

## ACC Survey: Managing Outside Counsel

Over the past eight years, more in-house counsel have required specific terms of retention that govern what they expect from their outside counsel, according to the results of the 2008 ACC/Serengeti Managing Outside Counsel Survey, a collaboration between the Association of Corporate Counsel (ACC) and Serengeti Law. The survey of member law departments, borne out of an interest to help these departments share their experiences related to outside counsel management, includes key findings for all major areas of concern in this area and a comparison with prior years' results of this report.

In-house counsel are setting more rules for their relationships with outside counsel, and more carefully monitoring work that is outsourced. Although many in-house counsel still use home-grown spreadsheets or other internal management software, a growing number is moving toward Internet-based, more sophisticated software to collaborate directly with outside counsel; a larger number reports that it plans to use such systems on a regular basis with outside counsel, including electronic billing to track spending, budgets and accruals.

"Year after year in-house counsel voice their frustration and finally, they are taking action," explains ACC President Frederick J. Krebs. "In-house counsel face increased pressure and scrutiny from internal management to lower their costs and this year's survey results further validate the need to reconnect value to costs for legal services. Many in-house counsel have become engaged in the *ACC Value Challenge*, an initiative designed to align law firm business models with what corporate clients want and need. We are intent on promoting a dialog within the legal profession to change the way corporations and their law firms think about the relationship between the cost of legal services and the value delivered."

ACC's survey also notes that a small number of activist in-house counsel are using more initiative each year and requiring more from their outside counsel. Methods of accomplishing this include convergence (reducing the number of firms with which they work on a regular basis), competitive bids for new work requiring minimum levels of experience of associates working on projects, getting discounts for early payments of bills, and systematically evaluating the performance of their outside counsel.

Budgets are widely used to clarify expectations and monitor performance of outside counsel, according to two-thirds of law departments surveyed, and on average budgets are required at least one-half of the time. Budgets are also directing in-house counsel to technologies such as electronic billing systems that automatically compare billing with budgets. While convergence continues to be used by about one-fourth of in-house counsel, law departments generally hope to achieve lower rates and better efficiencies with a smaller number of law firms. As a practice convergence does not appear to be gaining momentum – most companies reported that as a strategy for controlling cost and efficiency, it met but did not exceed their expectations.

Over 40 percent of in-house counsel

terminated relationships with underperforming outside counsel, which is a lower percentage than in prior years. Reasons for termination are typical: lack of responsiveness, poor results and high costs. Yet dissatisfaction with communication and personality issues is now cited by one-third of in-house counsel as a reason for termination. It is suggested that law firms should direct some of the funds allocated to new client development to addressing present client concerns.

Historically the primary driver of legal costs was outside counsel legal spending. Interestingly, during the past several years the ratio of expenditure on law departments as compared to outside counsel has shifted in favor of the former, reflecting the increasing recognition of the value of in-house counsel. While median spending on law departments was at one of the highest levels in eight years, the same spending on outside counsel was at its lowest in the history of the survey.

The vast majority of corporate legal work is still being billed by the hour, either standard or discounted, despite publicity to the contrary. The percentage of in-house counsel who subscribe to hourly rates is gradually increasing, showing that hourly billing is becoming even more the norm. And, although in-house counsel were having some effect in keeping the increases in hourly rates low during the prior four years, the rates are increasing again with rates expected to continue the current trend. This increase leaves less work going to outside counsel – departments are required to be more selective in the work being sent out. Median outside counsel spending is lower, and the prediction is that it will not increase during the coming year.

"During the past several years, the ratio of outside spending to in-house spending has decreased, reflecting the increasing value of in-house counsel and the legal work being done in-house," reports Serengeti's Rob Thomas, the author of the survey report.

While outside spending has been the top concern of in-house counsel during the past four years, that worry is being surpassed by even greater concerns with monitoring business activities that have legal implications. The increasing complexity of regulatory requirements driven by Sarbanes-Oxley and related laws – not to mention a series of high-profile trials involving executives and in-house counsel – have heightened concerns about compliance issues.

Unfortunately, in-house counsel report that despite the increased reporting obligations related to compliance (which include periodic reports on legal spending, accruals, liability exposure, legal matter status and legal results as well as developments of a material nature in the aforementioned areas), the challenge lies in assimilating the information from their numerous law firms. In-house counsels' methods of reporting continue to be largely manual and lack basic safeguards. As a result, law departments are considering new technologies to collect information directly from their outside counsel to comply with these requirements.

