

**Report on Professional Fees for House Response  
to Federal Investigation**

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Prepared by Daniel C. Crane, Esq.

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During December 2009, questions arose concerning certain fees and expenses incurred or paid to Gargiulo Rudnick, L.L.P. (“Gargiulo Rudnick”), a law firm engaged by the House of Representatives on January 27, 2009 to represent the Keeper of the Records for the Speaker of the House of Representatives of the Commonwealth<sup>1</sup>; the Keeper of the Records, Information Technology Department; and on April 16, 2009 to represent the Keeper of the Records, House Ways and Means Committee, Commonwealth of Massachusetts (hereinafter, collectively “the House”) in responding to certain grand jury subpoenas directed to the House in a federal investigation.

On December 30, 2009 the Speaker of the House of Representatives, on behalf of the House of Representatives, engaged me to provide legal services to conduct a review of whether these fees were fair, reasonable and necessary under the circumstances, and report my findings and recommendations for subsequent action, if any, concerning these fees. My services included reviewing all pertinent bills, requests for documents and records by federal investigative authorities, and whatever responses outside counsel made, prepared or recommended. My services also involved consultation on these matters with members of the House staff as well as staff at Gargiulo Rudnick. I also

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<sup>1</sup> Unless specifically noted otherwise, the reference to Office of the Speaker of the House is to the Office of former Speaker Salvatore F. DiMasi.

retained the services of a consultant to evaluate the services that CGM Technologies performed on behalf of Gargiulo Rudnick. My services included limited testing to obtain an indication of whether services were performed as billed.

### **Factual Background**

Federal investigators issued grand jury subpoenas, dated January 6, 8, and 14, 2009, respectively, directed to Daniel Toscano, an employee of the office of the former Speaker of the House; the Keeper of the Records for the Speaker of the House of Representatives of the Commonwealth; and the Keeper of the Records, Information Technology Department. Shortly before January 16, 2009, Louis A. Rizoli (“Rizoli”), the former House Counsel, approached Robert Griffith, Esq. (“Griffith”) to engage him and the firm he is associated with, Gargiulo Rudnick, L.L.P., to prepare a response to the subpoena directed to the Keeper of the Records for the Speaker of the House.

Years before, Rizoli and Griffith had served as assistant attorneys general at the same time and met casually at annual reunions of former assistants convened by the former attorney general who employed them. Rizoli was aware that Griffith had substantial experience in conducting and responding to government investigations of large organizations, particularly involving electronically stored information.

As early as January 16, 2009, Griffith and other attorneys at Gargiulo Rudnick began working with Rizoli and other attorneys in the House Counsel’s office to prepare a response to the subpoena directed to the Keeper of the Records for the Speaker of the House of Representatives of the Commonwealth. On January 27, 2009, the House entered into a written fee agreement with Gargiulo Rudnick, L.L.P. to “. . . provide legal consultation, analysis, and representation initially to the Office of the Speaker of the

Massachusetts House of Representatives and relative to the subpoena(s) issued by the United States Attorney's office to said office on January 8, 2009 and January 14, 2009, any other subsequent subpoena(s), and all matters related to said subpoena(s).” The agreement provided for hourly compensation of \$300 for Griffith; \$225 for John Bee, Esq, Associate Counsel; and \$75 for paralegals.

Each of the subpoenas sought multiple categories of information from the keepers of records. The subpoena to the keeper for the Speaker requested nine (9) categories of information. The categories were general descriptions of information that did not reside in any discreet file or location. Again, by example, Category #1 of the subpoena to the keeper of the records for the Speaker sought:

All records of communications from October 2004 to the present between your office and Richard McDonough, Joseph Lally, Richard Vitale, Charles Stefanini, John T. McLaughlin or any other person not employed by the Commonwealth of Massachusetts concerning a statewide performance management ("PM") system, including any legislation for the funding of the Information Technology Division ("ITO"), introduced in House No. 2915, 1790-2016 ("the Bond Bill");

A complete and thorough response to this category and other similar categories required an extensive search of a number of paper files in several locations and the cooperation of members of the former Speaker's staff. This was complicated by the resignation of former Speaker DiMasi on January 27, 2009, together with the replacement of most of his staff immediately thereafter.

