

Webcast: Tracking Outside Counsel Performance

Date and Time: Wednesday, September 27, 2006

Presented by ACC's Small Law Department, Litigation and Law Department Management Committees and Serengeti Inc.

Presenters: Mark Wolfe, Assistant General Counsel at FMC Technologies Inc., - medium law representative Deanne Tully, Vice President & General Counsel, Tier Technologies, Inc. - small law representative Mark LoSacco, Senior Litigation Counsel, American Express Travel Related Services Company, Inc. - large law representative Moderator: Rob Thomas, Vice President, Strategic Development Serengeti Law

ASSOCIATION OF CORPORATE COUNSEL

Moderator: Rob Thomas  
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Operator: Just a reminder, today's conference is being recorded.

Female: Please go ahead, Rob.

Rob Thomas: Welcome to the ACC Web Conference on Managing Outside Counsel, Evaluating Outside-Counsel Performance.

Today's panel is made up of a cross section of small, medium and large law departments.

We are pleased to have with us several representatives who are in-house counsel. I will do a brief introduction of them. If you want detailed information regarding their backgrounds, that information is available in the materials for this panel.

First I would like to thank (Mark Wolfe) from FMC Technologies for stepping in at the last minute for Jeff Carr. Jeff had a family emergency today, so he was not able to attend. Mark is the Assistant General Counsel at FMC Technologies. They have a medium-sized law department. And their business is a wide variety of different businesses.

Second on the panel is Mark LoSacco. He's Head Litigation Counsel for American Express Travel Related Services, a large company. Mark and his colleague at the Law Department manage a large volume of litigation matters with outside counsel. And he's our representative of large company law department.

Finally, rounding out the panel and representing the smaller company is Deanne Tully. She's Vice President and General Counsel of Tier Technologies. Their law department has three attorneys and two contract specialists. And their company provides electronic transaction processing (and) systems integration services.

Thank you to all of our panel members for participating in today's panel. Also thank you to the ACC for the work that they've done to get this panel organized and to provide for having this Web Cast today.

My name is Rob Thomas. I'm Vice President, Serengeti. Serengeti provides a matter management and electronic billing system that is used by many companies to manage their legal work with outside counsel.

I'm going to advance the screen now to move to the introduction. Today's panel is actually a follow-on panel to a seminar that was provided back in January with the same panel

members. That panel dealt with getting off on the right foot with outside counsel when you're beginning a legal project. It was entitled, "Managing Outside Counsel, Getting Off on the Right Foot and Staying in Step." During that seminar, we talked about case plans, budgets, performance-based fees; and how (to) monitor progress against the plans that have been put in place.

If you're interested in the topics that were covered in that first seminar, that was recorded and is archived and available on the ACC Web site. There's a link here on this page. If you just go to the ACC Web site and check the archives for the Web Cast, you'll find that the date of the Web Cast was January 18 of 2006.

Today's seminar follows on the topics that were covered in that first seminar, by looking primarily at the end of projects; how you capture, analyze and use the results of the projects that you're managing with outside counsel.

Housekeeping matter – I want to mention, for those of you that are attending the Web Cast, you can send us questions by clicking in the questions box down in the lower left-hand corner, and then hitting send. That question will be sent to us. And we do plan to reserve some time at the end of the Web seminar to respond to questions. So please feel free during the course of the Web seminar to send us questions that we can address at the end of the seminar.

There is also an evaluation form which you will notice under links. I was told to have you, at the end of the seminar, please fill in that evaluation form, and to select today's date, so that they can match it up with today's seminar.

So with that bit of introduction, let's move into the substance of the presentation today.

The first slide talks about capturing results and lessons learned from legal projects that are being managed with outside counsel.

What I would like to do is to have a brief discussion to start with the mechanics of how results are tracked; how they're captured. We'll get into, later on in the presentation, the actual specifics of what is tracked. But I would like each company to maybe talk briefly about how they capture the results, (if) they do different things for different types of matters, where they capture information from – whether it be internal clients, in-house counsel or outside counsel – how they collect information about the results they capture.

Let's start with Deanne, if we could, speaking from the small law department perspective. And then we'll move to (Mark Wolfe) from FMC, and then to Mark LoSacco at American Express.

Deanne?

Deanne Tully: Thanks, Rob.

Well, as a representative of the small law department contingency, I can tell you that our process for capturing results is remarkably low-tech and informal. I think it depends on the matter. If it's a matter that's really just affected the corporate side of things – general corporate advice, or some sort of issue that hasn't really affected our business units – it's typically a process that starts with me, as general counsel, sort of downloading my thoughts,

talking with any other in-house personnel who were involved – generally, with senior management, the CEO, or even the board, if appropriate, just to get their feedback.

If it's a matter that involved our business units – for example, a litigation matter, or intellectual property dispute, or something of that nature – we will definitely involve the business leaders. I really look to see – to give them an opportunity to have input into a process that oftentimes they don't understand or fully appreciate the complexities or the nuances. And I also very much want to test their level of satisfaction with the overall process and results.

And our mechanics consist of hollering down the hall to our coworkers, or setting up a quick meeting with folks that are based here in headquarters, and phone calls. It really is not set down in any precise form or process. It really is when things – I'm happy to say we don't have that many matters – but when they do (finish-up), we try and talk in person or over the phone – not e-mail; I really don't prefer that process – but we just try and talk with everybody that was involved in the matter or is affected by the matter, so that we have a good sense of how they feel about the results and the processing.

Rob Thomas: Thank you very much, Deanne.

I do want to mention that Deanne speaks for the vast majority of a lot of departments out there. I'm always amazed when we do surveys of ACC members that 80 percent of them are in law departments with five or fewer lawyers. I think the larger law departments get a lot of the publicity, but the smaller law departments definitely represent the majority of the profession.

So let's move on then to (Mark Wolfe) at FMC Technologies for the perspective of medium-sized company.

(Mark Wolfe): Thanks, Rob.

Just to follow onto what Deanne said, we also have a relatively small legal department, despite the fact that we're perhaps a relatively larger company. We have eight attorneys, eight toll attorneys. And that is international as well.

In terms of how we collect and capture results from a lessons-learned standpoint, it starts with the complexity of the matter. If it's a significant piece of litigation, that meeting – we actually have a formal meeting where there's very few note-taking by anybody. And there are maybe handouts that are collected at the end of that meeting. But it can include everybody from myself, outside counsel – inside-business clients. And the discussion then turns to, well, you know, procedural and substantive, meaning that – how could we have done the process better. And that is formalized, along with substantively, how could the business unit have preventing being in this particular situation to begin with.

I then take that information from the meeting. And the backbone of our tracking of this is Serengeti, Rob, as you may or may not know. Serengeti has a – has a process where they scorecard various factors that are involved in the – in the lessons learned. And I'll talk about that more later as we get to other slides. But I take this information, and I then input it into our Serengeti matter-management system. We have required in-house attorneys to not be able to close a matter until a lessons-learned comment is made in Serengeti for tracking

purposes. It's been real helpful to us. I think the last count, we have over 570 either lessons-learned comments or trackings, so to speak. And it has been real helpful for us to instill that kind of discipline in order to do it before we close a matter.

As to the different types of matters that we may do it on – and I commented on this to begin with – it depends on the complexity of the matter. If it was simply a contract review, well, that may be as simple as myself being involved in the lessons learned, and what I could have done better in connection with that contract. Or perhaps what the business unit should do in the future doesn't involve any outside counsel.

But like I said, if it's a significant piece of litigation, then the collaborativeness of how that's gathered is done differently in the form of a meeting. But then the in-house counsel is responsible for inputting that into Serengeti.

Rob Thomas: Do you sometimes involve internal clients, as well as the other groups you've mentioned, in this process of evaluating the results?

