

## An Event in Support of the ACC Value Challenge

### SESSION SUMMARY Las Vegas, NV – October 8, 2010

#### Program Title and Overview

This unique event in support of the ACC Value Challenge was titled, “Defining and Delivering Greater Value for Clients.” The program involved an overview of the ACC Value Challenge and related developments nationwide, case study presentations by six seasoned lawyers, and small group breakout sessions in which participants discussed potential ethical issues involved in implementing alternative fee arrangements.

#### Co-Moderators and Guest Panelists

Robert Solomon, former President of the ACC Nevada Chapter, and Michael Roster, Chair of the ACC Value Challenge Steering Committee, moderated the program. A panel of experienced in-house and outside counsel presented case studies describing what their organizations are doing to achieve greater alignment between the value and costs of legal services provided to their respective corporate clients:

- Michael Roster, former General Counsel, Stanford University and Medical Center
- Michael Cohen, VP, Asst General Counsel & Corp Secretary, Harrah’s Entertainment
- Richard Mosher, Chief Legal Officer, Loctronix, Board of Directors ACC DFW Chapter
- Don Martin, Director, Fennemore Craig-Las Vegas
- Gayle Hyman, General Counsel, Las Vegas Sands Corp.

**PART A – Understanding the ACC Value Challenge.** Michael Roster, Chair of the ACC Value Challenge Steering Committee, introduced the program.

#### Key Points From Mr. Roster’s Presentation:

- **The Need for Change.** At meetings of ACC members, consistent themes emphasized the need for change and gave birth to ACC’s Value Challenge. An eye-opening reality: over the past 10 years, general costs to U.S. companies rose 20% . . .but legal costs increased 75%.
- **The Challenge of Change.** Change is needed on both sides but difficult for both. Need to overcome long-time habits of thinking and action, existing methodologies, legacy systems and structures, established cultures and income expectations.

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For success, there needs to be trust and a true dialogue. Among other things, in-house and outside counsel need to learn how to think like managers, not lawyers (focusing on outcomes versus process); how to define and measure value; how to involve the next generations and how to get desired results.

- **Advances in Aligning Value and Costs.** There has been progress and innovation on both sides. Finding that additional skills and resources are needed – e.g., finance, project management, procurement, marketing, etc. See, [www.acc.com/valuechallenge](http://www.acc.com/valuechallenge). Metrics are very important – consider law firm leverage ratios, lawyer turnover and revenue per lawyer, rather than measures such as average profits per partner which may actually undercut delivering high value at reasonable costs.
- **Things Law Firms Can Do.** Consider taking on whole portfolios of work for a fixed fee. Propose other alternative billing approaches and relationships. Get skilled at setting budgets and holding to them. Re-evaluate staffing for greater efficiency. Provide better training and mentoring, focus on efficiency and deliver value as defined by the clients. Implement knowledge management – don't reinvent the wheel; pass along your savings to clients.
- **Things Clients Can Do.** Stop saying, “We hire the lawyer, not the firm.” Stop focusing on discounts. Develop manager skills among in-house team members. Examine your own methods and thinking, with a focus on value and outcomes, not process. Work towards longer-term, trusted relationships with outside counsel (versus RFP's for every matter, third-party audits, etc.). Be receptive to firms' proposals. Stop rejecting involvement of associates. Communicate expectations clearly and ask for budgets up-front.
- **Examples of What is Working.** Among numerous things, in addition to those outlined above, clients and firms have found varying degrees of success in training lawyers in Six Sigma / Lean principles, consultation retainers, fixing prices by stage of work or type of matters, setting maximum staffing ratios, creating knowledge banks shared by preferred outside counsel (see, DuPont Legal Model), unbundling and outsourcing support services, and having law firm attorneys work on the client's site.
- **Bottom Line.** Continue the dialogue. Meet-Talk-Act. Talk candidly about working together. Ask, “How do we improve the value of legal services?” Try something new to achieve better value-cost alignment, even on a small scale. Periodically assess the efforts; and expand what works. Share both failures and successes with others. Remember, “In the end, it's all about value.”