The subpoenas also sought information that existed in electronic form, including emails, as well as paper documents. Gargiulo Rudnick took immediate steps to preserve information in both forms and organize an orderly search of these materials for relevant and responsive items. The new Speaker's chief of staff also issued a directive to almost thirty (30) effected staff (both current and former) to preserve and protect documents and

electronic files that might be covered by the subpoena. Gargiulo Rudnick also engaged CGM Technologies to consult on the identification and processing of electronic files that might contain responsive material. The federal investigators were well-acquainted and satisfied with Gargiulo Rudnick's decision to engage Chris McCune, CGM's principal, as its forensic computer expert in this matter. The importance of a positive relationship with federal investigators cannot be underestimated where the federal authorities could obtain a search warrant and seize all or a substantial number of the thirty (30) or more computers and documents if they were not satisfied with the thoroughness, accuracy, and timeliness of the response to the subpoenas.

Following preservation of the records, Gargiulo Rudnick worked with Rizoli and, at Rizoli's direction, an assistant counsel in the office of House Counsel to secure delivery of paper documents that might be responsive to the subpoenas. Gargiulo Rudnick also established protocols for searching and reviewing both the paper and electronic files. Gargiulo Rudnick's forensic consultant copied the hard drives of almost thirty (30) former and recently replaced employees of the former Speaker's office. They then negotiated with the U. S. Attorney's office on the terms that would be searched for in electronic files before the documents that contained these terms were individually reviewed for relevance to the subpoenas and whether any privilege protected their production. The results of this search were delivered on CDs to the U. S. Attorney's office as they became available pursuant to an agreement for rolling production negotiated between U. S. Attorney's office and Gargiulo Rudnick. As the non-privileged, responsive material was processed, Gargiulo Rudnick made twelve (12) deliveries of

CD's containing non-privileged ostensibly responsive documents to the U. S. Attorney's office between February 4 and November 4, 2009.

Five (5) attorneys at Gargiulo Rudnick devoted substantial attention to the matter during the months of February and March, 2009. This project was more challenging for the Gargiulo Rudnick lawyers because of the absence of any records administrator in the former Speaker's office who could serve as a keeper and appropriate limitations upon access to the records granted to the former Speaker's staff.

Federal investigators served an additional grand jury subpoena dated April 16, 2009 upon the Keeper of the Records, House Ways and Means Committee, Commonwealth of Massachusetts. Rizoli and the chair of the Ways and Means Committee requested that Griffith and Gargiulo Rudnick work to prepare a response to this subpoena as well. Gargiulo Rudnick began to provide these services promptly after April 16, 2009. On June 3, 2009, the House entered into an amendment to the written fee agreement with Gargiulo Rudnick, L.L.P. to “. . . provide legal consultation, analysis and representation to the Keeper of the Records of the House Ways and Means Committee of the Massachusetts House of Representatives relative to the subpoena(s) for documents or objects issued by the United States Attorney's office to said Committee on April 16, 2009, any other subsequent subpoena(s), and all matters related to said subpoena(s).” The amendment also provided that the “. . . House of Representatives will be responsible to reimburse Gargiulo/Rudnick, LLP for ancillary services . . .” It went on to state that “. . . ancillary services shall mean but not be limited to, technology support services, copies, retention of a person designated as keeper of the records . . . and for other related expenses associated with the . . . original contract.” It provided that

additional associate counsel would be billed at the hourly rate of \$225 and monthly billings for professional and ancillary services.

Gargiulo Rudnick provided the same types of services in responding to Keeper of the Ways and Means subpoena as it did with the subpoena to the Keeper for the Speaker. However, this response was more difficult since it required the search of a much larger volume of paper and electronic files because Ways and Means is a larger operation than the Speaker's office and has considerably more information archived on paper as well as electronically. The timing of the search and preparation of the response for House Ways and Means, beginning in late April, also complicated matters because it coincided with the committee staff's work on the state budget. Between April and early July, 2009, five (5) attorneys at Gargiulo Rudnick performed significant work to substantially complete the response to the Ways and Means subpoena.

