

# ACC's CLO ThinkTank Series 2008

## "TAKING CHARGE OF ESCALATING LAW FIRM COSTS – CONNECTING COSTS WITH VALUE"

Hosted by: Michael A. Dillon Executive Vice President, General Counsel & Corporate Secretary Sun Microsystems

> February 25, 2008 10:00 a.m. – 2:00 p.m. The Palace Hotel, San Francisco

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#### ACC CLO THINKTANK SUMMARY/OUTLINE OF DISCUSSION TOPICS

### Taking Charge of Escalating Law Firm Costs: Re-connecting Cost and Value

The following outline is intended to provide a short overview of some of the issues at the heart of this discussion topic. There may be other issues we've not identified or perspectives on the identified issues that are not adequately represented in the outline: you should feel free to raise these additional thoughts, as you like. *The outline is merely intended as a starting point to help you identify discussion topics and tee up your conversation. There is no expectation that all issues will be covered during the discussion; instead, you'll be asked to select those most interesting to you so that the group can develop a consensus agenda at the beginning of the meeting.* 

#### A. ORGANIZATIONAL RESPONSIBILITY FOR SELECTING & MANAGING OUTSIDE COUNSEL

- 1. Selecting & Retaining Outside Counsel for the Company-Role of Law Department; CLO: Is the law department on point for selecting and retaining outside counsel? Who, within the law department, is on point for developing strategies for engaging and managing outside counsel (e.g., CLO, Chief Operations Counsel, Outside Counsel Management Committee, other)? If the role is shared by many, how is it coordinated?
- 2. Outside Counsel Management Committee: Does your law department have an outside counsel selection/management committee? Who sits on the committee? What are the primary roles of the committee? Why did you create the committee? What are the pros and cons of having the committee?
- **3.** Client's Role in Engaging Outside Counsel: What role (if any) do clients play in the outside counsel selection/management process? Can client groups call outside counsel directly to ask for services on a new matter or do your law department's practices require that clients first contact an in-house lawyer? Are there different practices and processes in place for clients regarding contacting outside counsel on a preferred provider list (or with an existing engagement agreement) vs retaining a first-time firm? If clients may directly contact outside counsel without first working through the law department, how and at what point do you include in-house lawyers in the process?
- 4. Selecting and Retaining Outside Counsel for the Board/Company Executives: Does your law department play a role in suggesting and retaining outside counsel for Board Committees and/or executives? What is the nature of the law department's role? Do you have a list of 'independent counsel' at the ready who may be called for certain types of situations? What are the key considerations in managing or coordinating these engagements? Are there best practices you've implemented or heard of in these contexts?

- **5.** Corporate Procurement Function: Does your company's procurement function play a role in outside counsel engagement standards? Is this a relatively new role? What is the nature and scope of the role that procurement professionals play? Are there designated individuals on point within the procurement department that handle outside counsel engagements? Are there designated individuals within the law department to coordinate with procurement on this role? Did the law department develop engagement protocols/documents/ guidelines to assist with procurement's role? How/what are the key process points for coordinating with the law department? What are some of the key challenges? What types of practices have you implemented in connection with this process? Do you or your firms like or benefit from procurement's involvement?
- 6. Budget for Outside Counsel: Who pays for outside counsel? Do outside counsel costs get charged directly to the law department's budget? Do outside counsel costs get charged directly to the business units for whom the service is being performed? Does the budget that gets impacted depend upon the type of matter (e.g., litigation matters get charged directly to client business units, regulatory counselling matters get charged to law department, etc..)? Does the client's role in selecting and retaining outside counsel vary depending upon whether the client's budget will be directly charged? If units are charged for outside counsel services (or in-house counsel services), how do you track charges and inform unit leaders of these costs? Do you send a statement each quarter or engage in real-time cost tracking/reporting? Do clients help develop their own budgets for legal services?
- 7. Law Firm Organizational Responsibility for Engagements: When you negotiate preferred provider arrangements, which persons within the law firms do you most often negotiate with? Who are the ultimate decision-makers within the firms? Does this vary firm to firm? Is your business relationship primarily with a relationship partner supervising the matter OR with a managing partner or other specialized professional within the law firm? What are the key hot button items (e.g., most important to them, most contentious, etc.) for law firms in negotiating these arrangements?