(Mark Wolfe): Oh, absolutely. We have found that getting to the key decision-makers – as high as the business unit level, and sometimes to the vice president level of our divisions – we've found that that has a very chilling impact on the people down below that particular level, and it also then shows the company that the lessons learned are being taken seriously, and at the highest levels of the company. And therefore, then the domino effect of how that flows down into the organization becomes very noticeable.

And I'll give an example. We're in the energy business. And, you know, we're a product supplier. And we go out into the middle of the ocean on drilling rigs all the time. And when you go out into the middle of the ocean, the rig owners have 30 or 40 people that are used to moving things around the floor of that drilling rig. And we historically thought that we were either smarter or better than others in how we put our equipment in. And we used to give, you know, particular instructions to people on the rig floor, and et cetera, et cetera. And that just led to a whole host of negligence issues against us.

Well, you know, that doesn't happen anymore, through virtue of the lessons-learned process. That has become very well known in our business that we do not do that anymore. And when there's a piece of equipment to be moved around on a rig floor in the middle of the ocean by a drilling company, that is done by them, and it's no longer done by us.

So those items of litigation have virtually dried up. We don't hear of those anymore.

Rob Thomas: Great, thank you. That was a – was a good example. And I do want to talk a little bit more later on about how tracking results changes behavior in the future. I think that's an important – why do it if it's – if it's not going to change anything?

(Mark Wolfe): Exactly.

Rob Thomas: Let's move on, then, to Mark LoSacco at American Express. And Mark, maybe you could mention, just briefly, how you guys manage. Because I think you're fairly unique in managing a very large volume of particularly litigation work with a very small number of people, as well as talking about how you capture results.



Mark LoSacco: Right. It's interesting, having listened to everybody – a little bit of the same song, although we're certainly a large company, we are extremely leanly staffed as far as the litigation group goes. We have three lawyers managing all the litigation for the company. We have about – staff of about 10 people – including paralegals and what I would call legal analysts – most of whom are actually done in Miramar, Florida – and report up to – report up to (they).

And basically, the way we manage our litigation is we break it down into two categories, the routine litigation – which obviously is the high volume and the vast majority of what we have – and the more complex. All of our cases, however, are set up on Serengeti, which we also use, as soon as they come in the door.

So every matter that we get is captured on Serengeti initially, where we break down – and one of the analysts (breaks) down the type of matter, the issues raised, the jurisdiction, and all of that sort of information we can get from the (complaint). Then routine matters are initially handled with our group in Miramar, who will reach out to outside counsel, plaintiff's counsel, or the (pro se) plaintiff; and initially discuss the case, try to gather some information, and then make a determination whether or not this is something (that) can actually be resolved in advance of having to send it out to outside counsel. We've found that to be very effective.

With that group, as far as capturing results and the lessons learned, it's basically a two-pronged approach. One is that we do capture information continually in Serengeti. But more than that, we have a little bit more of an ad hoc approach, since that group discusses

results with each other. They can see all of the trends of the routine litigation. And we have an internal system where they know to alert us and alert the businesses if there are areas where there are – we continue to hear noise, or continuing problems as far as litigation goes. So that's how we handle the routine matters, which again is the vast majority of our volume.

The more complex matters – and certainly the class actions again – those come in the same way. They're set up on Serengeti. They'll be sent right to outside counsel, who accesses Serengeti as well. And we will collect the host of data – we'll talk more about it later – regarding budgeting, exposure, status, and a whole host of information we get from our outside counsel, that allows us to generate reports and determine how we're going to actually approach the case from a – from a defense perspective, what type of resources we need, and whether we need to consider early settlement; things like that.

And then, as we follow it through to conclusion – follow the case through to conclusion – there is also a two-pronged approach. One is the one that (Mark Wolfe) mentioned earlier, using Serengeti and the closing information on Serengeti to evaluate outside counsel and also to capture the results and the root-cause analysis that we do. But secondly, because we have a small number of lawyers dealing with these cases, and we also have a small number of outside counsel that we use at this point, we do also have an ad hoc approach there as well, where we will do our own postmortem on significant cases, and capture lessons learned, have discussions around it, and then report up to the businesses appropriately.

Rob Thomas: Can you talk a little bit more about that? Mark described some of the work that they do with their internal clients. Do you also meet with internal clients to discuss some of the results of the – some of the major work that you're doing?

Mark LoSacco: We do regularly. We meet with our internal clients, obviously, throughout the course of the litigation. And depending on the particular business unit, the business client is more or less interested. There are some business units within the organization where what is not a significant matter to one of the other units would be extremely significant. And they would be very involved and want to be kept up to date on the litigation as far as its progress goes, regularly – also want to be very involved in settlement discussions and things of that nature; whereas, in the larger world, the card world, that we handle, there's obviously a much higher threshold for where senior business leaders want or need to be involved.

But we don't have a real systematic approach for deciding, at the end of the case, OK, every case has an analysis, a postmortem – sit down with the business client, go through lessons learned. What we do have is sort of again the more ad hoc approach, where if we see a significant issue, we have regular and consistent access with the senior business people to bring to their attention, and hopefully resolve the issues.

Rob Thomas: Great.

Before we move on to talk about some of the specific things that each of your law department (is) tracking in terms of results, is there any other – any other points that any of you would like to make regarding kind of the mechanics and the general process that you follow at the end of a project?

OK, great. Well, let's move on, then and talk about some of the specific things that are tracked. I'm going to advance to the second slide, performance factors. Obviously, different

types of companies and different types of projects track different types of specific information related to the results of a legal project.

This slide lists some of those things from the specific results that are achieved, which obviously are going to be different for different types of matters in a litigation matter. It may be a judgement or settlement in a transaction, it may be a closing and filings, it may be successful processing of the filing; efficiency factors, dealing with how long it took to get something done, in terms of hours, fees and expenses; the duration of the matter – how long it took from beginning to end to wrap something up – predictive accuracy – how accurate were your outside counsel in terms of giving you a general idea as to the cost, the duration and the results that you should expect; and then finally, in addition to these objective factors, subjective factors – how responsive was your outside counsel, did they understand your goals and try to meet them; that sort of thing.

So let's turn now maybe to some of the more specifics with regard to legal projects. And again, this may depend upon the type of project. But if you could describe more specifically, what types of information are you looking for at the end of a legal project to assess the results and look for lessons learned?

And Deanne, do you want to kick it off again?

Deanne Tully: Sure.

I think – our process again – which isn't reduced to a form or even a written guideline or policy that we follow, but just sort of an informal before you send the – cross this off your

to-do list, and send the files off to archives, we sort of do a download or brain dump of everyone who's affected. I think – we usually do it in two steps. The first step involves just me or other in-house counsel discussing it with our own clients internally without the presence of outside counsel. And I generally start with a fairly broad question. Because my experience is that many of my clients here, even senior managers – but particularly down at the practice level and the project manager level – don't have a lot of experience with a lot of the legal matters that touch on them.

And so what I – what I try and start with is, Are you overall satisfied with this process and the results, which is a different question than, Are you happy that you are in litigations? Obviously, nobody's happy about that. But for our more routine, run-of-the-mill litigation matters and disputes – things of that nature – we'll start actually at sort of the lower level and work our way up.

And we do – we do ask questions somewhat specifically. But again, we start out kind of general. The things that I find that are important to my clients are, did they feel that the attorneys that they worked with really grasped the issues and understood our business. I think probably the most common complaint you have is that an attorney didn't really understand what the overall business goal was, or what the big picture – sometimes they end up getting too bogged down in the trees and forgetting about the forest.

So we asked some sort of admittedly touchy-feely questions. You know, do you think – do you think that the attorneys understood what they – the issues, understood our business? What is their concerns about the process? And that goes sometimes to duration. But

usually, it helps explain to them that sometimes we don't have control over the process, or something that they may think is wasteful actually did create a positive result.

