

FINAL TRANSCRIPT

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****ACC - Managing Outside Counsel Getting Off on the Right
Foot—And Staying in Step**

Event Date/Time: Jan. 18. 2006 / 1:00PM ET

Jan. 18. 2006 / 1:00PM, **ACC - Managing Outside Counsel Getting Off on the Right Foot—And Staying in Step

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Stuart Alderoty

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PRESENTATION

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Welcome to the Association of Corporate Counsel's webcast entitled, "Managing Outside Counsel Getting Off on the Right Foot and Staying in Step." This is a first in a series of webcasts host by the ACC for its members regarding the effective management of work being handled by outside counsel.

My name is Rob Thomas. For the next 90 minutes or so, I will be moderating a discussion among three law departments to bring different perspectives to the use of budgets, case plans, and fee arrangements. If you have to leave during today's session, or if you have colleagues who are interested but unable to attend, this program will be recorded and available through the ACC website for a year.

As we proceed through the presentation, you'll just need to click on the arrows at the base of the slides to advance through them. If you can't see the slides, you may want to check the pop-up blocker in your system to make sure that you can get through to the slides in the presentation.

We would like to thank Karen Palmer at the ACC for assembling today's panel and for also helping us prepare the presentation materials. Karen will be fielding your questions during the presentation. Please email them to her at legalresources - that's all one word-- legalresources@acca.com. If you need to check the email address, it's on the last slide in the presentation. Assuming that things go as planned, we should have about 15 minutes at the end to respond to your questions, which Karen will be forwarding to us at the end.

At this point, please advance to the second slide which summarizes our panel members. We have detailed background about each of the individuals on the panel in the presentation materials on the ACC website. I'd just like to take a minute to point out some of the differences in the types of law departments represented by each of the panel members.

Representing the small law departments is Deanne Tully, General Counsel of Tier Technologies in Reston, Virginia. Tier is a \$150 million a year revenue company that is involved in systems design and business process re-engineering for government entities. The Tier law department has three attorneys.

On the other side of the spectrum is American Express, represented by Stuart Alderoty and Mark LoSacco who are in their litigation group. Most of you are familiar with American Express activities. They're a \$30 billion a year diversified financial services company. Prior to their spinoff of Ameriprise, they had a group of about 22 people, including five lawyers, managing the litigation work. Since that spinoff the group has been reduced to about a dozen people and two lawyers. So they're essentially representing a small group in a much larger group.

Jan. 18. 2006 / 1:00PM, **ACC - Managing Outside Counsel Getting Off on the Right Foot—And Staying in Step

The third entity represented on the panel is FMC Technologies by Jeff Carr who's the general counsel in Houston. FMC Technologies is a \$3 billion a year company involved in a diverse mix of various business units including oil and gas drilling introduction, food handling systems, and airline ground support systems. Their law department has seven lawyers.

Let's move on to the next slide which is slide 3, and maybe I should say a word about myself here. I'm Rob Thomas. I'm with Serengeti. I'll be moderating the panel and Serengeti has a system that is currently used by over 5,000 in-house counsels to manage their with over 7,000 law firms around the world.

During the past five years, I've been privileged to work with the ACC to produce an annual ACC Serengeti Managing Outside Counsel Survey Report, which summarizes the latest techniques being used by ACC members to manage to work with outside counsel and we'll see some of the findings from that survey as we head into the primary parts of the program.

So if everyone's on slide 3, we can start with the discussion of case plans and budgets. That will be the first half of our program. The second half will be devoted to fees.

Let's then move to slide number 4, "Budgets and Case Plans." In the survey that we do each year of ACC members, we find that the number of counsel who are requiring budgets that are outside counsel stays roughly the same year over year. About three quarters. We have changed over the years and fairly dramatically is the amount of work that they are requiring budgets for. About five years ago it was roughly a fourth of the work on average that budgets applied to. Now that number has increased to over half.

The savings from using budgets on average by those in-house counsel are significant., approximately 20% of the amount that they are spending on outside counsel.

With that bit of background let's move to slide number 5, "Budgets and Case Plans," and at this point I would like to open up the discussion by the panel members to provide a brief overview as to when and how they use budgets. What details they require for what time periods and how they use budgets basically to get matters off on the right foot with their outside counsel.

Let's start, Deanne, if we could with you to provide the small law department perspective and then move to American Express and then to FMC.

Deanne Tully - *Tier Technologies, Inc. - VP & General Counsel*

Okay. Thank you, Rob. Good afternoon or morning to all our listeners, whatever the case may be. With respect to the details and the time periods of a budget or a plan, I think obviously that's going to really depend on the matter. Probably the most common type of matter that we require a budget is a litigation matter, and my experience has been it helps to break that down into phases that typically tracks the litigation process. You can start with something like the initial pleadings phase and then I usually have them break it down through discovery and then possible motions would be a third phase and then a fourth phase through trial. That helps us require a fairly detailed budget in that regard. It helps establish expectations between me as in-house counsel and outside counsel, and it's also helpful for the business folks to see the process, to see the costs involved and to help them make their business decisions.

For other types of matters, and to echo what Rob said, now we do require budgets for matters other than litigation and at a minimum, we'll obviously ask the firm to specify the attorneys that are working on the matter and the rates, the anticipated tasks and the anticipated time for each task and then a division of labor among the assigned attorneys. And again, I think probably the most helpful tool in developing a budget and including the details is just a lot of extensive discussion with their outside counsel so that you're on the same page upfront and can establish mutual expectations and have a pretty good understanding. My other intent is to have your outside counsel use plain English when they budget so that you can use it with your internal business folks, as well. And I'll kick it over to my friends over at American Express.

Jan. 18. 2006 / 1:00PM, **ACC - Managing Outside Counsel Getting Off on the Right Foot—And Staying in Step

Stuart Alderoty - *American Express - Chief Litigation Counsel*

Thank you. This is Stu Alderoty. Given the volume of cases that we have of small, medium and large we found, Deanne, that asking for details around budgets as you've described created an issue for us because although we're a large company with a lot of lawsuits, we don't have a very large in-house staff and the more detail we ask for - we realize we're going to ask for, we really have to process it and review it. And it was just too much information to really review in a way that was going to be meaningful. So what Mark and I did a few years ago is we told the outside counsel to stop providing detailed budget plans, breaking it down by phases of cases, discovery, motion practice, pretrial, trial, et cetera. And what we now ask for on every single case whether it's a \$5,000 case or whether it's a \$5 million case is we want a budget electronically submitted to us through Serengeti and what we're most interested in, is given everything you know about the case in January, what do you think you're going to spend on that case for this calendar year?

