include your firm's name in the title. When making grants, include your brand in the title of the gift, *i.e.*, the Howard & Howard Head Start to Art Grant, the Howard & Howard Future Laureates Arts Scholarship, the Howard & Howard International Health Studies Scholarship Fund. Issue press releases in connection with your grants. Include, whenever possible, photographs of grant recipients and their ultimate beneficiaries in your external communications. Consider obtaining a reusable large dry erase check bearing your firm's name and logo that can be used for promotional photo opportunities. Finally, you should strongly encourage attorneys and staff to participate in events and receptions sponsored by the organizations that your firm supports.

Conclusion

Although William G. Howard's descendants no longer practice law, his legacy of community service survives. Our firm's culture has evolved in large part out of the philosophy of giving embodied in the Howard & Howard Community Reinvestment Fund. We share with the community and we share with each other with the understanding that in doing so we prosper and with our prosperity we make our communities a better place. In turn, we continue the cycle of growth and prosperity. Through this process we have come to understand that promoting the greater good also advances the bottom line. ■

Leonard Sachs serves as the Partner in Charge of Howard and Howard's Labor and Employment Practice Group and Chairs the Allocation Committee of the Howard and Howard Community Reinvestment Fund.

Note: A version of this article was previously published in *InterBusiness Issues*, Central Illinois Business Publishers, Inc. (Published by Peoria Magazines).

Upcoming CLE programs

To register, go to www.isba.org/cle or call the ISBA registrar at 800-252-8908 or 217-525-1760.

May

Tuesday, 5/3/11- Teleseminar—Ethics & Confidentiality in a Digital World. 12-1.

Tuesday, 5/3/11- Chicago, ISBA Chicago Regional Office—Hanging Out a Shingle or Putting Up a Roof. Presented by the ISBA Young Lawyers Division. 12:30-4:00.

Wednesday, 5/4/11- Chicago, ISBA Chicago Regional Office—Settlement in Federal Courts. Presented by the ISBA Federal Civil Practice Section. 11:55- 4:15.

Wednesday, 5/4/11- Webinar—Conducting Legal Research on FastCase. Presented by the Illinois State Bar Association. 12-1.

Thursday, 5/5/11- Teleseminar—Securities Law Issues for Medium and Smaller Businesses. 12-1.

Thursday, 5/5/11- Chicago, ISBA Chicago Regional Office—Municipal Administrative Law Judge Education Program. Presented by the ISBA Administrative Law Section; co-sponsored by the Illinois Association of Administrative Law Judges. TBD.

Friday, 5/6/11- Lombard, Lindner Conference Center—Business Purchases Involving Real Estate. Presented by the ISBA Real Estate Section. 8:55-4:30.

Friday, 5/6/11- Chicago, ISBA Chicago Regional Office—Legal Ethics in Corporate Law- 2011. Presented by the ISBA Corporate Law Department Section. 12:30-4:45.

Tuesday, 5/10/11- Teleseminar—Managing a Trust: Trustee Duties, Liability, and Investment Decisions, Part 1. 12-1.

Tuesday, 5/10/11- Chicago, ISBA Chicago Regional Office—A Primer on Trademark Office Actions- A Panel Discussion. Presented by the ISBA Intellectual Property Section. 9:30-11:30.

Wednesday, 5/11/11- Teleseminar—Managing a Trust: Trustee Duties, Liability, and Investment Decisions, Part 2. 12-1.

Wednesday, 5/11/11- Chicago, ISBA Chicago Regional Office—Effective Advocacy for Juveniles with Mental Health Needs. Presented by the ISBA Mental Health Law Section; co-sponsored by the ISBA Education Law Section, the Child Law Section and the ISBA Standing Committee on Disability Law. TBD.

Thursday, 5/12-Friday, 5/13/11- Chicago, ISBA Chicago Regional Office—2011 Annual Environmental Law Conference. Presented by the ISBA Environmental Law Section. 9-5; 9-1.

Thursday, 5/12-Friday, 5/13/11- New Orleans—Family Law Update: A French Quarter Festival. Presented by the ISBA Family Law Section. 12-6; 8:30-4:00.

Tuesday, 5/17/11- Teleseminar—Attorney-Client Privilege and the Work Product Doctrine. 12-1.

Wednesday, 5/18/11- Webinar—Advanced Legal Research on FastCase. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 5/18/11-Thursday, 5/19/11- Chicago, ISBA Regional Office—Literature for Lifelong Learning. Presented by the Illinois State Bar Association. 9-4:30 both days. Max Cap: 30.

Thursday, 5/19/11- Teleseminar—Successor Liability in Asset and Business Transactions. 12-1.

Thursday, 5/19/11- Springfield, INB Conference Center—Issues Facing Municipalities in a Difficult Economic Climate. Presented by the ISBA Local Government Section. 12:30-5:00.

Friday, 5/20/11- Collinsville, Gateway Center—Civil Practice Update. Presented by the ISBA Civil Practice and Procedure Section. 9-4.

Friday, 5/20/11- Cedarhurst Center for the Arts & Fifth District Appellate Courtroom, Mt. Vernon—Judicial Roundtable Luncheon/ Appellate Training. Presented by the ISBA Bench and Bar Section and the Appellate Lawyers Association. 12:0-4:45.

Tuesday, 5/24/11-Teleseminar—Nonprofit Organization Director Duties and Liability. 12-1.

Wednesday, 5/25/11- Webcast—Client Management and Ethical Issues AND Supreme Court Rule 922. Presented by the ISBA Family Law Section. 12-1:15.

Thursday, 5/26/11- Webcast—Avoiding Ethical Violations. Presented by the ISBA Federal Tax Section. 12-1.

June

Wednesday, 6/1/11- Webinar—Conducting Legal Research on FastCase. Presented by the Illinois State Bar Association. 12-1.

Wednesday-Friday, 6/1/11-6/3/11- Chicago, ISBA Chicago Regional Office—CLE Fest. Presented by the Illinois State Bar Association. 8-5 both days.

Tuesday, 6/7/11-Teleseminar—Inter-Species Mergers: Combining and Converting Different Types of Business Entities, Part 1. 12-1.

Wednesday, 6/8/11- Teleseminar—Inter-Species Mergers: Combining and Converting Different Types of Business Entities, Part 2. 12-1.

Wednesday, 6/8/11- Chicago, ISBA Chicago Regional Office—Issues Facing Municipalities in a Difficult Economic Climate. Presented by the ISBA Local Government Section. 12:30-5:00.

Thursday, 6/9/11- Rock Island, Stoney Creek Inn—Legal Writing: Improving What You Do Everyday. Presented by the Illinois State Bar Association. 8:30-12:45.

Thursday, 6/9/10- Chicago, ISBA Regional Office—ISBA's Reel MCLE Series. Presented by the Illinois State Bar Association. 1-4.

Friday, 6/10/11- Bloomington, Holiday Inn and Suites—Legal Ethics in Corporate Law- 2011. Presented by the ISBA Corporate Law Department Section. 12:30-4:45. ■

THE BOTTOM LINE
ILLINOIS BAR CENTER
SPRINGFIELD, ILLINOIS 62701-1779
APRIL 2011
VOL. 32 NO. 2

Non-Profit Org.
U.S. POSTAGE
PAID
Springfield, Ill.
Permit No. 820