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## **PART B – Panelist Presentations**

### **Strategic Partnering: Recasting the Stanford Law Department**

#### **Key Points from Mr. Roster's Presentation**

Mr. Roster reviewed the key elements contributing to the marked success of the Stanford University Law Department's preferred law firm partnering project (1993-2000). See, Mr. Roster's article, "Re-engineering the Legal Function," posted online at:

<http://pilf.usc.edu/centers/scip/participants/documents/ReengineeringtheLegalFunction.pdf>

- **In the Beginning.** The legal department at Stanford for years was "a model" department drawing upon very bright, highly skilled professionals with a broad range of substantive talents such that it could do virtually everything in-house. Reductions in budget, increasing complex litigation and the perceived need for higher-level expertise, however, dictated the need for change.
- **Restructuring and the Operative Goal.** The ultimate restructuring resulted in a department consisting of 7 full-time professionals compared to the previous total of 26 and consisted of a highly efficient in-house team that focused on the core functions of the client's business and a strategic alliance with three major law firms providing work at fixed or budgeted fees. The law firms' attorneys functioned on a regular basis on site as if they were in-house, with university telephone extensions, voicemail and email addresses and attending weekly internal staff meetings. The goal for all attorneys - whether in-house or outside - was to function as part of a single unified department.
- **Key Elements Contributing to Success.** There were multiple factors that contributed to success, including: Careful selection of our partner law firms through a competitive bidding process. The in-house and outside counsel worked together as partners, juggling work loads among themselves and across law firm lines and practice areas as needed. Everyone shared a common goal of managing and reducing the university's and medical center's overall legal costs and exposures. Setting clear goals and benchmarking progress in achieving those goals. Establishing a budgeting process based upon a matrix of internal clients and the types of legal services they are likely to need, estimated on an annual basis and taking into account the overall legal budgets for the university and medical center; and including a reserve to cover some of the extraordinary (off budget) matters encountered each year. Plus, tracking against the budgets monthly and sharing the numbers quarterly with the clients, which assists the clients in making more educated use of legal resources. Periodic evaluations of the quality and delivery of legal services by the client.
- **Demanding Change – Yet Being Patient.** Being patient with outside counsel in making changes demanded of them was also critical to success. The system forced the partner

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law firms into getting better at preventative law - which was necessary in order to meet budgets. Law firms must learn that they can no longer manage themselves solely on billable hours. Rather, they need to address the same issues as other industries quality of services, efficiency of service delivery, profit margins, risks, incentives, etc. To help in the process, the Stanford law department held monthly meetings with representatives of each partner firm to go over the numbers and discuss quality of services. It became apparent in the process that industry familiarity was very important in managing the client's risk and delivering cost efficiencies. In the end, to achieve success, outside counsel needed to learn to be strategic, to manage results, to be self-initiating in assisting clients, to leverage their knowledge and expertise, to deconstruct processes and budget effectively, to share responsibility and to be more trusting of their clients.

## **Positive Results from Harrah's Entertainment, Inc.'s Outside Counsel Summit**

### Key Points from Mr. Cohen's Presentation

#### **Background**

- In April 2010, Harrah's Legal Department held its first ever "Outside Counsel Summit"
- Had concerns that outside counsel may not want to spend the time and money to attend, but response was overwhelming
  - Everyone paid all their own costs, and we asked certain of our highest paid firms to fund a portion of the event
- We planned on 30 attendees (and max of 2 per law firm), but we had over 60 outside counsel attended from over 30 law firms that Harrah's do substantial business with for two days
  - 4 firms sent 3 or more representatives
  - All but less than 5 attorneys came from out of town
  - Participants included counsel in a variety of disciplines: litigation, intellectual property, regulatory, labor and employment, corporate, etc.

#### **Initial Fears**

- Room full of lawyers—would we get anything done?
- Would law firms that compete for our business turn the event into a constant "pitch" from different outside counsel on how each can do "more" for the Company?