The owner of that case, whether it's a lawyer or a paralegal or legal analyst in our group, then gets an email notification that the budget's been posted. They go in and they look at that number - it's an all end number for the year-- and based upon what they know about the case. And they should be familiar with their docket of cases they either get approved where they pick up the phone and they talk with outside counsel to talk through the budget to see whether the budget is a realistic budget for the real or they can hit reject but the outside counsel will not be able to post any invoices to that matter for processing until that budget is approved by the owner of the case and we'll talk in a bit as we move forward as to - by simply asking for that one all end number. Now we believe we've actually become more effective in managing the case as it moves forward through the system. I'll kick it over to Jeff.

Jeff Carr - *FMC Technologies, Inc. - VP, General Counsel & Secretary*

Thanks Stu. We're kind of between you guys size wise and we're between you I guess process wise as well. Let me start by just dropping back to why do we go to outside counsel. We do a makeup on any matter - any issue that comes up. Do we have the expertise in-house to handle it is the first question and then secondly, do we have the resources? If the answer to both of those questions are no then we go outside. Obviously for litigation - well not obviously. But we, at least with a relatively small law department, don't have the resources inside. So all litigation goes outside. We require budgets on all external matters, whether it is a small matter or large matter or whatnot.

For litigation we require a - we establish a placeholders budget for the first 90-day phase of a matter and then at the end of 90 days we require a full budget along with a decision trait at that 90-day threshold if the case has not been settled. The reason we do that is we have those two tranches is all of our engagements are on the basis of a performance base pay system and the outside counsel having the incentive to meet our objectives as quickly as possible and as efficiently as possible and get bonuses for that so in the first days of litigation most of time we want to get rid of a case quickly and so we just go through a placeholders process to do that.

Once a full budget comes in, like American Express, we require both a matter budget for the entire matter and then also a time based project for the annual period so that we can roll that into our financial protections for the company.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Thank you. Does anyone have anything to add to the first point here? We've got an interesting set of perspectives already.

Let's move on then to slide number 6. One of the issues with budgets often is what do you do with them after you've got them? Do you put it in a drawer and take a look at it when the matters done or do you somehow monitor your progress as you're going along?

Jan. 18. 2006 / 1:00PM, **ACC - Managing Outside Counsel Getting Off on the Right Foot—And Staying in Step

The next question is how do you track progress against a plan and spending against the budget as you're moving through the life of a project that we do have a budget or case plan? Deanne, do you want to start us off again?

Deanne Tully - *Tier Technologies, Inc. - VP & General Counsel*

Sure Rob.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

And I was asked to have you speak up just a little bit.

Deanne Tully - *Tier Technologies, Inc. - VP & General Counsel*

Okay, I'll try and do that. I think basically as a small law department for a company that's comparatively small compared to American Express and FMC we typically only have two to four matters on a given time that are being handled by outside counsel so we aren't completely overwhelmed with managing budgets or looking at them. I will say that as a small department with limited resources we are squarely in the nineteenth century in our technology somewhat in that we get a piece of paper that has a budget.

We get a paper that has an invoice and we try and track that on a monthly basis although that's ideal but not always practical or feasible, but certainly on a quarterly basis and because there are a limited number of matters at any given time that responsibility rests for me individually so I have a fairly good sense of where my counsel are coming in on matters and if there's any surprises. I tend to sort of see them coming particularly in litigation matters. So it's a fairly rudimentary tracking process that we use and it really does rely on me to find the time to do it and talk with outside counsel but we have found that for our needs and our size it's fairly effective. Stu, do you want to give the American Express view of that?

Mark LoSacco - *American Express - Head Litigation Counsel*

Thanks Deanna. This is Mark LoSacco actually from American Express. I'm going to take this one. What we do as you pointed out we have a large volume of cases and we also have a rather small litigation group relative to the number of cases. So we do a budget tracking in part as a method of triage really to sort of see what kind of cases - which cases we need to pay a lot of attention to and actively manage, and this goes a little bit into the next slide and we'll talk about reports. But the manner in which we monitor the budget is we get a report every week that's run every Tuesday. We get a package of reports and one of them is our budget versus spend and we-- that's all sorted by the percentage of the budget for the year that's been spent already. And we can take a look at the top spenders versus budget and make decisions on how we are going to actively manage those cases.

So if we see a situation where there is a case that is running at a 50% spend to its budget and you're in February, you know you need to get on the phone with outside counsel and say what's the story? Why are you running at this high spend at this early point? And there may be a reasonable explanation and the budget stays the same.

You may find that there's a need to adjust the budget or you may find that there's a need to adjust the approach of the strategy to the case to bring it more in line with what you expected to spend. So we can't really monitor closely the budgets on every single case, but what we can do is see cases where the budgets are running or the spend is running high to the budget.

Jan. 18. 2006 / 1:00PM, **ACC - Managing Outside Counsel Getting Off on the Right Foot—And Staying in Step

Jeff Carr - FMC Technologies, Inc. - VP, General Counsel & Secretary

Mark, this is Jeff. We do things quite similarly to you, but not quite as frequently. We're looking at stuff quarterly, monthly and annually, and looking for divergences from the expected spend. Part of our difference in the way we look at it is because we use the performance-based pay system, we don't care a lot about the velocity of the spend. What we care about is where are you going to be on budget if the firm is under spending on the budget and we get to bank that money and if they are over spending what are we going to do to get back. And so - but like you, we only do things electronically and so we've got the tools through Serengeti Trackers to help us monitor what the budgetary performance is and what the spend is to actual.

Rob Thomas - Serengeti Law - VP, Strategic Development

Jeff, can you explain a little bit more what you meant by banking if the situation where the firm gets either ahead or behind the budget, what you meant by that?

Jeff Carr - FMC Technologies, Inc. - VP, General Counsel & Secretary

Sure. When I said banking, I mean my CFO is always after me as to what our spend is going to be. So do I get to release money for the year and take some more money to income in effect from a projection standpoint or are we going to be over our budget in the aggregate basis for the year.

Rob Thomas - Serengeti Law - VP, Strategic Development

Great.

Jeff Carr - FMC Technologies, Inc. - VP, General Counsel & Secretary

When I said "bank it," I mean anticipated savings that's going to translate to earnings per share in the long run.

Rob Thomas - Serengeti Law - VP, Strategic Development

Any other discussion of how you go about tracking your progress against budgets and case plans that you have in place with your active work? Okay. Let's move into slide number 7. We may have talked a little bit about this, but let's see if there's anything that anyone wants to add about reports. What types of reports do you run to track spending against budget, status results. How they all match up. How do you assess where you are on the plan and what types of reports do you have to help you do that? Deanne, do you want to start us off?