#### B. PREFERRED PROVIDER PROGRAMS; APPROVED LISTS; TYPES OF FIRMS; VALUE

- 1. Preferred Legal Service Providers: Do you have a list of preferred legal service providers or relationship/partner firms? How many firms are on your list? How do you choose preferred providers? How long did it take to arrive at your current list? Do your preferred providers know who the other firms are? Do they interact with each other in a structured way to share best practices in performing work for your company? What are the key benefits of having preferred legal service providers? What are your greatest challenges in working with these providers? Do your arrangements set a 'floor' for business? Are lawyers required to use preferred legal service providers whenever possible? Do preferred provider arrangements include identifying key personnel to work on your company's matters?
- 2. Key Features of Preferred Provider Firms: What are the key selection criteria for your law department's preferred provider firms? How much of the law department's business do these firms (combined) receive (e.g., more than 50%, more than 75%, almost all)? Do these firms all have certain common attributes? What are they? Do you have preferred providers set by geography, substantive practice area, other?

- **3.** Approved List of Additional Firms: Do you have a list of additional firms that are not 'preferred providers' but that are 'approved' for use by the law department? Are lawyers required to use law firms on this list whenever possible? How many law firms are on the list? What are the key selection criteria for including law firms on this list? Is there a required approval process for going 'off list'? What is it?
- 4. Types of Firms: Does your law firm categorize firms by type (e.g., national firms, regional firms, specialized boutique firms, 'elite' specialty firms, etc..)? Do you assess the various strengths of different types of firms? How (if at all) does the type of firm correlate to the likelihood of engagement? Do you set different engagement expectations for different types of firms? Do you have guidelines you generally follow by type?
- **5. Identifying 'New' Firms:** How do you 'find' firms that you haven't used before? What sources do you look to for information? What are some of the major criteria that would attract you to a 'new' firm? If nobody ever got fired for hiring 'BigLaw,' how do you get comfortable finding and hiring firms/lawyers who aren't on that list (yet)?
- 6. Key Selection Criteria: What are the key factors you consider in selecting preferred provider firms and/or firms to include on a larger 'approved firm' list? Do you evaluate things like: (1) profit per partner, (2) firm compensation & bonus structure, (3) associate salaries, (4) retention and attrition/lateral vs. home-grown talent, (5) diversity- in recruiting, retaining and promoting, (6) firm management structure, (7) commitment to alternative billing practices, (8) other? Are there criteria you would like to evaluate that there isn't comparison data currently readily available for? Is willingness to engage in alternative billing a factor that you consider? How important is it? Does it vary depending upon the nature of the work?
- 7. Value: How do you define 'value' received from outside law firms? Is it cost savings, results, other? To assess value, is there some sort of comparative process (e.g., cost or results versus expectations, comparisons with data from other outside law firms, satisfaction with quality, etc.)? How do you measure value (e.g., metrics, benchmarking, quality/satisfaction surveys, etc.)? What inputs do you receive to help make the value determination? What inputs come from the law department? What inputs come from outside law firms? Who is involved in providing inputs on value? Who is involved in assessing value? How do you communicate value—internally within the law department and the company AND externally to the law firm that is being assessed and to others? Is there data/are there tools that ACC could help develop that would help enhance the value evaluation process?
- 8. Performance/Results Goals & Drivers: Has your law department set performance/results goals for outside law firms (preferred partners, approved list firms and others)? What types of behaviours/results are you interested in shaping (e.g., increased retention of associates who work on company matters so no need to retrain, diversity metrics, pro bono, paralegal staffing on company matters, no billing of associates at certain levels, secondment experiences, partnered outsourcing, swaps, etc...)? How do you set these expectations? How do you communicate them? Is there resistance at law firms? What is the nature of the resistance? Where do you see the hot buttons? Where are the opportunities? If you've successfully achieved helping to shape results, what are some of the key factors that helped make your law department's efforts so successful?