We obviously look at the results, although that's – you hate to say this, but sometimes, that's even the least determinant factor. Because the results can depend on so many things outside of control of the outside counsel.

We certainly look at the amount spent. But I think probably the most important issue is really a cost-benefit analysis. Do we really feel like we got enough bang for our buck? Was it worth going through this to get – to get the result we got? As part of that, we look to see, Did you stick to your budget? Did the outside counsel sort of follow that, or were they way off? And if so, why?

So it's a combination of sort of broad questions that sometimes, in all – with all due respect, deteriorates a little bit into a therapy session – you know, how do you feel about this – but ultimately gets into the specifics and the details. And it's from that, that kind of feedback internally, that we get our lessons learned. Everybody has, I think, lessons learned from every experience like this.

Again, we don't have a form that we fill out. Our lessons learned is sort of my notes jotted down. I think each of my staff counsel carries around the lessons learned in their head. But definitely, we implement it. And if we implement something, we feel like it's a – in other words, if there is a lessons learned, and we now have a training program on that, and we haven't seen any more cases of that nature come down the road, then, you know, we feel that

it was a hard lesson, but a good lesson. And that goes to our overall satisfaction with the outside counsel.

Sometimes it's hard to distinguish between, are you happy with your outside counsel, and are you happy with just the way this whole thing came down. And so we try and break it down, first and foremost, to let everybody vent; and then second, to get the specifics, so that we can do somewhat of an objective evaluation of our outside counsel and how they handle that particular matter.

Rob Thomas: When you're doing this cost-benefit analysis that you talked about, can you talk a little bit more – are there any other objective – is there any objective information you take a look at, like the amount of fees, or how long it took? Or is it primarily the subjective things that you've talked about?

Deanne Tully: Well, definitely, we look at the fees, because that's the cost and the cost-benefit part of it. But I think it's also an ability of outside counsel to grasp the bigger picture, which is – a lot of times, we're not interested in getting the world's best brief, or having a jury trial. We're interested in preserving a business relationship or a client relationship. Or we're trying to look at the big picture.

So part of the cost benefit will be – yes, we paid x many dollars in fees. And that may even be 10 percent over what the budget was. But the overall result was a mediation that preserved the party's abilities to continue to find mutually beneficial business opportunities.

So I think there are benefits to – I know we're talking about just litigation here, but even in other types of matters – mergers-and-acquisitions work, some of the other issues that we come across on a day-to-day basis – we just – part of the benefit is the lessons that you learn and derive from any issue. And again, we look at specifics. But it's also trying to look at the big picture and figure out where it all fits in, in our overall business goal.

And other than the dollars, it's hard to get down to the specifics. Duration is certainly part of it. I think you're always going to find people happier, with things getting resolved quicker. We certainly push for that internally. So I think those are two very important objective factors that need to be evaluated and count very highly in our book.

Rob Thomas: In evaluating your outside counsel, did you look at all at whether what they thought was going to happen actually happened, in terms of duration or budget or results? Is that important as well?

Deanne Tully: Very much so. And I've found – and we'll get to this later – but we have what we call the go-to list, and – which is our list of counsel that we, not surprisingly, go to. And the top couple of firms that are on that go-to list – when I think of why they're there, I think, largely because they got good results for us. They're really well qualified. And the way they said it was going to go down is really pretty much how it went down. And so it was really helpful for us to manage expectations.

And sometimes those – you know, how they predict things are going to happen – we don't like necessarily what they're saying, right off the bat. But again, they're never Chicken Little,



nor are they everything's hunky-dory. It's kind of here's how it's going to – these things typically play out, or this is what we think is going to happen.

And when it follows that pretty closely, everybody has a sense of being satisfied with – that outside counsel – they know what they're doing.

Rob Thomas: Yes.

I heard a formula the other day, happiness equals reality minus expectations. It sounds like having outside counsels who are better at predicting things makes your life easier in terms of managing those expectations.

Deanne Tully: Absolutely. I think – I think that that's really one of the quickest ways. Again, I think there's some counsel that want to really give you the worst-case scenario and then deliver better, and visa-versa. There are others which is, Oh, don't worry about this, don't worry about this. And suddenly, you know, the roof caves in. And you just don't want anybody to soft-pedal it, you don't want anybody to scare you. But you do want somebody who's going to be pretty good about figuring – or telling you how things are going to work.

I can – I'm a little probably more flexible than most of my clients about understanding the vagaries of the legal process. But they really point to that consistently as one of the objective reasons why they really are satisfied with a particular outside counsel and the result of a particular matter.

Rob Thomas: Great.

Well, let's move on, then, to the medium-sized law department. (Mark Wolfe), could you maybe talk a little bit about the topic that Deanne just discussed, both subjective and objective factors you evaluate when you're looking at results?

(Mark Wolfe): Sure.

We break it down into both a litigation and a – and a non-litigation bucket, so to speak. From the litigation standpoint, we evaluate the case on really three simple performance factors. One is success, two is accuracy, and three is efficiency.

We structure those on a collaborative effort, in terms of success. It could be that the internal client says this case should be dismissed. And so we learned something else, other than the fact that we should be dismissed; perhaps that is the definition of success. Maybe the case goes on for two or three months, and come to find out there's a piece of paper that arises that indicates that it is our product at that point in time. Then everybody gets together and says, Well, that's not a realistic definition of success; now let's change that definition. And it's a collaborative effort between myself, in-house clients and outside counsel.

From an accuracy standpoint, that could include things such as decision trees, which we're really big fans of. And the reason why we are big fans of decision trees is that most of our internal clients went to business school. And when they see these decision trees, they like the fact that we're trying to talk their talk, so to speak, rather than hand them a 25-page memorandum from outside counsel, which goes through, ad nauseam, various factors of the

case. And when our internal clients get done reading it, they said, you know, What does this say?

With a decision tree, within an 8 and a half-by-11 piece of paper, they can look and see how the law, the facts, and all the other concerns that we have of the particular case fit together in a weighted-risk process, and a finance tool that they are – that they've seen before.

From an efficiency standpoint, we're very rigorous with our budgeting. But it's a fluid budgeting process that starts at a particular moment in time, that – the assumptions that the budget will be agreed upon, and should those assumptions change, then the target changes in terms of the budget.

So we think we're pretty good about monitoring outside counsel any matter, you know, using these three types of factors. And I mentioned decision trees as a definition of success. But perhaps it's a cross-licensing agreement, if you have intellectual property litigation. Or perhaps it's a cross-supply or a cross-purchase agreement with a supplier and/or other outside customers, as the – as the definition of success for a particular matter. Maybe it's a contract case rather than a product liability case.

So that's what we do for litigation purposes. In the non-litigation evaluations or performances, so to speak, we go right in line with the Serengeti breakdown. And it's as follows, understanding – did they understand our goals? How was their expertise? How was their efficiency? How was their responsiveness? How was their predictive accuracy, and how effective were they?

And this again goes back to the Serengeti tracking. And it's easy for us to evaluate outside counsel, because that is set up for us. Within each of those categories, you have things such as, Do they exploit technology? Do they leverage knowledge management between other outside counsel? Do they determine – are they good at determining when to incur expenses? Do they win with teamwork? Are they creating solutions, or are they simply going through the litigation process? So all of that factors into the six core Serengeti evaluation performance factors that we use.

Evaluations are critical. Outside counsel understands that their pay is directly commensurate to the outcome of those – of those performance items. It's something that they understand fully before a matter's engaged. And so there's no misunderstanding as to what they are expected to achieve in terms of their defense or their plaintiff actions for us.

One of the comments on this slide is duration. That's been a good byproduct for us. And I'll speak to that later, when we get to other slides. But our cycle times are coming down in many ways, for many reasons. And our litigation concepts – the lower the cycle time, the more financially rewarding it is to outside counsel, at least in the litigation concept – not necessarily all the time in a non-litigation evaluation, but most certainly in a litigation concept.

