



## ACC'S CLO ThinkTank Series

**"NAVIGATING THE COMPLEXITIES OF C-SUITE RELATIONSHIPS"**

**Hosted by Gloria Santona, CLO of McDonald's Corporation**

**October 23, 2006**

**9:00 a.m. – 1:00 p.m.**

**Manchester Grand Hyatt- San Diego, California**

\* \* \* \* \*

### **Participants' Briefing Book**

\* \* \* \* \*

## SUMMARY/ OUTLINE OF DISCUSSION TOPICS NAVIGATING THE COMPLEXITIES OF C-SUITE RELATIONSHIPS

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.*

### I. Organizational Structure: Who does the CLO Report to and Advise?

- **CLO Selection Process:** What is the process for selecting the CLO at your company? Who interviews CLO candidates? What role does the Board have in the selection process? How does your company's process affect reporting and de facto loyalties/assumptions?
- **Organizational Reporting:** Who is your 'supervisor'—the CEO, the CFO, the Chairman of the Board? Are there new reporting trend lines you've observed (in Europe, for instance, there is a distinct trend line in the direction of CLOs reporting to the CFO)? Who does your performance reviews? Are reviews 360 degrees/shared? Has the organizational reporting structure changed in recent years?
- **Executive 'Clients':** Are you the top lawyer for each of the C-Suite executives? Do they each view you as 'their' lawyer? Do they consult outside lawyers without your involvement? Have your relationships with your C-Suite peers changed in recent years? Do they want to interact with you more or less, and why? Do your Board members consider you their lawyer, or do they consult independent counsel? Has the tenor of your role changed in the last five years vis-à-vis these relationships?

#### *Resources*

*The Ideal Of The Lawyer-Statesman*

<http://www.acc.com/resource/v4851>

*Leading Practice Profile, Providing In-House Legal Support To The CFO & Finance Function*

<http://www.acc.com/resource/v5902>

### II. CLO as Business Executive and Top Legal Advisor: Balancing Responsibilities

Job titles for CLOs often include additional business titles (Vice President, Corporate Secretary, Chief Compliance Officer, Chief Risk Officer, etc..). How do you balance the multiple responsibilities that go with these roles?

- **Practices to Segregate Multiple Roles:** What types of practices do you implement to clarify what role you're playing as you perform various functions that go with wearing multiple hats? Is it important to clarify what role you are performing and whether you are acting in your capacity as a legal advisor or an officer—why or why not?

- **Who Provides You with Legal Advice When You're Acting as an Officer:** For CLOs who are CCOs, CROs or hold other business function officer titles: who provides legal advice to you when you are acting in your capacity as CCO or CRO? Do you communicate to business personnel what role you are performing in providing information to them?
- **Business Executive Committees (Compliance Committees, Disclosure Committees, etc...):** Many organizations have executive level committees that serve as filters and policy makers on issues such as disclosure, compliance, compensation, etc.. Often, these committees are comprised of top C-Suite leaders and business leaders. As CLO, are you a working member of these committees or do you participate as a legal advisor? If you are a working member of a committee, do you also provide the primary legal advice to the committee or have you designated a lawyer from your staff to be on point for legal advice?
- **Certifications:** Are you asked to provide written certifications in support of financial filings? Are there issues associated with providing a certification and providing advice on the underlying financial analysis, and how have you traversed this? How do you handle the sub-certifications that you rely upon?
- **Signing Documents & Impact on Privilege:** Do you sign documents binding the corporation? If you sign them in your capacity as an executive officer, how might this impact any privilege protections the organization might want to preserve with regard to advice on the underlying transaction?
- **Bundle Titles and Roles or Separate Them Out:** What are the pros and cons of having the CLO be the Corporate Secretary? What about having the CLO perform the CCO, CPO or CRO roles or Divisional or Functional Head responsibilities (e.g., external or government relations, administrative officer, geographic business leadership, etc..)? Do you see any trends in this area? Have you recently added or subtracted titles/roles from your portfolio?