#### C. CREATIVE ENGAGEMENT RELATIONSHIPS THAT MOVE BEYOND THE BILLABLE HOUR MODEL

- 1. Alternative Service/Billing Models: What types of alternative service/billing models have you successfully negotiated with outside counsel? Are certain types of work more amenable to certain models? What types are most amenable to which models? What are the most creative arrangements you've implemented or heard of? Do you require outside counsel to propose/use alternative billing arrangements? Have you walked away from firms that refuse to engage in alternative billing practices? Do you believe that alternative billing strategies help to re-shape law firm practices and motivations, or do they simply allow a different cost model for specified work?
- 2. Managing Alternative Service and Billing Arrangements: What types of processes have you implemented to track the success of alternative service/billing arrangements? Where have your best ideas come from and how did they arise? For arrangements other than discounts of billable hours, do you employ 'shadow bills' or other department-driven tracking technologies? Have you integrated alternative billing features into your e-billing system? What are some of the key steps in selecting an alternative service/billing approach (both internal to the law department and on the law firm side)? Are alternative arrangements generally proposed by the law department OR do you require outside law firms to generate alternative service/billing ideas? Do firms generally succeed in offering meaningful alternative structures? Do your lawyers like to manage alternative fee arrangements, or do things generally slip back to hourly assumptions as soon as no one's looking?
- **3. Process for Seeking Alternative Service/Billing Arrangements:** What is the process within the law department for ideas and approvals of alternative service/billing arrangements? Do you require all firms to propose an alternative service/fee arrangement for all types of matters (or only some firms for some types of matters)? What is the process within law firms for ideas and approvals of alternative service/billing arrangements? Who are the key decision makers within the law department and within the law firm for approving alternative service and billing arrangements? Are you requiring/seeing more or less of these? Do you communicate to other law firms the successful alternative service/billing models you've used with others? How do you communicate these successes? Do you communicate these successes with other law departments & how?
- 4. Impediments & Solutions: What do you see as the key impediments to alternative service and billing arrangements? Which impediments are within the law department? Which impediments are within the law firms? What do you see as the key sticking points? Do you see alternative billing as something done on the fringe of your work, but not affecting the mass of your legal spend? Is that changing? Do you have ideas on solutions to help overcome impediments to future alternative model successes? Are there tools, communications, data, surveys that would be helpful?

#### **D.** OUTSOURCING/OFF-SHORING

1. **Outsourcing/Types of Services:** What types of services or legal practice areas does your law department outsource, if any? Why or why not? Have you outsourced entire substantive

practice responsibilities to law firms (such as Intellectual Property, Litigation, Employment, etc..) or work for certain business groups or in certain geographic locations? What was the internal process for determining which services to outsource? What were the primary factors driving the decision to outsource these services? Have you hired firms in less expensive jurisdictions that may be unrelated geographically to the legal matter you're working on (see "off-shoring," below)? Have you outsourced legal services to non-law firms (research companies or document discovery consultants/document review companies, for instance), and required your law firms to work with these providers? If so, with what results?

- 2. Process for Procuring Services: Do you use an RFP and/or auction process? Who within your law department is on point for managing the service definition and procurement process? What are the key terms of the RFP? What were the pros and cons of using this type of approach? How long did it take? Did you go to the firm's offices and evaluate their systems and processes prior to selecting them? Did you seek other kinds of recommendations or experiences of other companies before hiring them? Ideas on best practices?
- **3.** Service Models & Relationship Management: What type of service models do you use? Who is on point within the law department to manage the relationship? What role do you play as the law department executive in managing this relationship?

>>Communications: If your model suggests that entire segments of the law department's work will be housed in an outsourced provider, what processes do you implement to help ensure that service providers are keeping the law department and clients 'in the loop'? Do they provide periodic reports (electronic, verbal, other) on matters handled? Can business clients pick up the phone and call the outsourced service provider directly or do they first notify the law department?

>>Integration with law department; business clients: Do outside service providers for outsourced areas participate in regular business client staff meetings? Do they perform their work on site or from another location? For purposes of reporting and internal controls, how do you help ensure that key issues are brought to the attention of contacts within the law department?

>>Staffing & performance: How is staffing for your company's matters handled (e.g., are there certain key personnel)? How do you track the services provided? How do you evaluate the services?