Rob Thomas: Thank you, Mark.

Can you maybe give us some – in the litigation context, maybe some examples of specific results that you're looking at, in order to evaluate those three factors that you mentioned,

success, accuracy and efficiency, maybe – what are you looking at from outside counsel in order to determine whether they met your goals for each of those three categories?

(Mark Wolfe): I'll just – you know, remember one piece of litigation we had several years ago. And this may not be the best example, but it is – I think it is instructive.

The decision tree resolution was maybe \$100,000. Outside counsel brought that in for, say, \$75,000. So from a success standpoint, we considered that success. And therefore, everybody was happy with the result. Because they were very accurate with their analysis from a decision tree standpoint – and by the way, the decision tree standpoint is also a collaborative effort; it's not just outside counsel preparing the tree, me looking at it, and then – and then inside counsel – or (that) in-house client saying that's fine. You know, we sit down and discuss the trees. So everybody agrees that if a – if a reasonable resolution of a matter is \$100,000, well, then we all agreed that that was the definition of success.

So in a case where this outside law firm came in at \$75,000, we ultimately financially rewarded them for being \$25,000 less than what they told us it was going to be. They ended up receiving another 25 percent bonus multiplier. And we can talk more about that later, about what that means. But they were encouraged to provide us with accurate decision trees. And in that particular case, they were – they were rewarded for it.

Now likewise, in that particular case, they were penalized because they went over budget. And so this outside counsel had the ability to learn, in one particular case, how all of these fit together in order to end up in their financial pie, so to speak. We patted them on the back for achieving success, we patted them on the back for being – for being more than accurate

on the dollars that our in-house client spent, in this particular case. But then we slapped him on the wrist for not watching their dollars, in terms of telling us that the budget would be 150,000 and then bringing it in at \$200,000.

So I think that they learned a lesson – a valuable lesson, in that case – is that, you know, we aren't simply focused on the results. We're focused on the whole process and everything that goes into getting those results.

Rob Thomas: Great. And I think we will – the next slide, we are going to talk in more detail about ways in which you can maybe tie compensation to these factors that you're looking at in terms of results. So we will be coming up on that soon.

Mark LoSacco, how about American Express? What specific factors are you guys looking at when you're assessing the results that you're getting, and the work that's being done by outside counsel?

Mark LoSacco: Yes.

There are a couple of things. First of all, as far as the results achieved – and I put that in the category of subjective factors as well, because it's very difficult, especially with the wide-ranging types of litigation – to necessarily categorize exactly what a good result is or is not.

So with results achieved and other subjective factors, we really view that as something that really just keeps our outside counsel at the table, meaning that if you're not getting results, and if you're not responsive, you don't understand our business goals; pretty quickly, we

understand that, we recognize that, with just three lawyers managing the litigation. We've learned that information pretty quickly.

And so, consequently, over the last three and a half years, we have severely whittled down the number of outside lawyers that we use. And again, that's something that we do because it's subjective on more of a case-by-case basis. We just come to the realization, Hey, this law firm doesn't get it as far as the substance, or they don't get the results we need; they're not responsive. And we move on.

The other issues, though, how we – once you get past the results, and get the law firm that you know will get you results day in-day out, will be responsive day in-day out, will do the things that they just need to do to even get a place at the table; then we look at the other factors. We look at the efficiency and predictive accuracy, and things along those lines.

And how we've been doing that – again, in large part, we rely on Serengeti, but not on the sort of postmortem that you would do when you close a case. And you rank the outside counsel on these various factors. Because what we've found again, with the volume of cases that we have, and with the limited amount of time we can spend on anything other than the largest of cases, we really don't do as good a job as we would like to in analyzing how outside counsel performed in every single case. Because we just don't have the time to focus on that – again, (on anything) other than the largest of cases.

So what we do is we focus on the information that's collected in Serengeti as the case goes on. For example, we will look at the budgets that were put in, in the case, both from inception and throughout, to the extent they've changed. And we have very systematic ways

of comparing that against both the spend, and we also compare it against what the outside counsel initially predicted the case would cost, and what it ultimately costs as they change their budget throughout the process. And we will measure our outside counsel based on that data that we – that we collect along the way.

We currently are working on trying to come up with a more systematic type of report card utilizing this information – (this is something) we hope to be able to do sometime next year – but basically, focusing on the information that our outside counsel puts into the system as the case goes along.

Rob Thomas: Thank you very much.

Did anyone else have any other comments, before we move on, about any of the specific factors that you're looking at as your evaluating results on projects that outside counsel are handling? Missed anything that anybody wants to talk about?

OK. Well, let's move on, then, and talk about performance-based compensation. And Mark LoSacco just mentioned kind of the ultimate performance-based compensation, which is, if you're not achieving results, you don't get any work. That means your compensation's going to go down dramatically in the future. So we can maybe talk a little bit about that.

But also, do any of you have any compensation – performance-based compensation – I think (Mark Wolfe) mentioned some that they have – that basically ties compensation in a specific project to specific factors, tied to results or performance? Let's talk a little bit about



ways in which you look at tying performance to the – tying compensation to the performance of your outside counsel, and the results that they achieve for you.

Deanne, do you want to start us off?

Deanne Tully: Sure.

I think – because our matters sort of fall into two categories generally – at least those for which we seek outside counsel – one category is sort of big problems, like an SEC subpoena, for which, you know, you need to get a specialized counsel to help you deal with that – or it falls into very – what I call the one-off litigation, which is – it's not part and parcel of a string of the same types of matters. It's just – they may be relatively run-of-the-mill issues.

But because we're a small law department, if you've got a big problem, you're going to go with the best counsel that you can think of to solve that problem. And if you've got just a few little problems for which you go to outside counsel, you don't really have enough of a track record, or certainly not enough volume, to be able to come up with an equation that might work to examine performance-based compensation. So we admittedly have very, very little experience with it.

We have utilized – and when we have – we did a series of many, many acquisitions for awhile there. And towards the end, we had some compensation tied to whether or not the acquisition went through or not. And that can be very much a double-edged sword, in that your outside counsel – if they know they're going to get a pop at the end – may not be quite

as rigorous in protecting your interests during the course of the negotiation they might otherwise be. So you have that to worry about.

But by the same token, it also – a lot of times, the acquisitions – at least at our level, which are not very large – have a lot of personality issues, for lack of a better term. And it gives them additional incentive to sort of take a deep breath, and just sort of work through those.

And I think we've done that twice. And both times, the deals went through. And both times, there was a little extra kicker at the end. But I just don't see that as a sufficient track record to be able to recommend it in certain circumstances.

In other cases, we really haven't tied it to any sort of unusual compensation scheme – other than, unfortunately, just a straight hourly rate – again, because we're either wringing our hands, saying, Boy, this is a big problem; we just need to get it resolved, or, Here's this one-off. There really isn't anything else to compare it to. We don't know what a fair alternative compensation scheme might be.

But one thing that did pique my interest, with one of the Marks that said this, about giving outside counsel – based on their results, giving them a little bit of an extra, additional compensation at the end, because they came in under budget. And, you know, we've thought about that. And the concern that comes in our mind is, Well, does that give the outside counsel too much incentive to just come in with a hot budget, so that they'll be sure to beat it and get some sort of additional compensation? Again, since we don't have the sufficient volume of cases that are sufficiently similar, to be able to say yes, that's fair or not fair, we've never tried it.

But when you turn to Mark and Mark to discuss that, I'd appreciate if they would address that. Because that's something we'd like to think of doing, but so far we've only talked about it.

Rob Thomas: Well, let's do that. I think it was (Mark Wolfe) that mentioned compensation tie-in (in part, at least,) to budget.

But before we move on, I do want to mention, Deanne, that your experience mainly using hourly fees is, again, representative of what we (see) from most law departments that are members of the ACC. We do a survey every year of law departments that are members of the Association of Corporate Counsel, asking them specifically about ways in which they're managing outside counsel.