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## Goals for the Summit

- Allow in-house counsel to get to know their outside counterparts better
  - Some had never met in-person
- Teach outside counsel what we expect from them
  - We also wanted to understand from outside counsel what they expect from us to do their jobs effectively and efficiently
- Allow outside counsel to learn more about their client to allow them to represent the Company better
  - Both legal and non-legal areas of the Company

## Agenda

- Administrative Items
  - Introduced our counsel to our new Outside Counsel Billing Guidelines
  - Introduced our e-billing system, CounselLink
  - Introduced our Law Department Mission Statement, Values, Structure and Strategic Architecture
  - Discussed budgets, and how to manage against budgets
  - Discussed the important of regular communications, and the worst fear of an in-house counsel—surprises!
  - Discussed the need for monthly billing on matters
  - What can in-house counsel do to make your jobs easier and more efficient?
  - Project post-mortems—how can we do it better and more efficiently next time?
- Law
  - The day in the life of an operations attorney
  - Financings and M&A transactions—things we do at Harrah's
  - Development and the law
  - Compliance and gaming regulatory overview
- The Business
  - The History of Harrah's—from 1937 to present
  - Total Rewards and HET Marketing Capabilities
    - Matt Bowers, Vice President of Total Rewards
  - State of the Business
    - Jonathan Halkyard, CFO
  - The role of Government Relations
    - Jan Jones, SVP of Government Relations and Communications
  - Continuous Improvements and Effectiveness
    - John Baker, SVP of Enterprise Effectiveness
  - Development
    - Peter Murphy, President, Strategy and Development

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- Fun
  - Villa Tour—new Octavius Tower
  - Craps and Texas Hold Em Lessons
  - Group Dinner at Planet Hollywood

### **Post-Event—Was the Summit Useful?**

- Informal Feedback
  - Counsel really enjoyed spending quality time with the in-house counsel and the other lawyers that work with the Company
  - Getting to know lawyers you work with in a non-project environment beneficial
- Formal Feedback—Post Summit Survey
  - Survey counsel on:
    - What liked best about the conference
    - Suggestions for future topics
    - Other improvements for future summits
  - Very strong feedback
    - 75% of the attendees provided feedback

## **Gearing Up at Fennemore Craig Managing Litigation as a Business, etc.**

### Key Points from Mr. Martin's Presentation

Mr. Martin, a Director of Fennemore Craig's Las Vegas office, summarized the firm's senior management regarding the ACC Value Challenge and the firm's response in support of this important national campaign..

- **General Reaction to ACC Value Challenge.** Even clients that haven't heard of ACC's Value Challenge are expressing concerns re value of services and cost. The ACC Value Challenge has heightened our sensitivity even more to client wants and needs. Our tight economy, plus ACC's Value Challenge, are driving us to look hard at all our means for providing high value services to our clients at reasonable costs. Our clients and our firm are benefitting in the process.
- **What We See as "Law Department Hot Points."** Increasing demands from management for greater efficiency, lower costs, more value from legal spend. Limited time, dollars and legal resources. Concern re escalating cost of litigation (discovery). Critical importance of predictable costs. Tough challenge of being "legal generalists."

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Need for state-of-art technology to facilitate communication, centralize knowledge / work product and control costs. Need for partnering and collaboration among preferred outside counsel. Need to improve skills to better manage legal processes and outside counsel.