Deanne Tully - Tier Technologies, Inc. - VP & General Counsel

Well, I can do that. Our reports are pretty informal. We do not have a system for tracking these things that will generate a report and again it comes down to generally myself but someone else on my staff if they are handling a particular matter being very comfortable and familiar with the budget and the plan, looking at the invoices and developing a very good rapport and level of discussion with outside counsel so that I sound pretty - I think our (inaudible) sounds pretty primitive compared to the great systems that American Express and FMC has but I'd be not telling the entire truth if I said really we carry it around in our head a lot and our reports consist of CFO or controller popping their head into our office saying how we doing on this? I think we all probably face the same requests from CFOs. Is there any access in this accrual? Do you think that this is what they're going to spend? Where are we on this? Are they over or under?

Jan. 18. 2006 / 1:00PM, **ACC - Managing Outside Counsel Getting Off on the Right Foot—And Staying in Step

We have sort of a rough idea that we carry around in our head that we do not generate any monthly or quarterly reports. I think for my brethren in the small law departments as we struggle to get into the 21st century and automate this practice there's a lot of discussion out there about where to start and how to get a program that's meaningful for you so that you do get away from just having it in your head and maybe we can discuss that in the Q&A period about how you might get started to have a little bit more of a automated way to track these things other than pen and paper and experienced counsel who are dealing with and contracting outside counsel and discussing it.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Deanne, before we turn to American Express I do want to tell you that you are probably in the majority of what we see in the survey that we do of ACC members each year. Eighty percent of the law departments out there are five or fewer lawyers and most of them are tracking this information manually. They're getting paper bills, paper budgets, paper status updates and so on. Many times they have a spread sheet or some sort of internal database of someone who's manually taking the information they want and putting it in and that's the extent of their reporting and for many companies that works just fine. Some of those companies are starting to think about electronic billing or other things that would help them become more efficient. Do things with less people but we can talk about that later if you want but I just want you to know what we see is that you are representative of a large part of the in-house population.

Deanne Tully - *Tier Technologies, Inc. - VP & General Counsel*

Well it's good to know I'm not alone.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Okay, how about the perspective of American Express.

Stuart Alderoty - *American Express - Chief Litigation Counsel*

Sure. As Mark said every Tuesday we get a package of reports and I don't want to make it sound that they're three feet high. They sit in a manila folder and they're probably a quarter of an inch or half an inch thick and we start at a very high level and we get a one page summary that will show us in the aggregate what we have paid for all of our outside counsel, litigation expenses from January 1 through to the Tuesday the report has been run. On that same one page summary we compare that all end number to the budget we have fed to the general counsel in terms of our projection as to what we're going to spend for the year and we'll talk a little bit later on about we do that (inaudible) process so we can track in the aggregate about where we are versus what we told the GCO what we were going to spend.

We also on that front page see how many new cases were opened. How many cases were closed and what the net cases are in our system and then we also say on that front page where we're tracking compared to the previous two years. And again, this is really antidotal information that it's just helpful to see as early in the year as possible whether or not things are going to off kilter so we can see for example as of February 1 what our spend is for obviously 2006 compared to 2005, compared to 2004 quickly look at the number of cases in our system. See if the number of cases in our system compare to these previous years. Are they higher or are they lower. Then as you flip through we have on the next we'll get a pie chart that shows as our top 20 spend cases compared to our top 20 budgets so we try to understand where our big chunks are flowing and have we recently anticipated where those big chunks are flowing.

Then as you go through that - as you get past that summary report which is something you can look at in five minutes. You can look at it on the train ride home. You can look at it in the evening or you can look at it at your desk but it really gives you in five minutes you really get the sense of this is where we are as of this week in the year and then as you peel through it there are

Jan. 18. 2006 / 1:00PM, **ACC - Managing Outside Counsel Getting Off on the Right Foot—And Staying in Step

levels of detail. Mark has already talked about one level of detail where we have a report that I think is incredibly useful that as Mark describes compares the budget of every case to the spend to date in descending percentage basis. So the highest percentage of spend to budget from lets say whatever it is - sometimes it's over 100%. Let's call it 100% down to 0% so we can quickly look as Mark said if we're in June of the year theoretically or hypothetically cases should be hovering around the 50% mark. We know that isn't always the case but if cases are at the 95 or 85% market or halfway through the year you know that you need to talk to somebody about what's happening and hopefully get a reasonable explanation.

We also - I mean we haven't gotten into this yet. We also asked the outside counsel to supply - at the same time they supply the budgeting information to us when they open a new case we asked them to supply to us a range of exposure. Now this is now reserve exposure. This is not financial accounting standard five exposure. This is simply exposure based upon a review of the complaint. The understanding of the venue. An understanding perhaps of the plaintiff who's on the other side. Also perhaps there's been an early discussion. They'll be one generally to get a sense of what the case - what the risk is on the case.

Again, I want to emphasize that this isn't a reserve setting exercise and then one of our reports compares the net liability sort of exposure range with the budget number and then we also do that on a percentage basis descending and what this helps you find - Mark and I refer to it as sort of the death by a thousand cuts. Everybody knows your top cases. I mean you know those top 20 cases in our system. We know them and we know why we're spending so much money on them and there's a good reason for it but all those cases you have in your system and they've got hundreds of them where maybe you're going to spend 25, 30, 35, \$50,000 on the case maybe flying below the radar screen but by comparing the sort of early exposure range to the budget all of a sudden on a percentage basis they start finding cases in the system where outside counsel is telling you a reasonable estimate of exposure is 50,000.

But we think it's going to cost \$45,000 this year to litigate the case and all of a sudden you're able to find these cases that I think otherwise would be flying below the radar. Pickup the phone with outside counsel and quickly revisit the strategy on the case because there may be a good reason why you want to spend \$60,000 litigating a \$50,000 case but in most cases there's not a good reason so you either have the wrong lawyer or you have the wrong strategy or you have the wrong approach. So that also helps. I'll kick it over to Mark.

Mark LoSacco - *American Express - Head Litigation Counsel*

Yes, I mean I'd just like to say one quick thing about contents of reports in general when you say reports. Stuart and I both came from private practices commercial litigators and you come into a corporate environment and you start hearing about reports and the real issue is the utility of the reports and what these are not is reports as they are not reports that you put together for the sake of having a report just saying okay well that's interesting here are our numbers lets move on.

These reports are really about what I refer to earlier as triage. They are the starting point - they're not really an end to themselves they are the starting point for discussion with our outside counsel so this really - these reports really allow us on a weekly basis to get a quick look at the overview of our case load but also to call out those cases what we refer to as the outliers whether it's because the exposure is out of whack with the budget or the spend is moving too fast or it's just a huge exposure case or a huge budget and so we need to get in early and understand what the case is about and direct strategy.