>>**Misc.:** What are the pros and cons of entirely outsourcing an area of practice or service line? Where have you seen the greatest efficiencies?

- 4. **Billing Models:** Who pays the bills for outsourced services? Do client groups pay directly or is the law department on point for procuring and paying these services to the provider? What types of billing models do you use? Do you estimate a budget or set a payment floor to ensure a certain level of staffing and service is available or are you billed on a per project or hourly basis? How did you estimate the budget for these outsourced legal services? Do your outside service providers use your law department's electronic billing systems? How do you ensure that you are being billed for services performed?
- 5. Off-shoring: Does your law department off-shore any legal services? Is the off-shore service provider an affiliate of your company or an external provider? What process did you use to procure these services? Did you perform an on-site assessment of the capabilities of the off-shore service provider? What types of technology and security measures do you require? What

type of service delivery model do you implement? What are the key terms of the off-shoring relationship? How do you evaluate these services and stay 'in the loop'? Who is on point to manage the service relationship? What are the pros, cons and best practices? What are the greatest challenges?

#### E. PROCURING OUTSIDE COUNSEL/ OUTSIDE COUNSEL GUIDELINES

- 1. Process for Procuring/Retaining Outside Counsel: What process(es) does the law department use to retain outside counsel? Do you primarily use one-off negotiations, RFPs, auctions, other? Do you generally set service model/billing parameters when soliciting outside counsel services OR do you leave the service delivery model and billing parameters open for outside counsel to propose? Who, within the law department, manages the retention process? Do you have a centralized mechanism for tracking all outside firms? Do you track firms who respond to RFPs but who don't 'win' the work?
- 2. Outside Counsel Engagement Letters & Guidelines- Law Department Criteria: Do you require that engagement letters be on 'your company's paper'? What do you view as the key terms or provisions in your engagement letters and guidelines? What terms are the most controversial and most often negotiated? Do your outside counsel sign these letters or guidelines to acknowledge review of the terms and certify that they will comply with them? Do these documents identify key law firm personnel to staff law department matters? Do they identify inhouse counsel on point for the various outside counsel relationships? Do the guidelines address matters such as reporting ethical or other material or significant issues or matters to you or the CLO? Do they require that outside lawyers contact you or an in-house lawyer if they're contacted directly by a business client to perform legal work?
- **3.** Outside Counsel Engagement Letters & Guidelines- Law Firm Issues: What are some of the 'hot button' issues you hear from law firms in engagement letters and outside counsel guidelines? What do you think is driving these concerns from the firms' perspectives? What types of practices have you implemented to help address these concerns?
- 4. Policies Apply to Outside Counsel: What types of law department policies do you require outside counsel to comply with? If applicable, do you require outside law firms to comply with your Sarbox 307 policy? Do you have pro bono or diversity policies that extend to outside counsel? What types of law firm policies do you review? Do you review their Sarbox 307 policies, knowledge management practices, diversity or staffing policies or conflicts programs? What do you consider to be best or leading practices in this area?
- **5. Ethical Issues in the Engagement Process:** What types of ethical issues arise most often in the engagement process (e.g., conflicts, privilege, ownership of IP, ownership of files, etc.)? Which are the thorniest? Do any present persistent challenges? What types of practices have you implemented to address these issues and challenges?

#### F. METRICS; TRANSPARENCY & COMMUNICATIONS

1. Evaluating and Comparing Outside Counsel: What types of metrics do you use to track outside counsel costs and value? Do you implement different processes/track different metrics for preferred providers? How often do you evaluate outside counsel performance and what is the process? Do you track number of firms used (and/or convergence progress)? Do you compare performance on matters/spend across law firms? Do outside law firms track how they staff

matters (e.g., use of paralegals, use of partners vs associates, diversity metrics, etc..) and report that to you? How do you use metrics information relating to outside counsel? What do you consider to be best practices in this area? What are your greatest challenges?