And despite all of the talk about the evils of hourly rates and fees, and the disincentives of being paid by the hour, what we see every year – in fact, most recently it's growing – is that the majority of law departments – the vast majority of their work is still handled by hourly fees, without any performance-based component.

So with that being said, (Mark Wolfe), maybe you could address some of the questions Deanne had, and maybe explain generally the performance-based compensation scheme that you use.

(Mark Wolfe): We have a system called the Alliance Counsel Engagement System. It's – the moniker is ACES for short. We really have two main models under this system. One is called ACES LT, or Long

Term, which you can use for things such as retainer work, projects; those types of outside-counsel services. And the factors under what's called ACES LT are the six factors that I made reference to in the previous slide, in connection with the information tracked in Serengeti. And they are – by way of reminder – the (under-store) goals, (their) expertise – they're efficient, they're responsive, they have good predictive accuracy, and they're effective.

And we categorize those on a – on a scale of zero to four. And we rank the outside counsel based on those particular performance criteria. And during the course of a matter – not a litigation matter – during the course of a matter under the ACES LT, we withhold 20 percent of outside counsel's invoice. They send an invoice in for 10,000; we pay them 8,000, and we put 2,000 over to the side, so to speak.

So the law firm is showing a receivable every month that's getting larger and larger, and much more concerning, I'm sure, to other partners within their law firm. But as time goes on, the outside counsel is expected to tell his internal partners, Look, if I am successful, and I am – and I am – and I'm ranked and evaluated under these factors – these factors are well known. They know what it is going into the project. And they say, If we do these things, then not only (we going) to get that money back, but we're probably going to get more than that back, if we do better-than-average work.

And so during the course of this matter, everybody's got their eye on the ball. And at the end of the matter, if they end up – we determine that they scored an average of 3.2, which I think is what our going averages are at this time under the ACES LT – they're going to get back everything that was at risk, every dime we withheld from them during the course of the matter – we just simply give that back to them. And then we pay them a percentage above that based on the outcome of the evaluation process.

And once again, the evaluation process could be threefold. It could be me providing an evaluation, it could be our internal clients as they related to the outside counsel on this project – whether it's an employment matter or retainer matter – and then we collectively put those together and come out with a number, which we then communicate back to the law firm and say, Look, you were very innovative on this project, but you weren't that responsive. When our internal client wanted something, you weren't that responsive. So you might have got a one on that rather than a three or a four. And we think that's been a very powerful model to use, especially in non-litigation matters.

Now on the litigation side, we use something called ACES for Litigation. And it goes back to the same criteria I made reference to on the prior (slide) for success, accuracy and efficiency. Once again, during the course of a matter, we withhold 20 percent of every invoice. And as time goes on, that invoice – that at-risk amount builds over time. But the outside counsel knows what he is expected to do in order to make sure, A, he gets that back; and then B, perhaps get a bonus, for three reasons, for being accurate on their decision tree evaluations, and for being – for being efficient on their budgets; and then also for achieving success.

Now, Deanne, to address your question about the budgeting, you're right, it depends on the type of matter. I think the more homogenous a matter is, or the history you have with a particular type of litigation, the better – the better you are about judging what a matter should cost.

For example, in terms of what we call cats-and-dogs litigation, just straightforward product liability – couple of witnesses – product involved – we have internal information that is giving us a number or a range where this budget should come in. And that includes every cost. That's not just fees. That's everything else that they do in connection with the matter, whether they use local counsel, you know, whether they decide to make 10 copies inside, and try to bill us for them, which we typically don't agree to. But we know what a number of a range should be.

So the gamesmanship in the budget side doesn't happen in our – in what we call our cats-and-dogs litigation. And that covers probably – I don't know – probably 70 or more – 70 percent or more of our – of our litigation portfolio.

In the context of employment litigation, we also are starting to get good history about what those cases should cost, (soup-to-nut), in terms of dollars spent out the door for a matter. And we're getting good information on that. So the gamesmanship is not – you know, is not occurring in those cases, either.

On the decision tree side, there are so many people that have a chance to weigh in on agreeing on success that if the decision tree ends up being wrong, then there's a whole lot of people that are to blame for that, myself, outside counsel, my internal client; sometimes Jeff,

the general counsel, gets involved and takes a look at these as well. So a whole lot of people have to be wrong in order for outside counsel to be able to pull that one off on us, so to speak.

So – but what we have found through this process – and I don't necessarily want to get ahead of us here – but we are finding that our cycle times are coming down. We are finding that we are essentially buying less hours from the law firms. The law firms think it's going to be 500 hours, and their stated billing rate is \$400 an hour. Well, we go back to them and say, Look, we only want to buy 250 hours, because we want you to get us out of this. And how would you like to make \$430 an hour for those 200 hours? So outside law firms are starting to figure this out, that if they can get rid of cases quicker for us, and they can achieve the success that we desire, they're being paid more per hour; they're just not selling us as many hours as they thought they were going to.

So obviously, the keys of the system – Deanne, you hit on one – is the budget. And as indicated before, (decision tree's a) success. And they're all fluid. All three of those can be fluid, depending on what goes on in the matter. They come up to us and say, I have to defend four pieces – or four depositions. Come to find out that an unreasonable plaintiff attorney wants them to defend eight. Well, that means the budget needs to be changed.

So we have that kind of fluidity all through the process, in terms of changing success when we have to, changing the budget when we have to. And at the end of the game, if the law firm ends up taking a financial hit, it's not as if they didn't know what was coming.

Rob Thomas: Mark, let's talk a little bit about the potential push-back from the law firms at the end of the process. Do you ever run into any situations where the law firm and you don't agree as to whether or not they did what they were supposed to do, or whether there were external factors that came up? Or do you kind of resolve all that as you're going along, so that by the time you get to the results, it's pretty clear what they're going to get, what they're not going to get?

(Mark Wolfe): It's the latter. It's the understanding that they had the chance, when something arose, in order to, say, adjust a budget. So we did not ultimately hit them with an inefficiency penalty.

If a case is filed in Cook County, Illinois, and the case goes on for a year and a half; and on the eve of trial, outside counsel comes to you and says, you know, We need to adjust the budget, and we ask why, and they say, Well, we're in Cook County – well, we've been in Cook County since the beginning. So maybe that should have been understood back then, that the budget should have looked a little bit different, because we were in Cook County. But if they come to us at the end and say, Look, you know, something significant has changed here in terms of, you know, we lost this motion – you know, we assumed that we would win this motion, and that's assumption number four in our budget – good point, we did lost that motion. And so the budget needs to be adjusted.

And that's the kind of discussions that take place all throughout the case. There's never – I've never had a situation where, at the end of a matter, that outside counsel did not understand either the bonus or the inefficiency bonuses, or whatever we were doing at the end – that it wasn't clear to them why we were doing it, and there was no surprise.



Rob Thomas: Do you ever find law firms that aren't willing to enter into that kind of a performance-based compensation? It sounds like you're giving them an opportunity to increase their hourly rate dramatically, if they're able to perform as expected. They realize that hourly rates are a trap for them, too, because they can only raise them so high and so fast.

But do you sometimes find firms that aren't willing to get into performance-based fees like you've described?

(Mark Wolfe): Oh, absolutely. But as time has gone on, we've had this system now for about – I want to say five or six years. And only recently are we starting to get good metrics, where we're able to prove to people – and we've been telling you about this system, and everybody said, Well, that's neat, but does it work? And two or three years ago, we really couldn't tell them whether it worked or not.

We're starting to get more information, where now we can show them that it's working. And now I think we're piquing their interest more so than we did years ago.

But as long as you have a market for the type of matter that you want handled – now, I'm not going to sit here and say that if our company had a shareholder action, that we would absolutely hold firm, and must go through this process, when you need – when you need someone to attend a gunfight with you, you know, this may not be the type of model that we use. Thank goodness we haven't had that type of situation.