Stuart Alderoty - *American Express - Chief Litigation Counsel*

I think just others echoed that. Coming from our background of private firm commercial litigators and then moving inside the philosophy that Mark and I have is we don't answer a single piece of information from our outside counsel unless we're going to put it to good use and we don't generate a single piece of paper inside unless we're able to process it and put it to good use and all of these reports are reports that the run on Tuesday as I said you can flip through them and you five or 10 minutes. Sometimes I do it on my commute home and then every Thursday our group Mark and I and the senior paralegals will convene by phone and very quickly you're able to access where you are if you're think moving on course and then you're able to pick

Jan. 18. 2006 / 1:00PM, **ACC - Managing Outside Counsel Getting Off on the Right Foot—And Staying in Step

out the two or three cases that really appear to be outliers and focus in on them for as I said a discussion and hopefully a change in strategy and if you think about it you're doing that every week.

Let's just say if you can find one case a week that's 52 cases a year that are otherwise being aggressively managed that without these reports I don't think really would have been noticed and in fact since we've been doing this and now this is our I guess second full year - we're going into our third year of running these reports in. We're actually closing out more cases each week than we're opening.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

You guys are going to work yourselves out of a job.

Stuart Alderoty - *American Express - Chief Litigation Counsel*

Well we've got a long tail on it.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

You've got a long tail.

Stuart Alderoty - *American Express - Chief Litigation Counsel*

I'm sure if we did that they'd find another thing for us to do believe me.

Mark LoSacco - *American Express - Head Litigation Counsel*

Well from an in-house perspective our job is to try to get rid of litigation not to be good at it.

Jeff Carr - *FMC Technologies, Inc. - VP, General Counsel & Secretary*

I like the aspect of what Mark and Stuart and Deanne are all talking about. It all comes down to metrics that matter. Information that lets you run your practice better and good performance and like these guys we run both periodic reports but also then episodic ones for a particular need but the ones that we use all the time are measured things budget to actual, cycle time, evaluations of the counsel, what we call deviation from expected value. Once something has been resolved, do we resolve it at what we expected it to be resolved at or below? And we're measuring - as you reduce cycle time, you can get rid of cases if you overpay for them. So that's not a metric in itself that is particularly useful. But if you're resolving cases faster and under budget and under your expected value for them, then you're increasing the performance of your department.

We also look at lessons learned, our inventory of cases and what types to see trends. Are we seeing more HR matters from one of the business units as a whole? All of these things go into what we call a snapshot, which is done at the corporate level and then for each of our primary business segments. And my primary business lawyers use the snapshot the same way I use the corporate one. Snapshot is a one PowerPoint slide that focuses on financial performance, litigation performance itself, significant matters and then other metrics. And it's just a way in one slide to give people the same kind of picture that Mark and Stuart were talking about, so that then you can have a dialogue with your business people, then with your outside counsel to increase performance.

Jan. 18. 2006 / 1:00PM, **ACC - Managing Outside Counsel Getting Off on the Right Foot—And Staying in Step

Rob Thomas - *Serengeti Law - VP, Strategic Development*

So if I could summarize a bit here, it sounds like from the last two exchanges, that in addition to tracking fees and expenses it's also important to track your exposure and your results so that you have the overall picture not only of what you spent, but what you got for it.

Jeff Carr - *FMC Technologies, Inc. - VP, General Counsel & Secretary*

I think so anyway, yes.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Great. By the way Jeff, I just got a note that someone asked me to have you speak up a little bit.

Jeff Carr - *FMC Technologies, Inc. - VP, General Counsel & Secretary*

Okay. No problem.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

We're trying to broadcast this over the Internet and I guess it doesn't catch everything that would normally be caught on the phone. So let's move on then to page 8 unless there's other comments on the reporting. I remember over 25 years ago sitting as a young associate in the office of a partner who'd just been asked for a budget by the client, and hearing that partner go into a litany of reasons why you couldn't possibly do a budget on this piece of litigation. And the client very patiently listened to it and said, you know I build skyscrapers for a living. Do you think there aren't contingencies when you dig into the ground and put up a skyscraper? If I can do a budget for a skyscraper, you can do a budget for this measly little case.

So how do you handle unforeseen circumstances, changes in a matter once you have a budget or a plan in place? What do you do when outside counsel don't follow the plan or overspend the budgets? How do you handle these changes down the road? Deanne, do you want to start us off?

Deanne Tully - *Tier Technologies, Inc. - VP & General Counsel*

Sure Rob. I think we've all had similar experiences both on the side when I was in private practice. I must have had the same partner at some point, because I heard the exact same litany of reasons why you can't do it. And then the client said if you can't budget for a case, then I don't think you can win the case, and I'll find somebody else. And I would say that from the other perspective now being in-house counsel, one of the disadvantages to requiring the details upfront, and Stu hit on this earlier. You put a lot of detail in a budget and things change and your budget is changing a lot. And sometimes you find yourself spending more time managing the budget than managing the case, which is not really where you want to go.

For changes, again, because I'm so - I generally play a pretty involved role in the cases that are handled by our outside counsel. And we speak very often and frequently, and I generally get a heads up through a phone conversation about how this is going in a different direction than anticipated and I'd like for them to raise - so we need to revisit the budget and if they don't then I'll say well what is this going to do to the plan and the budget and the time and so again it comes up usually in an informal way or I will raise the issue with them when I'm looking at two or three months of invoices that are way out of line with the budget either way. Either higher or lower and if it's lower I'll use that as an opportunity to revisit the budget. Also just evaluate the case and that actually has happened to me on occasion where they're coming in so low under their budget that we've revised it downwards.

Jan. 18. 2006 / 1:00PM, **ACC - Managing Outside Counsel Getting Off on the Right Foot—And Staying in Step

Typically though you have the problem that it's costing more than you anticipated. At that point we don't go back and revise every little detail in the budget or the plan, not every line item but we will adjust sort of the rough numbers and also from our perspective it does matter very much not only how much are you spending but when are you spending it for our quarterly reports. We're a publicly traded company and we want it to be as accurate as possible and so again getting counsel to focus in on trying to be as accurate as possible both on amount and timing is important to us and then the changes usually get communicated in our usual fashion of this particular budget - attached revised budget with an amount. Usually I'll summarize it in one or two lines in an email that goes to our CFO and CEO but again it's just probably more determined by the personal involvement of the in-house counsel on a particular matter which we can do because we have a fairly limited number of cases.

Although at some point I will throw out I'd love to get the perspective from both Mark and Stu at American Express and Jeff as well if there are any matters that they feel don't lend themselves to budgets. It's more work than it's worth. Maybe they could address that at some point.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Why don't you folks address that now as we talk about how to deal with changes and so on.