#### *Resources*

*202 Identity Crisis: Managing a Legal vs Business Role*

<http://www.acc.com/resource/v7214>

*ACC/NACD Survey: General Counsel As Risk Manager*

<http://www.acc.com/resource/v4961>

### III. CLO Represents the Organization

Ethical rules of practice say that in-house lawyers represent the organization. As part of the organization's C-Suite, and with corporate executives increasingly in the spotlight, how do you handle situations such as:

- **Requests for Personal Legal Advice:** Your CEO, CFO, COO or a Board member asks for guidance on personal liability in connection with certain business decisions—how do you navigate this?
- **Requests for Personal Legal Services:** Your CEO or a Board member have a lease or purchase agreement or other transaction they would like help with—do you help them/how?
- **Privilege Considerations:** Do you think fellow executives are more or less likely to include you in conversations because of your role as CLO?
- **Gatekeeper:** Do your fellow C-Suite executives view you as a gatekeeper? Do you view yourself as a gatekeeper? What practices do you implement in executing this role?

#### *Resources*

*In-house Counsel Legal Department Ethical and Professional Conduct Manual: Chapter Two: Who's the Client* <http://www.acc.com/resource/v8414>

*In-house Counsel Ethics InfoPak*

<http://www.acc.com/v1/index.php?action=search&full=yes&anytext=In-house+counsel+ethi>

#### IV. CLO and the Board

As the top lawyer for the organization, what challenges do you experience vis-à-vis interactions with and advice to the Board?

- **Lawyer for the Board:** Does the Board view you as their lawyer? Has your role changed in recent years post-Enron and Sarbanes-Oxley? Does the Board want to see you more or less? Do they view you as their gatekeeper?
- **Independent Outside Counsel:** Does your company's Board have its own independent counsel and is that counsel present at the Board meetings? Do individual Board members have independent counsel, and are these lawyers present at Board meetings?
- **Executive Sessions of the Board:** Do you sit in on executive sessions of the Board (without other C-Suite executives present)? Is this by invitation only or generally the rule? What is your role?
- **Requests for Assessments of Executive Officers:** Does the Board ask for your input on performance of other Executive Officers? When and how? What challenges (if any) does this present?
- **Staffing Board Committees:** Do you have special responsibility for any Board Committee(s)? If so, what are your responsibilities?
- **Lawyer's Role as Information Bridge Between Management and the Board:** Do lawyers have a special role to play in ensuring that the Board is making informed decisions—especially in the event that the Board is not provided written information for their review? Do you have concerns about where the line is between too much information and not enough information? How do you find the proper balance between supplying them with necessary information and information overload?
- **Reporting Concerns and Significant Matters to the Board:** What is your organization's process for reporting concerns or significant matters to the Board? Are you or is the law department responsible for making these reports? To the full Board or to designated committees?
- **Board Training:** What is your role regarding training for the Board? How do you keep training fresh?
- **QLCC:** Does your Board have a QLCC? What types of policies and practices are in place? What are the pros and cons from the CLO's perspective of having a QLCC?

#### *Resources*

*Leading Practice Profile, Board Governance and the Role of In-house Lawyers Post Sarbanes-Oxley*

<http://www.acc.com/resource/v5907>

*Leading Practice Profile, Training For The Board of Directors: What Companies are Doing*

<http://www.acc.com/resource/v6062>

*Ethics & Privilege-- Confusion in the Boardroom*

<http://www.acc.com/vl/index.php?action=search&full=yes&anytext=confusion+in+the+boardroom>

V. **Liability and Protections (Insurance and Indemnification)** *(See Tabs 5-7)*

A. **Liability for CLOs- criminal cases** *(See material at Tab 5)*

- Focus of criminal cases is almost entirely against CLOs
- US-DOJ Corporate Fraud Task Force/ Thompson Memorandum, SEC Seaboard Report
- Nearly all prosecutions were against in-house lawyers who also were subject to SEC administrative sanctions
- Some common threads noted in materials: big losses increase risk of prosecution; perjury and obstruction of justice as crimes charged; mere knowledge of transaction later deemed to be financial fraud does not appear to be sufficient to charge; almost absence of actions when inside lawyers have relied upon outside legal advice; no prosecutions where alleged fraud is complex and propriety debatable
- Impacts on practices:

B. **ABA Model Rule 1.13 and Sarbox 307 Attorney Professional Conduct Standards: “reporting-up” (and out) rules and exposure to sanctions or disciplinary action** *(See material at Tab 6)*

- **Up-the-ladder reporting systems and channels for reporting (supervisory attorneys, audit committees, CLO, QLCC, etc.):** What types of reporting-up policies have you developed within your legal department? Does your system include written certifications from lawyers within your department? What’s the CLO’s role in facilitating or implementing such policies?
- **Training and Guidance:** What types of ethics/compliance reporting training is provided to in-house lawyers? How do supervisory lawyers or CLOs distinguish when discussions are 307 discussions versus requests for guidance?
- **Role of in-house lawyer:** Do “changing” professional conduct standards have a chilling effect on client willingness to seek preventive legal guidance? Do you see this at the C-Suite level?
- **Interface with outside counsel on Sarbox 307:** Do they sign onto your policy? Do you receive copies of their policies? Are there requirements for them to notify you or designated individuals within the law department simultaneously with performing their own internal review of whether a Sarbox 307 issue has been identified?
- **Liability Concerns:** Are in-house lawyers asking about corporate protections available to them in light of their increasing exposure (vis-à-vis the SEC and the bar) pursuant to Sarbox 307?

