Daily Journal

Consider This Before Slashing Services

With the recent announcement by Governor Arnold Schwarzenegger that California public school districts must cut costs by an additional $4.2 billion for school year 2009/2010, schools that had already dismantled vital education offerings such as summer school only six months earlier are now facing the unimaginable-additional teacher layoffs, increases in class sizes (again) as well as eliminating what many thought were "givens," such as school transportation and routine maintenance.

Special education, once an off-limits area protected by a host of federal laws - the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act in particular - has also come under scrutiny as an area ripe for squeezing. Indeed, dozens of publicly funded health and human services programs serving the same population - Regional Center services, Child Welfare Services Program, Healthy Families and In-Home Supportive Services Programs - have already been slashed by hundreds of millions of dollars, putting an even greater burden on schools, which now serve as the stop-gap measure of last resort for many families struggling in a state that has 11.9 percent unemployment.

But before schools consider slashing special education services, they had better consider the June, 2009 Supreme Court decision (*Forest Grove School District v. T.A)*, which grants parents the right to reimbursement for private school education if the "free and appropriate education" criteria-as called for in the Individuals with Disabilities Education Act and Section 504 - are not met, regardless of whether or not their child has been enrolled in his or her local school and whether or not that child has received special education services there or not.

In the 6-3 decision, the Supreme Court held that "...we conclude that [Individuals with Disabilities Education Act] authorizes [tuition] reimbursement for the cost of private special education services when a school district fails to provide a "free and appropriate education and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school."

Bolstering this decision is the Individuals with Disabilities Education Act's "child find" requirement, which calls for districts to "identify, locate and evaluate all children with disabilities" to ensure they receive needed special education services. The Forest Grove School District circumvented that statute by refusing to grant T.A., the student and plaintiff in the underlying case, an individualized education program despite years of correspondence from his parents substantiating T.A.'s inability to access the curriculum due to his diagnosis of attention deficit hyperactivity disorder, depression and a learning disorder.

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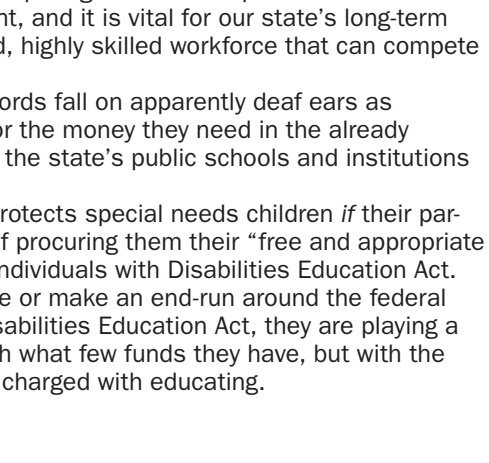
Moreover, the Supreme Court stated: "Indeed, by immunizing a school district's refusal to find a child eligible for special education services no matter how compelling the child's need, the School District's interpretation [of the statute] would produce a rule bordering on the irrational." This would "leave parents without relief in the more egregious situation in which the school district unreasonably denies a child access to such services altogether."

The Supreme Court concluded: "...[Individuals with Disabilities Education Act] authorizes [tuition] reimbursement for the cost of private special education services when a school district fails to provide a "free and appropriate education" and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school."

The unequivocal mandate by the Supreme Court is that schools work within both the spirit and the letter of Individuals with Disabilities Education Act. As such, school administrators must realize that denying a child's disability is no longer an option to getting around offering the child an individualized education program or special education support. Nor is it wise to tempt parents to remove their children from public school special education programs for more enriched and costly private learning environments.



Defending a school district's decision to deny services can be expensive, too. Districts that choose to go this route must decide if their actions are truly justified-or if the dollars spent in opposition would be better spent preparing today's students, including those served by special education departments, for tomorrow's workplace challenges.

Public schools' commitment to special education has already proven its worth, paying off in dividends that enrich the broader pool of public school students, many of whom are also challenged to stay in school.

Rethinking education for those who learn differently and recognition of "multiple intelligences" has motivated educators to create "differentiated curriculum," which offers individualized approaches to what students learn, how students learn and how students demonstrate what they have learned. This advancement in differentiated instruction helps keep all students engaged in learning, whether challenged by disabilities or not.

In a time when more than 120,000 California public high school students drop out annually costing the state over a billion dollars a year in criminal justice costs alone, this contribution from the special education community could not be more welcome.

Given the link between well-funded, exceptional educational opportunities and a robust economy, California policymakers are making an egregious error agreeing to cut funds for education while simultaneously forcing schools to pick up the slack from slashed health and human service agency cuts.

California's State Superintendent of Public Instruction Jack O'Connell underscored this when he said, "Preparing students for productive futures is a critical mission of our government, and it is vital for our state's long-term success that we have an educated, highly skilled workforce that can compete in the global economy."

But the superintendent's wise words fall on apparently deaf ears as Schwarzenegger's advisors look for the money they need in the already picked pockets of those attending the state's public schools and institutions of higher learning.