But as long as you have a fairly homogenous piece of litigation – contract claim, an employment claim, a product liability – something that is very common in our world – as long as you’ve got two competing law firms, and there’s a market, then – and market forces will dictate – it’s OK if several of them say, No, thank you, we don’t want to agree with you under that model. Because we know that there are 10 or 15, or hundreds of law firms right behind them that are going to step up and say, We will do this. And that is happening more and more.

You know, years ago, it was, (you know,) We’re not interested, we don’t understand it, we don’t want to do it. And we say, OK, thank you. We’re not going to do business, then. We’ll just go to the next law firm. And we’ve always found law firms – very confident and very blue-chip law firms – that want to do this.

Rob Thomas: Great.

Well, let’s get the American Express perspective on this. Mark, you mentioned the ultimate performance-based compensation, which is not sending work to those firms that don’t produce results that you want. Is there anything else that you do in terms of structuring the compensation to reward results that you want?

Mark LoSacco: Well, you know, this is something that we’ve looked at somewhat extensively.

Because – and it is very interesting. And as Mark mentioned, one of the things that I think is very helpful, if you’re going to have this sort of model, is to have basically a lot of homogenous or commoditized types of litigation that you can – that this sort of model really works well with.

And somewhat interestingly, the process that I described earlier with our routine litigation – many year ago, the genesis of how that was handled is that it was – routine litigation was sent to a few outside firms who were then – got performance-based fees based on how quickly they were able to resolve it. And if they were able to resolve it and settle the case relatively quickly, and in an inexpensive fashion, we would then give them a performance kicker of some sort.

And the decision was made ultimately that we didn't need outside law firms to do (them on the) routine litigation. Eventually, we've pulled that in-house, and have that system that I described earlier, with the group of legal analysts who handle the routine litigation and try to resolve those cases.

If there are any cases that are commoditized for us, that are really sort of the typical types of cases, it would be those routine cases. So we don't have a great number of those that ultimately go to outside counsel. And so we don't usually use any sort of performance-based compensation.

The other types of cases – the class-actions that we get, or the very significant actions – are ones that are really not – we haven't found yet to be generally amenable to that sort of – that sort of arrangement.

What we will do occasionally, though, is we occasionally will have the case that will come across our desk that we take a look at and say, Well, look, there is a possibility of a recovery. In this case, it's defensive litigation, but it's in part because the plaintiff realized that we have

a claim. And it's more preemptory that they're bringing it against us. And so we might try to work in some sort of contingency type arrangement, where they can press a counterclaim, or outside counsel can press a counterclaim, and get a percentage of that for an appropriate reduction in rates – things along those lines. But we do that more on a one-off basis if we see something that is appropriate for that type of arrangement.

Rob Thomas: Does anyone else have any other comments that they want to make on performance-based compensation?

We've got – I'd like to cover the next few slides, if we can, in the next maybe 10, 15 minutes, so we have time for some questions at the end. And there are some questions starting to come in. So I would encourage the participants – if you do have questions, please use the questions box and send them to us. We will cover them at the conclusion.

So I'm going to move on to the next slide, which talks about some of the other things that people may want to do with the results information that they're tracking. Obviously, when you're comparing results, you need to compare apples with apples and oranges with oranges. And as Mark LoSacco just mentioned, part of that depends on whether you've got a certain volume of similar things going on that you can track. I think Deanne mentioned that as well.

But do any of you use any of the results information to compare performance in similar things? Do you compare performance of various outside counsel? Or do you use this information to decide whether or not to allocate work in-house versus outside, looking at the

result that you get and the costs of handling things in-house versus handling those same things by outside counsel?

Deanne, do you want to start us off?

Deanne Tully: Sure, Rob.

I think, again, we just don't have a sufficient volume of cases to be able to have an apple-apple comparison that's really going to be meaningful to us.

As far as comparing outside counsel – I mean, there's the go-to list, and there's – and you're either on it or you're not. And the only way you might get business from us if you're not on our go-to list would be a new matter, new subject matter, or requires some level of expertise. But again, the go-to list – I think you can compare outside counsel, even on different matters. If we look to results, accurate prediction of what was going to happen, and sticking to a budget – or, if you're deviating from a budget, having a very good reason why.

And those three factors in and of themselves, I think, cut across any number of different types of cases that require the use of outside counsel. And that'll get you on our highly informal handwritten go-to list.

As far as allocating work to in-house – I think we have, in evaluating things – our clients here always want in-house to handle it. And it's surprisingly not just because we're part of the overhead. And it doesn't hit their budget to have an outside counsel; they just feel that our in-house staff – all of whom have been with the company a long time – really understand

the business really well. We grasp things quicker. We know the personalities of the people we're dealing with.

And so, they always push for that. And we sometimes do use the results in-house to say, What would be more efficient? Because, you know, our time does come at some cost. Again, it's a very informal, low-tech, kind of lick your thumb and hold it out to the wind, to see how we go about doing that. And it varies on a case-by-case basis. But I think it has some bearing. But just because we don't have that many issues or matters, it's probably not the most significant tool we have.

Rob Thomas: Thank you.

How about FMC? (Mark Wolfe), any other things you do with the results in terms of comparing outside counsel, or making decisions about what you do in-house?

(Mark Wolfe): Sure.

We – every month, top management of our company sees exactly every dollar that we're spending external – about 85 percent of what we spend externally is contained on one PowerPoint slide that Jeff then presents to top management. In connection with that slide, there's a column on the slide that indicates what the most recent ACES evaluations for those law firms – how they – in terms of what they've done as of late. And based on the number of files that they've done, it's an average of however many files they've had within the last, say, year for us.

So it's very clear to see, you know, what law firms we think are doing what we want them to do, and how they compare to other law firms based on similar criteria. And it's very rare to have one of our law firms at the very top of that list, in terms of dollars being spent, that don't have very close evaluation averages right next to them, or right next to the dollars, so to speak.

And, you know, what we do is we do compare them for all the work that they do for us. Again – and Mark indicated earlier – you just don't send work to them. And that's essentially what happens. We don't believe in just firing them; we believe in giving them constructive feedback, and giving them a chance to change.

Now, if we give them constructive feedback for seven, eight months, and they don't get it, well then, ultimately, we take a play book from Mark – play out of the play book from Mark, and say, OK, we're just not going to give you any work anymore, and this is why. It's not as if you haven't been warned why; it's – we've given you a chance to correct the fact that you're scoring zero on responsiveness.

And we've given you seven, eight, nine months to try to achieve a better result, from an evaluation standpoint, on your ability to use and leverage work knowledge, or work product. You know, we want you to respond to someone in another part of the country that's looking for a brief on a particular product liability case that we know that you've prepared. You know, we expect you to share that stuff with the other counsel. And because you don't want to play in the sandbox, and we've told you that that needs to change – if it doesn't change, then eventually, no work goes to them.

In terms of the allocating work to in-house counsel – or versus outside counsel – we kind of do an internal value determination. We – you know, we see which internal client wants this. Is this the vice president that's (asked) the question, or is it – is it someone else lower in the organization? Can I answer this question based on my expertise and my tool set? Can someone else in our legal team answer the question? For example, Jeff came from practicing international law. So there may be a prohibited-country issue, or an export question that Jeff can answer very quickly off the top of his head. If Jeff's not available, and it's not in my tool set, then I will go out to outside counsel to try to get that question answered.

And then we try to see if the question's been asked and answered internally. And that's part of – our next initiative is to leverage that collective (work-not work) product knowledge of the team, and the tool set of the team, to then be able to say, Hey, this is a frequently asked question. Someone up in our Chicago office says they answered this before; let's use that answer, and give it to this client. So that's really how we decide whether to do things in or out.