As was the case with the original subpoenas, Gargiulo Rudnick was also successful in reducing the scope of materials the U.S. Attorney required as well as the number of electronic backup tapes that needed to be searched and turned over to the forensic expert for processing. Before the number of backup tapes required to be processed was reduced due to the efforts of Gargiulo Rudnick, a vendor routinely used by the House submitted an estimate of \$113,200 to restore and search the number that was originally subpoenaed. The actual cost to restore the reduced number of backup tapes and prepare them for search was \$6,984.95 paid to Vantage Technologies.

It is my understanding that Gargiulo Rudnick has completed all of its work to conduct an exhaustive and thorough search of the records of the office of the former Speaker of the House and the House Ways and Means Committee to provide a timely and

complete response to the U. S. Attorney's subpoenas directed to them. During the course of responding to the subpoenas on behalf of the House, Gargiulo Rudnick extracted and analyzed approximately 1,080,000 documents, including emails, spreadsheets, PDFs, Word documents, and paper documents. A total of 58 computers, two (2) servers, and one year of backup tapes were analyzed for responsive materials as well as 94 locations for paper documents. By November 5, 2009, the U.S. Attorney wrote to confirm that all searching or production of documents from the House was complete, and they did not expect the House or its counsel to take any more action in this matter.

Consistent with the assertions contained in Richard Gargiulo's letter to me, dated February 22, 2010, a copy of which is attached hereto as Exhibit A, I found that Gargiulo Rudnick did not perform or bill for any services for the benefit of the former Speaker. The House did not pay Gargiulo Rudnick anything to represent any current or former House employees. Gargiulo Rudnick did share copies of a small number of documents with counsel for the former Speaker, which was appropriate and necessary to facilitate a complete search for responsive documents. Gargiulo Rudnick delivered all responsive documents and materials as directed by the investigating assistant U. S. attorney.

## Standards for Lawyer's Fees

Lawyers are prohibited from charging or collecting illegal or clearly excessive fees for their services. *Massachusetts Rules of Professional Conduct, Rule 1.5* The pertinent part of the rule states:

“a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. The factors to be considered in determining whether a fee is clearly excessive include the following:

- (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.”

The factors set forth to determine whether a fee is clearly excessive are also applicable in determining whether a fee is fair reasonable and necessary. See, *Matter of Fordham*, 423 Mass. 481, 490 (1996).

## Analysis

When I applied the factors in Rule 1.5 to the work performed by Gargiulo Rudnick in this engagement, I found:

The House constituted a totally new client engagement for Gargiulo Rudnick that required a high level of immediate attention by Gargiulo Rudnick to gain the confidence of the investigating assistant U. S. Attorney. Although House Counsel's office worked closely and cooperated with Griffith and his colleagues at Gargiulo Rudnick, they did not have the expertise or resources to provide the services required to be compliant with the federal subpoenas. Full compliance also required a high level of expertise in searching a large volume of paper and electronic records to make a thorough and complete response to the investigative subpoenas. The House's interest required a high level of assurance that all responsive documents be produced and that counsel prepare and maintain a thorough record of the files and records that were searched and produced in response to the subpoena. It also required the lawyers to commit substantial resources on very short notice. Finally, with the departure of the former Speaker and the replacement of much of his staff, it required expertise in preserving records that might be responsive to the subpoenas.

Griffith and Richard Gargiulo, one of the founding partners of the firm, have extensive experience in representing clients in responding to federal criminal investigations, particularly representing clients in the health care field. They applied their experience in that area to organize a team of attorneys from the firm and engaged a consultant to search and review documents in an efficient and thorough manner. Their reputations and experience were also important in establishing an effective working relationship with the assistant U.S. Attorney conducting the investigation.

### Summary of Gargiulo Rudnick Charges and Payments

Legal fees	\$290,958.80
GGM Technologies	\$79,827.00
Vantage and other disbursements	\$10,559.72
<b>Total Charges</b>	<b>\$381,345.52</b>
<b>Total Payments</b>	<b>\$377,800.77</b>

Gargiulo Rudnick billed for \$290,958.80 in legal fees. It billed for 1131.76 hours of attorney time for representation in the matter as are set forth in detail in its bills. This produced a blended hourly rate of \$252 for attorney time. The number of hours that are necessary for a lawyer to competently represent a client in any matter is not subject to precise calculation. However, the number of hours Gargiulo Rudnick billed for this representation is well within what is fair and reasonable for the work that needed to be performed to thoroughly and completely search and analyze the volume of information involved as well as successfully negotiate adjustments to the scope of the request and arrange for delivery in a timely manner to the satisfaction of the investigating assistant U. S. Attorney.