Mark LoSacco - *American Express - Head Litigation Counsel*

Sure. This is Mark again from American Express. Deanna, we do as a require budget member case and we do think that it's useful in every case. I'll sort of describe the types of budgets we require though are a flat number for the year. What the spend is expected to be. Just some general description from the outside counsel if they want to say this anticipates going through discovery and possibly motion practice by the end of the year but does not anticipate trial for example. So we ask our counsel and tell our counsel look gives us in the comment section of the budget on Serengeti give us what you actually view will be a general description of the work so we understand what you're talking about when we get the number.

What we don't ask for because of the volume of cases and the complexity of them we do not ask for phased budgets much less some of the ones that - the types of budgets that we're use to seeing more outside where the requests were being made to know exactly how many depositions you're going to take. How much prep work is going into each of them and all that sort of level of detail which in some of our cases would just not make any sense at all so we don't ask for that on any case.

So getting the number - this sort of all in number for the year for the projected work is the way we go about it and what we do as far as - if circumstances change is we'll go back and we'll look at the description of the budget, the description that was put in by the outside lawyer at the time and again we need to approve all the budgets on Serengeti when they first come in so we would have that opportunity to look at the description at the outset. Look at what they're planning to spend and then either have a conversation with the outside lawyer to say this makes sense or it does not or just simply approve it if it seemed to make sense to us. So we have that initial check on. Then if something changes an unanticipated event that for example trial gets moved up or for example there was excessive motion practice around certain documents that we wanted to press to not release in discovery. Something like that we'll have a discussion with outside counsel.

We'll make a determination with them through the discussion whether it really should have been anticipated initially or not and whether it was really a shortcoming on the part of the lawyer in the firm in putting the budget in or whether it was a reasonably unanticipated event and then decide how to move forward with the budget from that point.

A lot depends obviously on the particular relationship with the firm. Whether or not this is an unusual event for the firm but the main thing it does is we've found over the past 2.5 years of requiring these budgets and showing the outside lawyers that we're actually looking at them which is really the key. Having the discussion and letting them know that if they go over budget they're going to have to sit down and have a discussion with us the budgets get more reasonable and the spend gets more

Jan. 18. 2006 / 1:00PM, **ACC - Managing Outside Counsel Getting Off on the Right Foot—And Staying in Step

reasonable. So we've found that overtime we've had to have fewer and fewer of these difficult conversations because the conversations are difficult ones that they don't want to have.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Which makes me think about - I think maybe our first question will be how do you make sure that outside counsel aren't sandbagging you by estimating high to make themselves look good at the end of the day then we'll talk about that later. Jeff, did you have any perspectives on how to handle changes to the budget or the plan based on unanticipated events?

Jeff Carr - *FMC Technologies, Inc. - VP, General Counsel & Secretary*

Sure. And I love your skyscraper analogy. We use exactly the same story although we talk about what we call our PSOs which is a type of ship. We make products and things that range in price anywhere from \$1 million to \$250 million. They're highly engineered. They're very, very complex structures and systems. We generally do that on a fixed price basis. There are always things that happen that are unanticipated and so it's always fascinating to me when a law firm comes in and pitches to me or one of my lawyers that they want to do our work in a particular area or for a particular case because of their great expertise and then when you ask them for the budget they say oh ho, well we can give you an indicative price or budget but we're not in control of what the other side does. We might get a crazy plaintiff or a crazy judge or a crazy defendant or what not and so we really can't anticipate any event. At which point I look at them and say okay now you're no longer in the marketing phase. You're now in the let's protect the law firm against risk phase and shift all the risk to the client.

As far as I'm concerned the reason we've hired that firm is because of their expertise and due to that they are in a better position than we are to accept the risk of being wrong in terms of what the budgets are and the unanticipated events. It all factors into our system that we use for the engagement of counsel. If the firm is above budget or is going to go above budget they can come in and talk to us to see if we want to adjust the matter budget and if they can convince us that this is truly unanticipated, it truly is something that could not have been anticipated or there's a change in the underlying facts or circumstances we might change those budgetary targets but if we don't change those targets the way our system works the firm accepts a little bit more risk.

If they are successful and still efficient they're going to cover their costs under our particular engagement system. So it - we do adjust the budgets all the time. We do review them all the time but we do it in the context of the system that is a true partnering relationship with the law firm where they are accepting some of the risk and getting some of the rewards from efficient successful performance.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Terrific. Well let's move on and conclude our discussion of budgets and case plans in the last slide which is page 9 and this refers to something I think Stu mentioned earlier which is how do the budgets that you're getting from outside counsel relate to the law department budget that you have to use for planning and internal purposes and then as Deanne mentioned for reporting purposes. Deanne, do you want to start us off there what the relationship between these budgets we've been discussing from outside counsel and your law department budget?

Deanne Tully - *Tier Technologies, Inc. - VP & General Counsel*

Sure. One of the reasons that I have a budget is I also use it as an education tool for the business units that's involved and a great of the matters that we handle arrive out of our business units and so it gets pushed down to their budget level. So not all of our outside counsel fees affect my law department budget and so that's why sometimes I will require the detail for example in a litigation matter to see how much additional costs would be incurred if we were to go through trial because I can show that to

Jan. 18. 2006 / 1:00PM, **ACC - Managing Outside Counsel Getting Off on the Right Foot—And Staying in Step

the senior VP in charge of that business unit and say you may be taking a hard line today because you don't like this person who's suing us but this is what it's going to cost to go all the way to trial as opposed to settling it and it helps them make business decisions about what they want to do because it is affecting their budget.

For the general matters that I do budget in our law department budget it does help to have an individual budgets and plans. I keep historical records so that I can sort of estimate as to where we are on things and the monthly tracking of invoices to my monthly law department budget is something that's of very keen interest to many people here and so we do achieve that. Again, it's in a somewhat primitive form in just an Excel spreadsheet and looking at where we are on budgets coming in on various matters and then comparing that to the overall business budget and the law department budget as well. So it's a helpful tool but I've also found that the budgets are helpful to educate and manage the expectations of your business folks as well.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

How do you create the law department at the beginning of every year? Do you require the outside counsel to provide their budgets in advance? Where does your number that you're tracking against come from?

Deanne Tully - *Tier Technologies, Inc. - VP & General Counsel*

I generally will anticipate for general corporate advice securities compliance any ongoing matters that I know about to get an annual budget for that and then I meet with each individual SVU leader and I say, last year you had three HR matters come out of this particular unit. You're clearly not spending enough time training and you need to do something about it and this is what you spent last year on these types of matters and this is what I would recommend you budget going forward. And they then will use sort of historical information, as well as if they are aware of any particular issue brewing-- disgruntled subcontractor or something. And I'll work with them to create what we think is a meaningful and useful budget that anticipates. But we divide up what we anticipate coming and whose budget that affects at the beginning of the year. That's the way I push it down to the SVUs so that they have a little bit more skin in the game.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Thank you. Shall we move on to American Express then?