From a litigation standpoint, we do try to structure a resolution on a non-core piece of litigation. If it's something that – it's not near and dear to the business unit, and it's an auto accident in Texas – and we know that the going rate for, you know, automobile claims in Texas is, you know, two to three times actual damages, well, then we try to – we try to resolve it without having to spend a lot of time and effort, and end up spending more legal fees than the case is worth.

Rob Thomas: Thank you.



Mark LoSacco, how about American Express? Do you do any work comparing results across either firms or versus what you do in-house?

Mark LoSacco: Well, yes, we do. And starting with the allocation between in-house and outside counsel – as I mentioned before – and this is obviously just talking from the litigation perspective – overall, the American Express (PCO) actually does a large amount of the more transactional work in-house. But in litigation, it's quite the opposite.

And when we're talking about the routine litigation, as I mentioned before, we do have a system where our first effort is made to try to resolve the cases, and we're very successful in doing that. We have a system where we capture information. So we know if we're getting, for example, repeat offenders who are trying to sue us a second time. Because they feel like they settled something before, and they'll do it again. And those we obviously will fight. Even though it's not on pure cost-benefit analysis and might not make sense to them, we will fight it.

Also, we watch the law firms, where we're getting repeat work from – (and we see) law firms that are – that are coming after us on the same types of claims, even in different jurisdictions. And we will make an assessment of whether it's time to sort of take a different approach rather than try to resolve that, because it would be more cost-effective in the individual case to resolve it. But then we start looking long term.

But other than that, we will generally do a cost-benefit analysis. We'll do research – the legal analysts will do research into the claim. We'll see if there's any sort of fraud involved; that's also another type of case that we, under no circumstances, will resolve. If we come to

the conclusion that somebody's trying to commit some sort of fraud on the company, we (won't) resolve that as well. But once we get over those hurdles, at that point, we will – we will do everything we can to try to resolve it in the most cost-effective and efficient way possible.

So that's the work that we really do in-house. Other than that, any significant litigation – everything obviously goes to outside counsel. And our involvement, the in-house lawyer's involvement, is really on a sliding scale based upon our perception of the importance of the case to the company and the brand risk, and a triage, really, of what we can afford to spend our time on internally, as far as being actively involved in the cases. So that's how we handle that allocation.

As far as comparing our outside counsel with one another – we are working on this project, as I mentioned, with a report card. But really more importantly, as I also mentioned before, we've really paired down to a very small group the number of outside counsel we are using at this point.

And what we've done is we have counsel geographically. We have a few firms that have many offices and have nice geographic spread across the country, and various hotspots. And so we use that firm. We have one relationship partner in each firm who will oversee matters, no matter what office it is in, in that firm. And so we will use those firms geographically, depending on where the case is.

And we also have a few firms that handle special issues for us on various hot topics. And so when we get a particular significant case, in an area that we have – a firm that has an area of

expertise, we will go to that firm and let them get local counsel that, usually, we will choose from our list of counsel that we use.

But our comparison amongst those outside counsel – because we’ve really (winnowed) down the list – is on a more subjective basis, and again, more along the lines of, you know, we’re not – we’re going to decide whether or not we’re satisfied with your performance. We’re going to tell you or not. And we’re going to expect you to come up to the level of performance we need, or we’re going to use other counsel.

But by and large, at this point, we have a tight list that’s used to our company, that knows American Express very, very well. And so it really has moved more to the partnership type model with our outside counsel than it was in the past, where it was more of – really, we felt more of the need to stay on top of them every – you know, every step of the way.

Rob Thomas: Thank you, Mark.

Anybody else have any other comments regarding comparisons of either outside counsel or in-house versus outside?

OK, let’s move on to the last substantive slide then, which is – we’ve talked a little bit about this. Basically, no good reason to track results, unless it’s going to somehow change people’s behavior. I think (Mark Wolfe) mentioned that seeing cycle times change, less hours and lower duration – and talked about how negative evaluations change behavior.

Can maybe each of you spend a minute or two talking about ways in which you're seeing behavior change as a result of the results information that you have, and what you do with those results? Deanne?

Deanne Tully: Well, basically, I think – as you have here on the slide, communicating with outside counsel – I think that's absolutely one of the key factors to be able to efficiently use any results, no matter how informally obtained those results are. In general, I will communicate a lot with outside counsel during the course of a particular matter or project. And if I hear something critical about the outside counsel, I will raise it with them and give them an opportunity to address it, and hopefully fix it. Then, at the end of the matter, I think I mentioned earlier, we have a two-step process, which is, you know, sort of a debrief internally with various clients that were affected by a matter.

And then we do have a second step where we communicate with outside counsel, which – that conference call generally will consist of myself, one or two other businesspeople, and the outside counsel, so that there's a give-and-take there to discuss things.

So it's really important to keep that communication going. And of course, the ability of outside counsel to have good listening skills – and then, as Mark said, translate that into fixing a problem – obviously goes very much towards whether or not we want to use it.

So even if you got off on the wrong foot with us – but we will always communicate that to our outside counsel. And if – and if they fix it, I give people credit for that. Because they've addressed it, and it shows that they're flexible and they're responsive.

If, at the end of the matter, folks are still unhappy we've met with outside counsel, the attorneys involved; and they have their version of events, or they have their explanation as to why it didn't go the way they thought, and we just don't really – aren't really accepting that, we have gone to – a couple occasions – to the firm's managing partner and said, We're not going to use you anymore. And we want to tell you why.

Those are, again, informal calls, usually via somebody who knows somebody. Because it's not like they make a big deal about it. But just – if we're not going to give you any more work – I used to be in private practice – I'd want to know why. And we – and we try and be, you know, very objective and specific about why. And so that's obviously very critical when it comes to assigning new work.

As far as – I did want to mention that we, as a small law firm, and consisting of a bunch of generalists – typically when we go to outside counsel on a non-litigation matter, it's usually because we need their area of expertise. And generally, we will try (and) get as much work product out of them – there's a lot of – law firms now have a lot of marketing materials. You get the alerts about the summaries of this and that alerts, and new developments in the law. We take that as much as possible. And that's what we really utilize to keep work in-house.

So the second time we hit that problem or issue, we will go back – we're very diligent about saving everything – we will go back and see if we can try and answer that question in-house, based on everything that's already been done or sent to us by outside counsel, including both their sort of generic marketing materials as well as specific memos or analyses that we've asked them to perform, for which we've paid.

We don't really use that too much with other firms, just because I think it raises some issues there. But definitely, it becomes – it goes in our binder, and it's something that we look at all the time.

Rob Thomas: Great.

(Mark Wolfe), you've mentioned some things that have changed, not only through oil rigs but also in your outside counsel, as a result of tracking lessons learned (and) results. Anything else you want to add to that?

(Mark Wolfe): Yes. I think – and I think I touched on it earlier – that I think it's extremely important to give outside counsel as much transparency – collectively or individually – as to what we as in-house counsel and our internal clients think is important. They know that, in every monthly management meeting, that there's a slide that's put up that top management in this company knows exactly where we're spending our external dollars, and how we – how we stand versus budget, you know, as a department. And they also understand, and in connection with that slide, that there is an ACES evaluation or a Serengeti evaluation that's next to their name. So they know exactly where they stand versus the other counsel. And they also know that cycle times are important to us, and efficiency's important to us. Because they are either rewarded financially or not rewarded financially for how they – you know, for how they respond to that.

I think that the follow-up and periodic-review portion of this slide is – I think it's critical that that be contemporaneous in real-time.

Rob, you may be able to speak to this more than I do. I wasn't clear whether our outside counsel can see their evaluations. But if they can't on a day-to-day basis, it is communicated to them frequently.

And, you know, finally, the last part of this is applying lessons learned in work product to future work. I think it's absolutely critical to future – to future legal department budgets that if outside counsel do not share prior work knowledge, you know – we've paid for it already, so essentially we've paid for it once; you know, why should we have to pay for it again? And any firm that resists that – well, then they ultimately end up not being on our list of firms at the top of our list to do things with.