- **Our Firm’s Commitment.** To understand our clients better and respond meaningfully to their changing wants and needs. To look for new solutions to deliver legal advice and services more efficiently and at lower costs, while still striving to be profitable. To be a thought-leader in responding to ACC’s Value Challenge and, particularly, in managing litigation in an effective, businesslike manner. Importantly, to “walk our talk” on all these fronts.
- **New Solution – Managing Litigation in a Businesslike Manner.** Fennemore Craig is taking a lead role as Project Director in a nationwide “Managing Litigation as a Business” initiative designed as an ongoing collaborative effort among participating companies and select law firms and legal suppliers to improve how in-house legal teams are managing their companies litigation, share best practices, find new solutions to common challenges, marshal litigation management resources and tools in central online “Managing Litigation Portal” and assist law departments in acquiring needed skills and implementing continuous improvement programs to achieve better litigation results at lower costs..
- **New Solution – Managing Litigation Reference Model.** The “Managing Litigation as a Business” initiative has evolved into a new “Managing Litigation Reference Model” (MLRM) Project – a collaborative effort among seasoned risk, dispute and litigation management professionals to develop a national standard for managing disputes, claims and litigation in a businesslike manner. Fennemore Craig is taking a lead role. Copies of the MLRM Mission Statement and the latest outlines of MLRM Key Elements and structure and functionality of the proposed MLRM Portal are among the handout materials for this ACC Value Challenge session.
- **New Solution – Proposed ACC Value Challenge InfoNet.** Recognizing the challenge many law department leaders face as “legal generalists” to make decisions that involve areas of the law about which they have little or no knowledge or where the law is rapidly changing or particularly complex – Fennemore Craig is offering to establish an online facility through which in-house lawyers can access panels of outside counsel with expertise in diverse legal practice who would provide quick “top-of-the-head” information in response to posted questions. There would be no cost for the use of the proposed “InfoNet,” sample screen shots of which were included in the session handout materials.
- **New Solution – In-house Paralegal Blog.** Paralegal professionals working for law departments and in other law-related in-house positions have grown to be an essential and valuable force for companies intent on improving efficiencies, reducing costs and gaining

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more value for their legal spend. It simply makes good business sense for businesses to be using all their legal personnel more cost effectively. Recognizing this, Fennemore Craig and LawPartnering, Inc. are collaborating with other parties in producing the In-house Paralegal Blog, a unique new online resource dedicated to supporting and advancing the in-house paralegal profession.

## **Early Case Assessment & Alternative Dispute Resolution at Loctronix**

### Key Points from Mr. Mosher's Presentation

- **About Loctronix.** Loctronix is a privately owned company specializing in universal location technology. The founders of the company are leading experts in low-cost, high-performance GPS positioning. The company is emerging from start-up mode into alliance-partnership-testing-development-manufacturing modes. The company is managed by a small management team and a very experienced Board of Directors.

The law department has historically consisted of one in-house counsel, consultants, two primary outside law firms (one corporate and one patent firm), and patent lawyers-agents in many countries. The scope of legal work is heavily centered on IP law and protection, with the usual mix of legal work in corporate governance, regulatory compliance, shareholder-financing agreements, tax, securities, contracts (including complex partner-customer development agreements), and employment law.

- **Premise.** Corporations are under increasing pressure to reduce outside legal costs and minimize the time spent by key employees in litigation. Law firms must be proactive to avoid losing business due to the convergence of retained law firms by corporations and competition from other law firms.
- **What Is an Effective ADR System?**

Classifying and Prioritizing Disputes: Settle, Try, or Compromise?  
Identification of Legal Risk, "Surprises", Business Objectives, Solutions, and Time-Lines  
Realistic Budgets: Forecasting, High-Low-Target Resolutions with Budget-Time Impact  
Aggressive Implementation

- **Goals of the System**

Must Meet Business Objectives

Reduce Cost; More Accurate Budget; Reduce "Surprises"; Maximize Staff Time and  
Minimize Key Employee Time in Litigation

Wins for Law Firms: Increase Piece of Budget Pie; Become Real Partner with Company,  
and Make Convergence Cut

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- **Keys to Success at Loctronix.** Our current approach to litigation management, similar to the CLO's previous work at Ball, Maytag and Hoover, consists of the following:
  - extremely early case assessment with involvement and buy-in by the business unit
  - early ADR whenever possible
  - always look for (and expect outside counsel to look for) potential business advantages/benefits from litigation, such as potential licensing, better agreement terms, additional revenue streams
  - candid communication between inside and outside counsel on any proposal to staff and manage litigation
  - very detailed written engagement letter with outside counsel spelling out expectations
  - cost-effective management of litigation, as opposed to being overly concerned about hourly rates
  - mediation/arbitration in all international disputes in a neutral common law forum, whenever possible; avoid foreign courts at all costs
  - hire the lawyer not the law firm
  - rare use of alternative fee arrangements, other than a few fixed fees, not to exceed agreements, or negotiated hourly rate discounts
  - select attorneys based on personal references or networking through the Association of Corporate Counsel – look at attorney and firm background and specialties in Martindale Hubbell
  - limited use of competitive bids, which are not always very efficient or productive.
  