Stuart Alderoty - *American Express - Chief Litigation Counsel*

Sure. This is Stu. What we're able to do now, with over two years of good information in the system through these reports, is in December of each year we set a deadline that we want for all active cases in the system. Our outside law firms have to provide us with budgets for the coming year by a certain date. We've got all of those in the system, and then we simply do a bottoms up edition. And that's the starting point of thinking about what our forecast is going to be for the general counsel for the coming year. And we don't accept the bottoms up forecast or the bottoms up number at face value because we know things change. We know that certain firms over budget-- I'll talk about that in a second, Rob-- and we know that there may be certain things brewing in the industry that we've yet to get hit with. But we could reasonably estimate that we'll probably - we'll get hit with that type of litigation. And we may know that there are things in the system that (inaudible) that are going to be out of the system.

But the starting point is we have a budget as we said for every single case. We simply do the math and we say, here's the number. And then we massage it based upon what we know based upon the prior two years and what we know about the industry litigation landscape as we approach the new year and then in January-- or actually by the end of December-- we supply that number to the general counsel's office and we say, this is going to be our target forecast for the year.

Jan. 18. 2006 / 1:00PM, **ACC - Managing Outside Counsel Getting Off on the Right Foot—And Staying in Step

Now the caveat that I give them is that my crystal ball was still in the shop, so I can't guarantee that that's the number I'm going to bring it in at. And as things may change throughout the course of the year-- and what we do is each quarter we will actually go in - actually it's probably beginning the third month, at the beginning of the second quarter. Each month we will scrub that number. In other words, we'll do a new bottoms up edition and we'll start looking at our reports. We'll see what percentage of spend is actually occurring compared to the budget and then we'll keep feeding information to the general counsel's office on a monthly basis, trying to give them as much notice as possible if that number is moving. Because what I have found is while it's important to get the number right on January 1, it's probably equally important if not more important that that number is going to change either up or down that there not be any surprises as you move throughout the course of the year.

So the more notice you can give to the general counsel and the finance people as to a change, and then be able to substantiate and explain that change. Not just simply say or I got it wrong in January but to say look the number is now X plus Y and the reason we have plus Y is, and then you actually lay it out for them that these class actions were not in the system and not in our radar screen or, as Mark said, the judge accelerated this one trial where he told us it would take place in 2007. The judge has now moved the schedule up to 2006. So if you can explain what the variance is and then sort of give the credible explanation as to why you couldn't have reasonably anticipated earlier in the year. We have found that that's carried the weight for us.

In terms of the sandbagging Rob that you've talked about the message - when we got these reports that compare the budget to the spend on a percentage basis we're not only interested in the ones that are tracking 75 or 80% against budget in May. We're also very concerned about the ones that are tracking 8, 10, 15% spend and there you are sitting in May. So those cases also invite calls to the outside firms and what we make it clear to the outside firms is that nobody's getting a gold star for over budgeting the case and bringing it under budget.

Now obviously sometimes you can get an early unexpected dismissal or you get an early settlement and that's great for everybody but we tell outside counsel all the time is when we explain to them we say look we're using your budgets to forecast to the general counsel to make a commitment to the general counsel that we're going to be able to handle this entire inventory of cases for the year for this dollar amount and if you sandbag us you're not helping us. You're hurting us and again it's through and Mark touched upon this earlier. It's really through a - you're trying to reform the behavior of outside counsel. If it's coming from a private firm or coming from a private and I was there for a long time. Mark was there for a long time so I can tell you that as a lawyer on the outside serving a client they really don't appreciate the significance of the budget. It's sort of look I'm here to litigate the case. I'm here to get you your best result. I'm here to get you your best win. Why are you bothering me with how much this is going to cost? You appreciate it at some level but you really don't appreciate how much pressure there is on the inside counsel to be accountable for that number.

So what we do and we're trying to formalize this through - we're trying actually create a report card for our outside counsel where in one of the grades that they're going to get is accuracy of budget and you get a failing grade or you get a mid land grade for both under budgeting and over budgeting. So we're trying to create a formal process to do that but I can tell you that informally that as the new cases come in we're directing those new cases to the firms that are getting it right more often than not and when firms call us and say we saw on the docket that you were just sued in such and such venue, I'd like to have the case and we can tell them all you know John or Mary the case didn't go to you. It went to so an so and if they say why one of the conversations we may have with them is you know what we gave you a number of chances and you just never really could get this budgeting right with us and the conversation may be that they were trying to be a budget hero and then explaining to them how that didn't help.

So I think informally we're using it as - to use Mark's word not only triage the case but triage the firms. As we move into 2006 we're trying to think of ways to actually formalize a report card where we're going to be rating firms because I think lawyers kind of react to grades and react to feedback and one of the line items on that report card is going to be accuracy of budget.

Jan. 18. 2006 / 1:00PM, **ACC - Managing Outside Counsel Getting Off on the Right Foot—And Staying in Step

Mark LoSacco - American Express - Head Litigation Counsel

This is Mark. Just two real quick follow-ups on that one to the point that Stuart made about it being - there sometimes being reasons why you're under budget and it's not a bad thing. You may have a situation where a case has not got a motion or early resolution so it sometimes obviously much less clear that an under budget is a problem as opposed to an over budget so we try to reinforce that message but it is a little bit more difficult to cull out the cases where the under budget was due to over budgeting at the beginning and so the second follow-up is that to really address over budgeting you really need to engage counsel at the outset when they make the budget and we do that aggressively.

When we first get the budget we run these reports and compare them to exposure. We also look at the amount of the budget just flat out size. We have a certain idea of what these sorts of cases should cost and our outside counsel as you trim down the number of outside counsel you use they come to know what these sorts of cases should cost and so the real way to deal with the inflated budget is to make sure that you actually aggressively look at the budgets at the outset and by asking for just the one number rather than a long litany of information on the budgets we really allow ourselves to actively get involved with the budget rather than having sort of sit in the folder because it's too much information for us to digest.

Rob Thomas - Serengeti Law - VP, Strategic Development

Great. Thank you very much. I love the term "budget hero," as in don't be one. Jeff did you have anything to add to this discussion about the relationship between outside counsel budgets and the law department budgets?