For the time being, federal law protects special needs children *if* their parents are engaged in the process of procuring them their "free and appropriate education," as spelled out in the Individuals with Disabilities Education Act. If schools foolishly decide to ignore or make an end-run around the federal statutes in the Individuals with Disabilities Education Act, they are playing a dangerous shell game not only with what few funds they have, but with the futures of all the children they are charged with educating.

Wannabes, Pretenders And the Real Deal

SECOND IN A FOUR PART SERIES

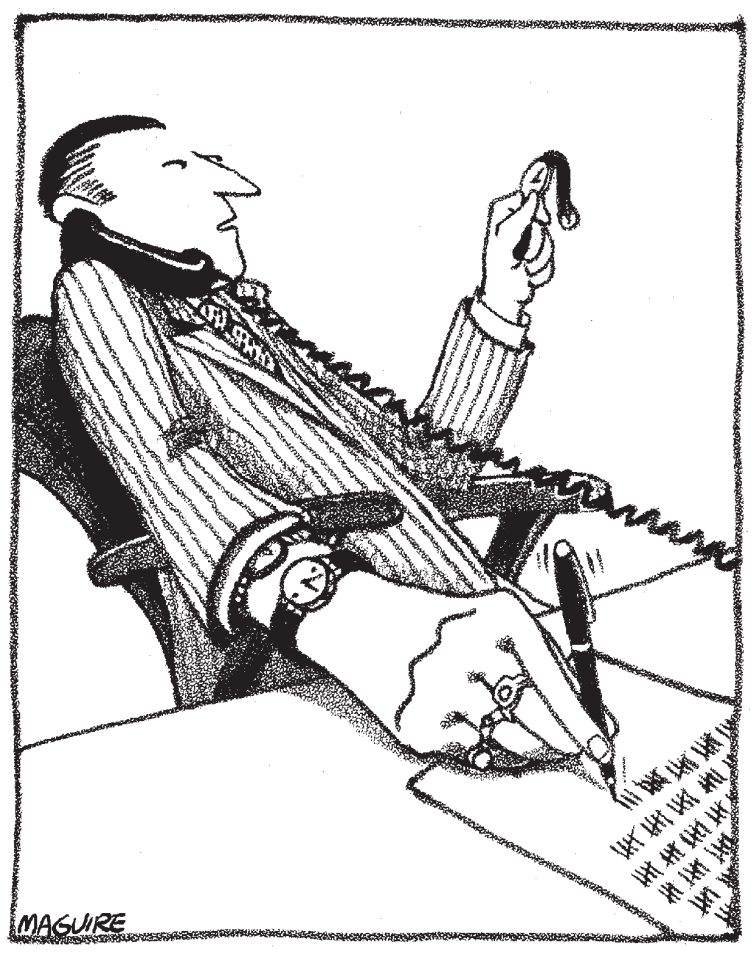
Co-authored by a Fortune 500 General Counsel, a Managing Partner, a Consultant, and a leading practitioner in alternative fee arrangements.

The problems associated with the hourly billing model have been placed under an increasingly harsh light as economic conditions deteriorated during this business cycle. Predictably, the hourly billing model began to wither. Its saving grace has been the three dimensional intersection of inertia, general risk aversion and a "devil you know" mentality. But the budget restraints of the new economic reality have caused a growing number of inside lawyers to more aggressively seek alternatives to the billable hour. Understandably, there are questions regarding what works and how to distinguish between true "win-win" propositions and proposals that simply lock in law firm profit via slick new packaging of the same old stuff.

One note at the outset. Lawyers are trained to look for the exception to the rule, and, as a class, are very good at it. Should you feel the temptation to look for exceptions to the propositions I discuss, save your energy. While perfectly compatible with every kind of matter, these ideas are offered in the context of bread and butter, ordinary course litigation. Try to be different and imagine circumstances where these propositions can apply. Failure to achieve perfection should not impede movement to the better.

The old adage that you get what you pay for is particularly apt with respect to fees. This adage is really a take-off of the equally old and true adage that money talks. If you pay for hours, that's what you will get. The new reality has helped clients appreciate that they do not want hours, so they are learning not to pay for them. But what should they be replaced with? The most common objectives are better results (total costs), reduced costs to obtain results (fees), budget certainty and speed of resolution. The alternative fee agreement system that I will discuss reflects the certainty that lawyers will respond to financial motivation and produce better behaviors when incentivized to do so.

Fixed fees obviously provide the budget certainty sought by most clients. One of the most oft-heard criticisms of fixed fees, however, is that lawyers have an incentive to push work down to lower-priced attorneys and to stop working when the maximum fee is reached. The best way to address this concern is to require outside counsel to have "skin in the game," that is, to make a certain percentage of the fee dependent on the result obtained. This approach is commonly referred to as a holdback model, and typically requires a minimum of 20 percent of the fee to be placed into a "holdback bucket." Depending on the result obtained, anywhere from none of the bucket to a predetermined multiple of the holdback amount is paid when the result is obtained. The bucket amount is a compelling incentive for counsel to have the work performed by the best, experienced talent rather than downstreaming work to inexperienced lawyers.