- **Balancing the Interests of All Parties.** In implementing our system, stakeholders included the financial, management and technical staff (within our company) and the management committee (within the law firms). At first we didn't fully appreciate the internal issues of outside counsel. It was also difficult to get outside counsel to freely communicate what their internal concerns were so those could be addressed. We overcame this issue by providing better communication and a clear picture of what we were trying to accomplish.

Our breakthrough in this endeavor was getting the outside law firms to finally see the future business that could be gained by more cost-effectively managing the work on initial litigation for our team. We sold this new concept to management and the in-house team by explaining the practical benefits of settlement – e.g. if we spend \$50K on litigation, you will need to sell X more equipment. We motivated team members by explaining that we were always looking for the business advantage in our decision making. This prompted earlier buy-in and involvement of business people, which is best done with a formalized process. We implemented the change gradually. We continue to evaluate the success of this program and effort.

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## **Driving Better Value-Cost Alignment at Las Vegas Sands Corp.**

### Key Points from Ms. Hyman's Presentation

Ms. Hyman reviewed the steps taken by Las Vegas Sands Corp. to reduce legal costs while maintaining productive relationships with its outside legal counsel.

- 1) In Fall 2008, Las Vegas Sands Corp. hired a legal auditor to review all outside counsel invoices.
  - The Company's legal auditor is an attorney, with a background in auditing legal invoices.
  - The use of an in-house legal auditor does not waive attorney-privilege. The use of an outside vendor could result in the waiver of the attorney-client privilege.
- 2) The Company's outside counsel guidelines were updated and enforced.
  - All firms representing the Company must comply with the guidelines.
  - The guidelines enable the Company to monitor and control its use of legal services and identify inefficiencies, including the following:
    - excessive time billed for legal tasks (often indicating inexperienced timekeepers;
    - multiple timekeepers at hearings, depositions, etc. The Company does not believe that it should pay to train new associates;
    - excessive reviews/revisions of work product by senior attorneys. It often is more cost effective for the senior attorney to draft the document in the first place;
    - task-based or minimum billing increments greater than 0.1 of an hour; and
    - billing for support services, library or IT staff.
- 3) The Company now negotiates fee arrangements with the vast majority of its law firms, including:
  - discounted hourly rates;
  - capped and/or flat fees;
  - staged billing with different rates for various elements of a matter; and
  - monthly retainers.

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4) The Company now uses an e-billing system.

- All of the Company's U.S. law firms and legal vendors and most of the Company's foreign law firms and legal vendors submit bills via the e-billing system.
- E-billing facilitates the prompt review and payment of legal invoices.
- Law firms provide monthly accrual information through the e-billing system, which allows the Legal Department to provide accurate information to the financial reporting team.
- Law firms provide budget information through the e-billing system, which enables the Company to better manage its annual legal budget.

5) The Company regularly evaluates its outside counsel and conducts a legal "post-mortem" following the completion of major legal projects.

**Bottom Line:**

Las Vegas Sands Corp. has made tremendous progress in controlling its legal costs over the last two years.

Las Vegas Sands Corp. strives to maintain strong relationships with its outside counsel.

**PART C – Small Group Breakout Sessions**

**The Ethics of Value-Cost Alignment  
Spotting Ethical Issues in Alternative Fee Arrangements**

Client Law Firm Relations

One small group expanded the small breakout group assignment to discuss dynamics of relations between in-house and outside counsel.