Jeff Carr - FMC Technologies, Inc. - VP, General Counsel & Secretary

I agree completely with Stu and Mark absolutely every point that they've made I agree with completely. The one area that I think might be interesting to focus on is timing. I'm rolling up my budget from starting the budget process for 2007 in May of 2006. In August of 2006 we'll be presenting what we call a first look or an early look and the one thing you learn pretty quickly in corporations is that you see is whatever you first look is that's the last look. The number can't go up. It can only go down. So all of these inputs from the outside counsel triaged by the inside counsel and just looked at across the board it's very important and the budgets have flopped.

The other thing that we do that may be a little different than others is we only budget for matters that are already in the till. We don't budget for new and unanticipated litigation. We don't have a general holding category as an example for \$100,000 worth of product liability cases next year. We - and the way we kind of manage that budget is we know that most of our matters are going to get settled so these full case budgets are flowing through our budgetary system and that becomes - if you settle a case earlier in the year halfway through the matter that frees up dollars for your new litigation. That's the way we do it. I know a lot of other people would do it in different ways but it does make the input from the outside counsel very important in that process.

Rob Thomas - Serengeti Law - VP, Strategic Development

Great. Well we have concluded the first part of the session on "Budgets and Case Plans" and now let's move to the next slide putting in place a fee structure that intends performance and we'll just move on to slide number 11 on "Fees." We've actually used up a little bit more of the time on budgets than I'd hoped but having such an excellent discussion I didn't want to shorten things. If we could try to streamline things a bit here we can still have 15 minutes or so at the end for questions as we move through the fee discussion.

Just to kick things off some of the things that we see from the survey that we do of ACC members each year is that standard and discounted hourly rates are still used for a majority of the work despite all of the publicity around the ABAs report several

Jan. 18. 2006 / 1:00PM, **ACC - Managing Outside Counsel Getting Off on the Right Foot—And Staying in Step

years ago about the - they called the corrosive effect of hourly fees. Hourly fees are still used in the vast majority of work out there for corporate clients.

This year we saw an increase of about 5.7% in hourly rates which actually reversed a trend of lower percentage increases each year. This past year it went up from the prior year and was about double the prediction that in-house counsel had made the previous year as to the increase that they expected. So we're starting to see an uptick in the percentage increase of hourly rates.

Regarding alternative fees the most common ones that we see in the ACC survey report are fixed fees, discounted hourly rates and contingency fees which are dependent on results and the average savings that law departments who use alternative fees what they're getting from those fees is roughly about the same they're getting from using budgeting about 20%.

So let's move to the next slide of that background, page 12. Just in general terms how do you generally compensate outside counsel and do you generally use hourly rates or some sort of alternative and for what types of work do you consider alternatives to hourly rates. Deanne?

Deanne Tully - *Tier Technologies, Inc. - VP & General Counsel*

Well I could give you a very streamlined answer for us. We are 100% hourly for all matters and we have been in 2004 and 2005. We have used an alternative which is for mergers and acquisitions and we - in '02 and '03 we did quite a few acquisitions with smaller companies and we would found that with one counsel in particular we would - tie the - that we could work on - well it wasn't a fixed fee but it was a budget to which they were very - they closely adhered to it and then if the acquisition was successful they got a bonus and if they didn't it was - they got deduct on the bill and that worked well for us in that situation and that's virtually the only experience we've had with alternative billing.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Great. American Express?

Stuart Alderoty - *American Express - Chief Litigation Counsel*

We do a mix. We have and I've seen the later slides. We'll get into some more detail so - but our mix is either discounted hourly rates usually based on the volume of the work that we've given and as I think most in-house lawyers have tried to trim down the number of law firms they use which increases your ability to get discounts and to get alternative fee arrangements and we also have used a wide variety of alternatives to hourly billing including fixed fees for specific charges of cases, types of cases, fixed fees based on geography, saved fees for an individual case, fixed fees for individual cases. The bottom line is just being creative and partnering with the outside law firm and recognizing that it's a true partnership. You're not trying to get every nickel from them and likewise they should understand that you want to have a good reasonable fee arrangement.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Mark, can you describe what you meant by "phased fees?" Is that a fixed fee for a certain phase of a matter?

Mark LoSacco - *American Express - Head Litigation Counsel*

Sure. For example, we've had a particular type of case when business finance was part of the company unit that had very - a high volume of small 40, 50, \$60,000 cases, and we had a firm that would handle them nationally. Engage local counsel to do little more than file pleadings and we had a phased arrangement with them where they knew what they had to do on these types of cases. They would have a "Motion to Dismiss" in the can that they could file and we got for the first phase of the case,

Jan. 18. 2006 / 1:00PM, **ACC - Managing Outside Counsel Getting Off on the Right Foot—And Staying in Step

which would be the initial motion a fee then discovery and final motions. And then if one of those cases ever went to trial, we would then pay a discounted hourly rate. So that's an example. And you do that as we did it on a whole wide variety of those cases and a certain type of case. And obviously if you have a particular case that seems amenable to that sort of arrangement where you say, well this is one that could really go out on an early motion, come up with an arrangement based on here's what we'll pay you to just file the initial motion. And if we don't get out, then give us a discount at the backend for the case.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Thank you. Jeff, do you want to give us your perspective on the-- how to align the incentives of your outside counsel with your goals in achieving quick and good resolution of these cases?

Jeff Carr - *FMC Technologies, Inc. - VP, General Counsel & Secretary*

Sure and we're the outlier I guess on this and we're the statistical anomaly. We do 100% of our work on an alternative fee basis, and we define alternative fees as performance based pay. My personal view is that discounted hourly rates are not alternative fees. They're just discounts. And it's really a factor how many hours you buy at that discounted rate so that doesn't, in my perspective, have enough volume to leverage it to get better rates and I just don't think it works that well.

We have two systems that we use. They're both called ACES, which stands for the "Alliance Counsel Engagement System." One is for everything but litigation and that's a report card system where we decide with the firm what the basis of the engagement will be. Whether it's hourly, fixed fee for a project, or a retainer. We then pay them \$.080 on their dollar for the invoice that they present. We withhold 20. We give them the report card periodically and depending upon how they do on the report card, they get between zero and 200% of the amount withheld. Or in other words, 80 to 120% of their invoice. What that forces me and my attorneys to do is to truly discuss with the firm what their performance has been, what our expectations are and how they satisfy those expectations and how they can improve performance.

For litigation, we use a very similar system, although it is more complex. It breaks a matter down into phases. For each phase, there's a target. Up to the target we pay, again, \$.080 on the dollar and withhold 20. If they exceed the target, we pay \$0.20 on the dollar and withhold 80, depending upon when success occurs in the matter and we've got to define success upfront. They get what's in that at risk bucket plus a multiplier. A multiplier is higher at the beginning of a matter, at the beginning of a case it's a 100%. At the beginning and it then descends through the phases to eventually get to 25%. We also then pay a second level bonus for efficiency or that could be a penalty if you told us the case was going to cost \$100,000 and you finished it for 50. If you're in a 25% multiplier category, the multiplier just went up to 75. Conversely, if you're over budget, the multiplier gets reversed.