The complete survey report can be purchased online at [www.serengeti-law.com](http://www.serengeti-law.com).

## Partners Notes

### Amper Informs Clients On SEC's Proposed IFRS Roadmap

The SEC published its proposed IFRS Roadmap on November 14, 2008. The plan outlines milestones that would give a narrow group of companies the option to early adopt beginning with their fiscal years ending on or after December 15, 2009. The U.S. issuers that have the option to early adopt the transition rules to IFRS would need to be among the 20 largest companies worldwide in their industry as measured by market capitalization with IFRS being the most common financial reporting basis used by those 20 companies. One item of note is that companies that elect to report using IFRS beginning with their December 31, 2009 year-end will need to provide comparable IFRS audited financial information for the 2007 and 2008 years as well. The SEC has also indicated that these early adopting companies will need to obtain a "letter of no objection" from the SEC's Division of Corporate Finance. The "letter of no objection" will give the company the SEC's blessing to use IFRS, but does not require it at that time.

#### Milestones

As the IFRS train gains momentum, the SEC's plan calls for seven milestones to achieve full adoption. These milestones are: (1) improvements to accounting standards; (2) funding of the International Accounting Standards Committee Foundation; (3) improved ability to use interactive data for IFRS reporting; (4) improved education and training in the U.S.; (5) limited use in a narrow group of companies (i.e. December 31, 2009); (6) SEC to determine in 2011 whether mandatory adoption of IFRS is feasible based on the progress in the first five milestones; and (7) mandatory use. If decided to go full steam ahead (as discussed in milestone 6) then large accelerated, accelerated and non-accelerated fil-

ers would be required to adopt IFRS beginning with their years ending on or after December 15, 2014, 2015 and 2016, respectively.

#### U.S. GAAP

The SEC's Roadmap gives issuers electing to use IFRS two choices on how to present their IFRS financial information as it relates to U.S. GAAP. The first option is a disclosure of a reconciliation from U.S. GAAP to IFRS. The reconciliation would include a restatement and reconciliation from prior years' financial statements and related disclosures. This would be done in accordance with IFRS 1, "First-time Adoption of International Financial Reporting Standards." The second choice would be to provide the one-time reconciliation previously discussed and then provide on an ongoing basis an unaudited reconciliation from U.S. GAAP to IFRS. At this time, there is no prescribed format for the reconciliation, nor is it required on interim reports.

#### Other

Certain amendments to Rule 4-01 and Article 13 of Regulation S-X would be made to incorporate the "IFRS" terminology.

Item 301(a) of Regulation S-K previously required five years of selected financial data in the financial filings. The amendment would allow issuers to present three years in the initial year of adoption and build to the five year requirement in subsequent year filings.

The proposed Roadmap is open for a comment period of 90 days which will begin upon its publication in the Federal Register.

Amper's International Services Group has anticipated the transition to IFRS reporting and is positioned to service clients as the transition progresses.

### KPMG Survey: Global U.S. Companies Have Difficulties Meeting FCPA Guidelines

Most multinational U.S. companies have programs to meet Foreign Corrupt Practices Act (FCPA) guidelines, but many executives surveyed by the audit, tax and advisory firm KPMG LLP acknowledge they still may not know enough about those with whom they do business in other countries.

Of 103 executives surveyed, 85 percent said their company had a formal FCPA or anti-corruption compliance program. Yet, key challenges remain:

- 82 percent of respondents said they still wrestled with performing effective due diligence on foreign agents and third parties,
- 78 percent said they had trouble identifying and assessing FCPA risk,
- 76 percent said they couldn't adequately audit third parties for compliance, and
- 73 percent of respondents said their mergers and acquisitions due diligence was subpar.

The U.S. Congress enacted the FCPA in 1977 and revised it in 1988 to address

accounting-transparency issues and bribery of foreign officials. Recently, the Department of Justice (DOJ), the Federal Bureau of Investigation (FBI) and the Securities and Exchange Commission (SEC) have heightened their enforcement activities. In 2008, approximately 80 companies were under investigation for potential FCPA violations, up from 29 in 2007 and as few as nine in 2003.

Only 32 percent of the KPMG survey respondents, all executives with day-to-day FCPA responsibility from across industries, said their organizations employed an FCPA compliance officer, while just 37 percent said their organizations had a committee responsible for overseeing compliance.

Moreover, the survey found that about half of the respondents (49 percent) reported having protocols for conducting FCPA compliance risk assessments, while just 45 percent said their programs contained continuous-monitoring protocols focused on anti-bribery and anti-corruption issues.