Highlights of the discussion included agreement that –

- there is need for candid discussion regarding issues/priorities for both inside-outside counsel
- such discussions are usually not clear or candid enough, and often inadequate when circumstances change
- part of the problem is definitional – that is, people assume they understand when parties use words such as "risk", "prompt", "time" and "cost" but inside and outside counsel are often attribute very different meanings to these words
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- definitional differences also exist from one company to another and one law firm to another
- there is much talk today about the need for stronger client / law firm relations; but still a huge lack of real communication, understanding and agreement
- law firms must change their current business model
- firms must be more creative from a business perspective and not just talk law
- law firm marketing must change consistent with discussions to improve relations
- inside counsel must realize they cannot just demand law firms cut costs

### Ethics Issues and AFAs:

In general, the small breakout groups discussed the reasonableness of the billable hour model and various alternative fee arrangements in light of Rule 1.5 – Fees, of the Nevada Rules of Professional conduct. Reported discussion highlights included:

- the billable hour model provides the incentive for attorneys to bill the maximum number of hours;
- the billable hour model is not necessarily aligned with the business goals of the client;
- the billable hour model is not, however, inherently unreasonable;
- alternative fee arrangements can be applied more successfully in certain practice areas, such as recurring litigation;
- certain alternative fee arrangements can potentially lead to sub-optimal representation once the fee cap or other fee metric has been reached (or the arrangement turns unprofitable for the law firm);
- the sophistication of the client is a key determinant as to whether an alternative fee arrangement can be successfully implemented
- the billable hour model and alternative fee arrangements will both continue to play a key role in the manner in which legal services will be delivered
- regarding the prior point, Mike Roster noted that from discussions with numerous law firms experience suggests that it is very difficult for a law firm to maintain both billable hour and genuine value-based fee models
- in general, no ethics issues should be encountered when a full discussion is held up front and fee adjustments (for case or portfolio) can be negotiated
- corporate counsel may suspect law firm profitability may affect work/resources but haven't really seen specific evidence of problem
- various AFAs – fixed price, not to exceed, success fees, etc. – all discussed; but no ethics issues identified
- law firm representatives indicated that there is no perceived pressure on attorneys handling matters to cut corners when an AFA is established
- the key to successful AFAs is a strong, trusting client / law firm relationship characterized by open frequent communications

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**Participant Materials:** Among the materials included in the participant binder for this unique event was a summary of responses by in-house counsel attending prior ACC Value Challenge related programs to the following questions:

*Aside from cost, how does your law department determine the value to your company of services you purchase from outside counsel? Please indicate the specific criteria you use.*

*Aside from reducing fees, describe two things your law firms could do to increase the value of the services they provide your company.*

The summary clearly demonstrates that law department leaders have very different opinions and criteria relating to the “value” of the legal services they purchase from law firms. This, in turn, emphasizes the importance of candid dialogue between corporate clients and their law firms to discover how the client defines and recognizes value in provided services.

Obviously, without a clear mutual understanding of what constitutes value, delivering value at reasonable cost becomes an extremely difficult undertaking in which it is very easy to miss the mark. Also, law firms need to grasp and learn to manage effectively the reality that providing services that one client considers highly valuable does not guarantee that the same level of service will satisfy the value criteria of other clients.

**Follow-Up with Program Participants:** Importantly, Nevada Chapter leaders recognize that success of the ACC Value Challenge locally and nationwide requires ongoing attention on finding ways and focused efforts by in-house and outside counsel to achieve better value-cost alignment. To these ends, program sponsors Fennemore Craig and LexisNexis have proposed this follow-up message to attendees of the Las Vegas event, requesting that they submit their ideas for advancing ACC’s Value Challenge in Nevada:

*Our October 8, 2010, program was just a start. The broad goal of ACC’s Value Challenge is to find effective ways to better align the value and costs of legal services provided by law firms to corporate clients. Of course, meaningful change will not happen overnight – and it’s very unlikely that it will happen at all if we don’t keep the dialogue going among law department and law firm leaders and take steps to implement new, positive ideas.*

*Please take a moment to share your thoughts on things we might do to advance the goals of ACC’s Value Challenge among Nevada in-house and local outside counsel. We will combine your suggestions into a single document and send you the summary. Perhaps, we will find a project or other collaborative endeavor that everyone agrees is worth pursuing.*

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