Perhaps the most oft-asked question is how to determine the appropriate fee amount. The easiest way to determine a fixed fee is to mine historic data and use historic averages for similar cases as a starting point. For this fee structure to yield savings, historic data must be the starting point from which reductions are negotiated. Not modest reductions, but material ones-on the order of 20 to 30 percent. How can these reductions be justified? First, the historic numbers have the law firms' profit included. In cases where hourly rates were paid, those rates had the firm's profit built in, and the firm did not take on any financial risk.

The second reason for downward movement off historic averages is that the fixed fee structure should cause the firm to behave differently. Firms billing by the hour tend to do more work than is necessary because the billing model motivates that behavior. Firms applying the fixed fee with results incentive do what is necessary, but eschew all unnecessary work as it eats into their profit margin. Firms also work harder to settle cases earlier within the targeted range in order to reduce transaction costs, thus increasing profit margin. With these behaviors fully incentivized, one would expect transaction costs to be lower than historic averages.

In the absence of enough data, there is some uncertainty about how to set a fixed fee. In this situation, many firms resort to the approach used to budget a case: figure out the tasks to be done, how many hours those tasks will take and who will perform them, multiply hours by the relevant hourly fee and then add the results. Many firms add a cushion, either in terms of the number of hours or simply by adding some percentage to the preliminary total. That number becomes the firm's proposed fee.

The problem with this approach to determining the amount of the fixed fee is that it locks in the firm's profit, sort of a "heads-I-win-tails-I-win" approach that is an utter anathema to real fixed fee protagonists. If the client's sole goal is budget certainty, this approach suffices. But if costs savings, better results and risk-sharing are objectives, this approach reveals the proponent to be nothing short of a bad pretender. For this reason, it is essential that any potential buyer ask its firm how the firm calculated its proposed fee.

Here are some other hints. Do not include the cost of trial in the fixed fee proposal. Ninety-five percent of all cases settle. A trial component only drives up the total the client will have to pay. If you are uncertain as to the real value of the case, structure the fee into subparts so you do not have to pay additional pieces if the case settles early. Ask for references. Firms that are committed to fixed fees and use them to save their clients money should have large supply of cheerleaders who will proclaim great economic results. Finally, look for project management details. A firm that does not excel at project management cannot maximize its profit margin. The absence of such skills is a tell.

In real estate, it's location, location, location. The alternative fee version is model, model, model. A law firm's business model will determine whether a fixed fee proposal is bona fide or a marketing gimmick. Fixed fees place a premium on senior, experience lawyers. Experienced lawyers are much more efficient and capable of differentiating work that is critical to the outcome and work that is not.

In a traditional law firm, power flows to "rainmakers," the lawyers who generate *revenue*. There is little concern about profitability, because hourly rates have the firm's profit built into them and realization rates show how much profit the firm is retaining. As a result, the firm's rainmakers are motivated to extract more from their clients' wallets. At the same time, associates are indoctrinated with the need to billable hour targets, that good enough is not acceptable and that more hours in the pursuit of perfection, even on simple, routine issues or matters, is excellent lawyering and not only justifiable, but essential to making partner. These days, the message to associates is even starker: meet your billable targets or lose your job.

Over time, these institutional and cultural messages have become integral components of most firms' DNA. A firm that does not aggressively seek to alter this institutional DNA will find it impossible to embrace the model on which effective alternative fees are based-experienced people doing those things necessary to a successful outcome, but nothing more, looking for ways to reduce time on a matter, not increase it. A firm cannot have partners seeking to advance and accumulate power based on the revenue billed scorecard while another group is focused on profit margins and cost control. This schizophrenia is no healthier in law firms than it is in humans.

The hallmarks of firms that have made the kind of client-focused commitment to alternative fees that will pay off for the client are those that have dramatically altered their leverage, focusing on experience and production instead of body count. In these firms, senior associates and young partners are the foundation on which a team is built because they are starting to have the experience needed to provide value. The benchmark firm will not be bringing in legions of rookies and then suffering through turnover at double-digit figures. The firm will invest heavily in the training of its people because it will be relying on them to produce results quicker and thus improve the firm's profit margins. The lawyers in the firm will have extraordinary insight into the firm's cost structure, because no one's costs is critical to being able to determine one's profit margins. These firms will be relentlessly focused on lowering costs and streamlining work and work processes because these things also will add to the bottom line. The differences are ones business people know well as the difference between a business that must continuously become more efficient and those that engage in cost-plus billing, which do not face the same pressure.

The relationship between business and its lawyers is on the cusp of tectonic change. That this chance will come is certain. As is true in a period of great change, some will take advantage of the situation to improve and better position themselves for the future. Others will simply seek to take advantage of the situation for more immediate gain. Still others will hope that the inevitable change is not inevitable at all - or at least can be put off to another day (when they are no longer so personally affected). The challenge to business is to align with those firms that are using the current environment to remake themselves into a business based on a model that aligns the firm's interest with that of its clients and not be victimized by firms looking to extract the last dollar from the old model.

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