- 2. Quality of Work; Client Satisfaction: Do you track quality of work/client satisfaction? Do inhouse lawyers rate the performance of outside lawyers? Do clients? Is it part of the evaluation of inside counsel legal services or a separate set of questions/criteria? What tools do you use to track performance in this area? Do you use periodic written/electronic surveys? Are these submitted on an anonymous basis? Do you have discussions with clients on their satisfaction? Do outside counsel rate the performance of in-house lawyers? How often do you collect this data? How do you use this information?
- **3.** Getting the Metrics Data: Do you require that outside counsel track and provide data to your law department? Are these requirements written into outside counsel engagement agreements? Do you primarily use e-billing, matter management, other? Ideas on best practices? Is there someone within the law department designated as the point person for receipt and analysis of this data?

>>Survey Tools: If you create and use surveys to help gather data (e.g., client satisfaction, climate within the law department, etc..), what types of practices have you implemented? Have you found best practices in survey questions/tools? How often do you survey? Do you use an outside company to facilitate information-gathering? What do you consider to be a robust response rate?

>>Benchmarking: What types of benchmarking has been most helpful? How can ACC help in this regard?

>>Law firm data/other: What types of law firm data do you include in metrics considerations? How do you get this data? Who is on point to coordinate with other corporate groups to collect this data? Other practices regarding input data for metrics?

4. Communicating Data: Do you communicate the results of outside counsel metrics data within the law department? What information do you withhold and why? Do you communicate the results to other law firms to show how they compare? How often do you communicate the results? How do you communicate the results to outside law firms (e.g., letter to all, letter to each firm, 'town hall meeting' of preferred firms, in-person sessions with key firms, etc..)? How do you communicate the results within the law department? Have you seen best or leading practices in this area?

# G. CHANGING THE CURRENT PARADIGM TO BETTER CONNECT VALUE AND COSTS OF CORPORATE LEGAL SERVICES

1. What Needs to Happen on the Law Department Side: What are the key impediments to change from the in-house counsel perspective? What are the current comfort zones that in-house counsel would have to step outside of in order to drive change and to successfully manage the firms they are asking to change? If no one ever got fired for hiring 'BigLaw,' how do we convey that soon no one will ever get hired for hiring 'BigLaw' either? How can ACC or other groups help promote change?

>>**Tools; training:** What tools would be helpful to support in-house counsel who wish to lead change? Do most outside counsel supervisors have the management and business skills to creatively change and maintain new relationships? Would it be helpful to be able to view a 'registry' of what firms are engaging in creative service delivery models so that firms that are stepping beyond the regular model can be recognized? What types of tools/training/information are required to help break out of the current law firm service delivery model and encourage inhouse lawyers to implement creative service delivery models that provide value?

>> **Data points:** Would additional data points (other than profit per partner and associate salary) on law firms be helpful to assess their business drivers (e.g., associate attrition, associate satisfaction, bonus structure, billing practices, lateral histories, etc.)? Would you like additional information/comparative data on law firms that isn't currently available?

2. What Needs to Happen on the Law Firm Side: What do you think are the key impediments to change from the outside counsel perspective? What types of tools/training/communications do you think would be most helpful and effective to help affect change? How can the message go out that profit is expected, but so is efficient and effective service related to the value of the matter addressed? How can ACC or other groups help?

### REFERENCES

# Following is a sampling of a variety of resources relating to our session topic. For additional ACC resources, search ACC's Virtual Library at <u>www.acc.com/vl</u>.

**DISCONNECT BETWEEN COST & VALUE** Article: "Cisco GC Leads Charge for Fixed Rates, Patent Reform" (From Fulton County Daily Report 1/18/08) http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1200594603458

Article: "Wal-Mart Memo Slams Associate Pay Hikes" (from Legal Week, 11/8/07) http://www.law.com/jsp/article.jsp?id=1194516238647&rss=newswire

Blog Piece: "Context is Everything" (from The Legal Thing- Notes from a General Counsel, 8/26/07; Mike Dillon's blog) http://blogs.sun.com/dillon/date/200708

Article: "Failure in Need of a Theory" (from The Washington Post.com, 2/8/08) http://www.washingtonpost.com/wp-dyn/content/article/2008/02/07/AR2008020703902.html

Article: Viva La Revolution? (ACC *Docket* 2007) http://www.acc.com/resource/index.php?key=8330

Article: "Commentary: GCs Should Assert Purchasing Power" (from Legal Week, 10/24/07) http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1193130217879