C. **Indemnification & Insurance Issues**

>>**Directors & Officers Liability Insurance Coverage**

- **Scope of coverage:** Do you have a D&O policy that covers you as the CLO, or is your coverage under the policy limited to services you may provide in your executive officer capacity? Does the policy include an exclusion for professional services? How do you

distinguish what services you're providing as an executive officer (which might be covered) and as the General Counsel (which may or may not be covered depending on how the policy is written)?

- **Trends in negotiating coverage:** what types of information are underwriters seeking in discussions to cover you as CLO? What types of exclusions? How are premiums being impacted? What are your experiences in negotiating and trying to carve back exclusions relating to your coverage as General Counsel? Success stories/practical considerations in negotiating coverage?
- Who advises on procuring and negotiations: Who is on point to provide legal advice during the procurement and negotiation process for D&O coverage? Are you consulted to advise the company or other C-Suite executives on the scope of the coverage?

#### >>Indemnification

- **Corporate By-laws:** Do your organization's By-laws include an indemnification of employees and would this extend to you as CLO? What limitations on indemnifications are of concern to you personally?
- **Indemnification Policy:** Does your organization have an indemnification policy that applies generally to C-Suite executives? Does the policy apply more broadly to all employees?
- **Individual Indemnification Agreement:** Do you have a separately negotiated individual indemnification agreement that runs to you as CLO? What are the pros and cons of having this type of agreement? How often do you revisit it? Who negotiated with you on behalf of the company when you were procuring this indemnity?
- **Scope of coverage:** What are the pros of having an indemnification agreement? What are the key terms that you want to see in the agreement? What gaps does it fill that might not be clearly covered in D&O? Does it provide for advancement of attorneys' fees?

#### >>Professional Liability Insurance

- Have you obtained separate professional liability insurance? Has your organization reimbursed you for the premiums?
- What are the pros and cons for obtaining this coverage?
- What were the key issues in negotiating this coverage? Were the negotiations contentious? What type of due diligence did your carrier perform? If this wasn't your first time negotiating for coverage, how did it compare to negotiations for previous years? Are there opportunity areas to advocate for better coverage options or sticking points in negotiating with carriers that CLOs should be aware of?

#### *Resources*

*SEC And Criminal Proceedings Against Inside Corporate Counsel (In-house Counsel as Targets: Fact or Fiction?)*

<http://www.acc.com/resource/v6063>

*How Can Corporate Counsel Avoid Getting Caught in the Crosshairs?*

<http://www.acc.com/resource/v6367>

*Paradise Tarnished: Today's Sources of Liability Exposure For Corporate Counsel*

<http://www.acc.com/resource/v4960>

*Leading Practice Profile, Sarbox 307 Up-The-Ladder Reporting and Attorney Professional Conduct Programs*

<http://www.acc.com/resource/v6328>

*Ethics & Privilege: Investigative Attorneys and the Reporting Obligations under the SEC's Professional Conduct Rules*

<http://www.acc.com/resource/v6354>

*QLCCs: The In-House Perspective*

<http://www.realcorporatelawyer.com/wsl/wsl0504.html>

*Rule 1.6 Confidentiality Of Information*

[http://www.abanet.org/cpr/mrpc/rule\\_1\\_6.html](http://www.abanet.org/cpr/mrpc/rule_1_6.html)

*Rule 1.13 Organization As Client*

[http://www.abanet.org/cpr/mrpc/rule\\_1\\_13.html](http://www.abanet.org/cpr/mrpc/rule_1_13.html)

*Final Report of the American Bar Association's Task Force on Corporate Responsibility: A Look at the Proposed Amendments to the Model Rules*

<http://www.acc.com/resource/v4137>

*Blowing Whistles And Climbing Ladders: The Hidden Insurance Issues*

<http://www.acc.com/resource/v5716>

*Directors and Officers Coverage: Potentials and Pitfalls*

<http://www.acc.com/resource/v5877>