The parties agreed in writing to hourly rates for partners, associates, and paralegals. The agreed upon hourly rates for each classification of service are well below those that the Gargiulo Rudnick charges corporate clients for the same work. Based upon my knowledge of the billing rates for other attorneys in the Boston area with similar competence and experience, the billing rates charged for the Gargiulo Rudnick attorneys

were fair and reasonable. It is not unusual for attorneys in the Boston area with similar competence and experience to those at Gargiulo Rudnick to bill corporate clients at hourly rates of \$400 and higher for partners for services similar to those provided by them. As appears in Exhibit B, Gargiulo Rudnick's submitted bills through the House Counsel's office in increments of no more than two months. They were reviewed and paid promptly after submission without objection or comment.

When I compared a random sample of the Gargiulo Rudnick attorneys' work papers to their bills for services, I found them to be reasonably accurate and consistent. Consequently, I do not recommend that a detailed audit of their work be conducted.

In addition to its legal fees, Gargiulo Rudnick also billed for \$90,386.72 for costs and disbursements incurred in this representation. Of this amount, \$79,827.00 was charged by CGM Technologies, a consultant who provided assistance with searching and locating electronic files for information that was responsive to the subpoenas. A summary of CGM's bills appears as Exhibit C. With your prior approval, I engaged the services of Thomas Morrissey of Connecticut, an independent professional who regularly engages and manages IT consultants such as CGM. His opinion is that CGM's bills for services in this engagement were fair, reasonable and necessary.

Gargiulo Rudnick also billed an additional \$10,559.72 for expenses and disbursements. Vantage Technologies, a consultant engaged to restore backup tapes, billed \$6,984.95 of this amount. It is Mr. Morrissey's opinion that these charges were fair, reasonable, and necessary for the services rendered. The remaining amount of \$3,574.77 is primarily for scanning, imaging, and bates stamping documents and delivery

charges. Those charges are fair, reasonable and necessary for an engagement of this nature.

### **Conclusion**

For the reasons stated herein, it is my opinion that the charges Gargiulo Rudnick billed the House for professional and consulting services it engaged to assist it, were fair and reasonable, and the services were necessary to provide a thorough and complete response to the subpoenas issued in the federal investigation.

February 23, 2010

**Exhibit B**

**Analysis of Gargiulo Rudnick Billings and Payments**

Dates of service	Attorney hours billed	Billing date	Legal services billed	Additional expenses billed	Payment date	Amount of payment
1/19/09-3/31/09	472.03	4/14/09	125,901.75	12,780.10	5/18/09	138,681.85
4/1/09-5/29/09	389.42	6/10/09	100,552.50	31,892.73	6/26/09	132,445.23
6/1/09-6/30/09	208.82	7/9/09	48,147.00	10,875.00	7/17/09	59,150.50
7/1/09-7/31/09	71.25	8/4/09	18,202.50	20,237.50	9/15/09	
9/1/09-9/28/09	13.38	12/30/09	3348.75			
8/3/09-8/12/09	9.08	9/10/09	2043.75	7,039.44	9/15/09	47,523.19
11/3/09-11/4/09	2.85	12/7/09	705.00			
10/22/09	0	11/13/09	0	7,500.00		
Totals	1131.76		290,958.80	90,836.72		377,800.77

Total billings to date \$381,345.50

Total payments 377,800.77

**Difference 3,544.73**

**Blended hourly rate \$252/hour**

### Exhibit C

#### Analysis of Billings from CGM Technologies

Dates of service	Hours billed	Billing date	Services billed	Expenses	Total billings
2/3/09-2/27/09	64.75	3/13/09	9,727.50		
3/3/09—3/31/09	79.00	4/2/09	11,850.00		
4/1/09—4/30/09	121.00	5/1/09	18,150.00	1500.00	
5/4/09—5/31/09	72.50	6/1/09	10,875.00		
6/1/09—6/17/09	52.83	7/2/09	7,924.50		
7/6/09—8/2/09	82.00	8/2/09	12,300		
8/3/09-10/9/09	50.00	10/22/09	7,500.00		
Totals	522.08		78,327.00	1500.00	79,827.00