Article: "UBS GC Speaks Out on Law Firm Fees" (from Legal Week, 10/22/07) <u>http://www.law.com/jsp/ihc/PubArticleFriendlyIHC.jsp?id=1192784611560</u>

Blog Piece: "The Way of the Mastodon" (from The Legal Thing- Notes from a General Counsel, 8/22/07; Mike Dillon's blog) http://blogs.sun.com/dillon/entry/the\_way\_of\_the\_mastodon

"Legal Careers Lose their Allure, Drop to Dentistry Status" (from ABA Journal, 1/7/08) http://www.abajournal.com/news/legal\_careers\_lose\_their\_allure\_drop\_to\_dentistry\_status/print/

Article: "The Falling Down Professions" (from The New York Times, 1/6/08) http://www.nytimes.com/2008/01/06/fashion/06professions.html?ex=1215406800&en=95d14468fd97b41 1&ei=5087&excamp=NYT-E-I-NYT-E-AT-0108-L1&WT.mc\_ev=click&WT.mc\_id=%20NYT-E-I-NYT-E-AT-0108-L1

Blog Piece: "Cisco General Counsel on The State of Technology and the Law" (from The Platform- The Official Cisco Blog, 1/25/07) http://blogs.cisco.com/news/2007/01/cisco\_general\_counsel\_on\_state.html

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#### MANAGING OUTSIDE COUNSEL; ALTERNATIVE BILLING

Article: Meet an In-House Cost-Cutter Who Believes in Fixed Fees (from GC California Magazine, 8/29/07) http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1188291741577

Article: HSBC Launches Legal Team in Malaysia for Bulk Work (Legal Week, 2/8/08) http://www.law.com/jsp/article.jsp?id=1202385713103

White Paper: ACC Management Report from session on "Strategic Management of Outside Counsel & Other External Legal Service Providers" <u>http://www.acc.com/resource/v8710</u>

Article: Reflecting on the Qualities of Successful Outside Law Firms (ACC *Docket* 2007) <u>http://www.acc.com/resource/getfile.php?id=8944</u>

Article: Tips & Insights: Managing the Outside Counsel Relationships with James Buckley, Lockheed Martin (ACC *Docket* 2007) http://www.acc.com/resource/getfile.php?id=8957

Article: Benchmarking the Performance of Outside Counsel (ACC *Docket* 2006) <u>http://acc.com/resource/v7174</u>

Article: Top Ten Methods to Managing Outside Counsel (2006) <u>http://acc.com/resource/v7740</u>

Article: Electronic Billing Enters the Mainstream (ACC *Docket* 2006) <u>http://acc.com/resource/v7173</u>

Article on Reviewing Outside Counsel Bills (ACC Docket 2006) http://acc.com/resource/v6649

White Paper: Report of the Review of the Regulatory Framework for Legal Services in England and Whales (Legal Services Review, December 2004) http://www.legal-services-review.org.uk/content/report/index.htm

White Paper: Strategic Outsourcing And Alternative Service Models (ACC *Leading Practice Profile* 2004) http://acc.com/resource/v5903

White Paper: Leading Practices in Using Non-Lawyer Personnel to Help Perform Legal Functions (ACC *Leading Practice Profile*) http://acc.com/resource/v5904

Article: When Should You Outsource Investigations <u>http://acc.com/resource/v7530</u>

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#### **OUTSIDE COUNSEL METRICS**

ACC Management Report from session on "Developing & Implementing Law Department Metrics that Work"

http://www.acc.com/protected/docs/mgmtreportmetrics0907.pdf

Law Department Metrics (ACC *Leading Practices Profile* 2005) http://www.acc.com/resource/v5899

Article: Hands On: Benchmarking the Performance of Outside Counsel (ACC *Docket* 2006) http://www.acc.com/resource/v7174

Article: Five Ways In-house Counsel Can Talk to Law Firms (ACC *Docket* 2005) <u>http://www.acc.com/resource/v6474</u>

The Quest For Seamless Service: Ensuring Consistency With Multi-office Law Firms (ACC *Docket* 2005) <u>http://www.acc.com/resource/v4985</u>