Rob Thomas: Actually, Mark, in Serengeti, the evaluation forms you referred to are not shared with outside counsel. It's up to you to decide whether or not you ...

(Mark Wolfe): Correct.

Rob Thomas: ... want to do that. Our concern is we want to make sure (that) in-house counsel are frank and candid, and not worried about, you know, what outside counsel might see. So the system is not set up for outside counsel to even know that that process is taking place, unless you choose to share it with them.

(Mark Wolfe): Yes, and we do, do that frequently anyhow, just because we didn't think that they – we weren't clear whether they could see it or not.

Rob Thomas: Yes.

How about American Express, Mark LoSacco? How do you use lessons learned (and) results to change behavior?

Mark LoSacco: Well, you know, I know we're running short on time. So I just will really focus on one point, and then we can – get some questions in. And that's the point about communicating with outside counsel of individuals versus firms. And the one point I'd like to make there – and this is something that, having come from a large law firm for a number of years, I think is really important to keep in mind – is to me, my relationship is with lawyers and not with firms. And anybody who's been part of a big firm knows that sometimes, at various times, the mentality in a law firm is not really amongst the partners, is not really (a rising tide of saw votes). And in fact, what – you may be a very, very important client to an individual partner in a firm, but that doesn't mean that the firm thinks you're that important. It doesn't mean that the other partners think you're that important. And you're – the individual partner that you're dealing with is really the person who is most – his or her future is most tied to your future and your results.

And so what I focus on is really having that relationship with the relationship partner at the firm, letting that person know exactly what's expected, and letting them do the work that they need to do within their firms to persuade the firm either to give us appropriate discounts, give us special fee arrangements, or really just to drive the results of the individual cases. And I won't hesitate, and haven't hesitated, to leave a firm behind when the partner who's working – who's a relationship partner for American Express leaves that firm. Because



that's who the relationship is really with, the lawyers, and not the firm. And I think that that's a key point to keep in mind in all of this, as far as I'm concerned.

Rob Thomas: Thank you.

Well, we have finished the substantive part of the meeting. We've got a little more than five minutes here to answer some questions.

A couple questions have come in. I would encourage people to use the questions box in the lower left-hand corner to send in others, if you have them. One person asked if they could see an example of the decision tree that was mentioned by (Mark Wolfe). And maybe what we can do is work on getting something that (is) generic enough that it doesn't have privilege issues, and post it with the materials for the session.

(Mark Wolfe): Sure.

Rob Thomas: We'll just post that afterwards, and people can come back to the (ACC) Web site, find that with the course materials.

Also we've had some other questions that we've, I think, already covered in subsequent slides. But let me ask this one, what types of reporting – and obviously we have to do this quickly, because we've got about five minutes – what types of reporting do you provide to management, internal auditors, et cetera, regarding any significant changes in your status or results? Is there any type of reporting that you need to do outside of the law department within your companies?

Deanne, do you want to start?

Deanne Tully: Well, I typically do a quarterly report to our board and a much more frequent report to the CEO, usually on about a monthly basis, unless something startling happens. But other than that, clearly we let the board know, both on large matters and also just – we just got the run-of-the-mill standard business type litigation issues. We don't – (I don't) want them to be surprised. But that typically is the limit.

Rob Thomas: OK. Give examples of what's included in that report.

Deanne Tully: Well, the report to the board is almost always oral, and by me. And it'll be, for example on an ongoing large matter, where we currently stand. Is there a possibility of settlement, what the anticipated time line is for resolution, if it's a government investigation – those require much more detail. We always look at what best-case scenario would be and what worst-case scenario would be, where we think we're going to follow that spectrum of things. Kind of varies per the matter.

The CEO – I mean, we're a relatively small company; we have less than 1,000 employees. The CEO's, you know, 20 feet from my office. And so, oftentimes, it's just an ad hoc update on things. You know, we got this resolved, or we did this. But generally once a month, I do just a very brief status report on pretty much the same issues for the larger matters. And the smaller matters, I'll just say, resolve pending – usually attach a dollar amount to where we think it's going to come down. That goes in writing to the CEO, but not too much more detail than that.

Rob Thomas: Yes.

(Mark Wolfe), you've mentioned the report that you do each month. Anything else you want to add to that?

(Mark Wolfe): Yes, in terms of the board and outside auditor reports, Jeff does that quarterly. And whatever he hands out to them in connection with those meetings – it's returned to him at the end of those meetings. Most of it is oral-based. And in terms of what we discuss with the board, it's matters that are significantly material, and there's not many of those cases that we have. And then the auditors, of course, listen to how we structure our reserve-setting process. And they've got confidence in that now that it's a disciplined process. So they rarely, you know, ask – or they're rarely intrusive where they want to see, you know, a (nit) and a (nat) on a particular decision tree, or along those lines.

So that's my understanding of how that's done.

Rob Thomas: Great.

Mark LoSacco, anything you have to add regarding reports that you may do, or regarding results and status?

Mark LoSacco: Yes. We will do semiannual reports to the leadership team for the company on litigation in general, highlighting significant litigation. And then we regularly keep the general counsel updated on significant litigation. And she will, of course, do reports to the

board as appropriate. So we'll prep her on that, as far as the significant litigation that needs to rise to the board level.

Rob Thomas: We just have a couple minutes. And another question just came in about, How do you deal with differences and perceptions between in-house counsel and business managers about performance on a project?

While you're thinking about that, let me just mention two other points here. The ACC annual meeting is next month. And it's an excellent place to exchange information and gather new information. There are over 100 programs at the meeting. So we would encourage you to think about attending that. It's in San Diego, and there's information on the ACC Web site.

And finally, there's a report that we do every year with the ACC based on a survey of hundreds of law departments regarding specific things that those law departments are doing to better manage their work with outside counsel. It generally is released at the ACC annual meeting each year. We will be doing that next month. And if you're interested, again, there'll be information on the ACC Web site or on the Serengeti Law Web site.

Does anyone have anything they'd like to say about how to deal with differences and perceptions about the results that were achieved between the business managers and in-house counsel?

Mark LoSacco: Yes, this is Mark LoSacco. Just really quick, I think – I think (Mark Wolfe) actually said something before, talking about the decision tree, that fits into this, which is, we've

learned – and as lawyers, it's difficult learning – but we've learned that sometimes you need to be able to put things into terms that businesspeople are most used to dealing with.

So rather than going in with the big memo and the talk about subject matter jurisdiction not being waivable, and that's why you got reversed, even though it wasn't (raised), and all that sort of stuff – just dealing with things that the businesspeople can get their arms around, figuring out a way to put a number on things, even if you feel as a lawyer that the number is really weak, or there can be a lot of fighting about whether or not a rating is good or not – businesspeople really need to see that sort of thing, as opposed to hearing lawyers talk about legal concepts which they're really not all that interested.

Rob Thomas: As we discussed, it sounds like sooner the better in terms of educating them and getting them involved in the process, rather than waiting till the end.

Mark LoSacco: Right.

Rob Thomas: Well, I think we're going to have to wrap it up there. We're at the end of our time.

Thank you very much to everyone who participated in the Web seminar. Thank you for your questions. And thanks to the panelists, Deanne, Mark and Mark, for your helpful insights today.

With that, I'm going to say thank you very much. And we will be posting some additional information on the (ACC) Web site regarding decision trees, if people want to take a look at that afterwards.

Thank you very much.

Deanne Tully: Thank you, Rob.

Mark LoSacco: Thank you.

Deanne Tully: OK.

(Mark Wolfe): Thanks, Rob.

Deanne Tully: Bye-bye, now.

Rob Thomas: Bye-bye.

Mark LoSacco: Bye.

Rob Thomas: Bye-bye.

END