We also sometimes use a deviational from expected value multipliers. So if we resolve the matter below what the expected value was the firms multiplier gets increased. If we go above it, it gets reduced. Those are the tools that we use in the theory.

Stuart Alderoty - *American Express - Chief Litigation Counsel*

Jeff, this is Stu. Have you got any analysis as to what your savings is generally as compared if you had done a straight hourly rate by going through the 100% alternative fee that you've done? I mean roughly.

Jeff Carr - *FMC Technologies, Inc. - VP, General Counsel & Secretary*

Right and we have Stu and as you can imagine the metrics are hard to measure in a lot of ways but one of the things - I mean if we're successful what you'll see is you'll always pay more to the firm than if they'd spent the same number of hours at their standard rate. Because if they're successful and they've come in under budget there's going to be a multiplier so you're always

Jan. 18. 2006 / 1:00PM, **ACC - Managing Outside Counsel Getting Off on the Right Foot—And Staying in Step

going to pay more. So the key is whether or not you're truly buying fewer hours. So on an individual case basis it's very hard to measure what the savings are but what we've done is we've looked in the aggregate and what we've said is that our case load - we use to have cases in the till for nine years - for five years for a long period of time.

Our average cycle time for cases now is less than a year and time is money in this area and we are in the - lets see. We've been doing this system since the late '90s. We were doing it for all of our matters - all of our litigation matters that we starting in about 2002 of the cases that we've resolved under the system we have only gone above the expected value three times. So at least anecdotally I think we're getting faster cycle times and we're not spending too much money on the cases and my overall budget has remained flat even though the revenue of the company has increased 50% law firm rates go up about 10% a year and my internal expenses to up about 5% a year. So with those metrics in mind our legal spend per dollar of revenue is actually declining.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Jeff, these assessments of who's going to get this money that's going into this pot where you're paying \$0.80 on the dollar and the other \$0.20 is going into this pot. Are you doing assessments of their performance as they go along or is this something that you do at the end of the transaction or the end of the case?

Jeff Carr - *FMC Technologies, Inc. - VP, General Counsel & Secretary*

That's depends. It's a great question Tom. We want to get to a point where we're doing an assessment every time we pay an invoice but we currently don't have the tools to do that and the systems to do that. So we are currently doing the assessment at the end of the matter when we close it out although we do it no less frequently than once a year for the law firms just so that they're getting feedback from us as to how their performance is.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Is there some place either online or somewhere else that people could get additional information about this? I think we went through it fairly quickly and there's a lot of details. Is there some place people can get additional information?

Jeff Carr - *FMC Technologies, Inc. - VP, General Counsel & Secretary*

Sure. With the webcast materials in our engagement letter, there's a description of the ACES program and you're welcome to call or email me and happy to give you some stuff.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Great. Okay, lets keep moving here because we're getting close to our time for questions. I think we've pretty much covered slide number 13 talking about different types of projects different fee structures.

The next slide is slide 14. How do you work these arrangements out with your outside counsel? What are their objections? Maybe lets concentrate on that. What types of objections do you get in situations particularly where you're talking about alternative fees and how do you respond to those objections?

Stuart Alderoty - *American Express - Chief Litigation Counsel*

Rob, this is Stu. I can take the lead.

Jan. 18. 2006 / 1:00PM, **ACC - Managing Outside Counsel Getting Off on the Right Foot—And Staying in Step

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Great.

Stuart Alderoty - *American Express - Chief Litigation Counsel*

I think primarily we have two types of objections. One is too much risk. Too much uncertainty and the other one is we don't do that sort of thing and if we did it for you we'd have to do it for every other client. So there are some firms that the conversation is simply a non starter and you don't retain them. On the risk piece what we try to do if we really need a firm that truly have expertise is what we tell them and we mean it is that this is all about trying to align our interests. We're not looking to scrape every nickel off the table from them. We understand that they're running a profit center. We understand that they have partners that they're accountable to and they need to earn a living as well but what we're trying to do is we're trying to align interests and we can reward you - if you partner with us.

If you take some risk in partnering with us we can reward you and we can do that in a number of different ways. Jeff has his way which is intriguing in terms of - they must pool of money in a pot and then rewarding it perhaps as a premium as a reward for efficiency.

Other ways you can reward a firm is you can reward them with volume. You can reward them with introducing them to other members of the GCO outside the litigation group so they can perhaps get transactional work, securitization work, technology work, straight up patent work. We can develop relationships with them and we also let them know that the more they get to know us the more efficient actually they can be - can actually start doing this work for less hours.

But it really is - I find that most objections can be dealt with - not all, but most can be dealt with by aligning interests. This can't be heads we win, tails you lose proposition and again it doesn't work with every firm. A lot of firms it's sort of - just has to be a thank you. A thanks but no thanks conversation.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Is it more determined by the firm or the type of matter that you're looking at? Are there certain types of matters that you find are more conducive? I think Mark mentioned certain groups of matters-

Stuart Alderoty - *American Express - Chief Litigation Counsel*

I fight firm. I mean we've had alternative fee arrangements for everything from fairly routine matters along the lines of what Mark has described all the way up to national consumer, class action cases and we have found that it works for all shapes and sizes. You have to have - I think at least the key has been for us has been that there has to be a volume of similarly situated cases. Either by type or by geography. There are certain one off cases that I think would lend themselves to in at risk pool. We've yet to do that Jeff and I'm actually have got a new case in the door that I'm interviewing some firms for this week and next that I'm actually going to try to structure in at risk structure for them because it's a case that lends itself to an early Motion to Dismiss and if we can get that right we can get out of the case obviously in six months to a year as opposed to litigating this thing for three to five years and I think that is worth the return for a heavy discount with a premium. So we're going to see if we can work something like that.

But I have found that it's really kind of firms are just very resistant to it. We're sitting here in Manhattan and a lot of the big firms in Manhattan the traditional white shoe firms are resistant to this but I think even when you kind of peel it away you can start to really find out what's bothering them.

Jan. 18. 2006 / 1:00PM, **ACC - Managing Outside Counsel Getting Off on the Right Foot—And Staying in Step

The other thing that - and I'll just (inaudible) out. I know we're running late is I haven't done this yet but what a lot of firms have told me. You know if they do it for you we have to do it for all of our clients and what I'm tempted to ask one of these firms one day is to give me a most favored nations promise which is essentially the arrangement that you're giving me is that you're not giving any other client a more favored arrangement and just sort of a way - I mean we can't audit it. We can't break their privilege but I think it's sort of a way. If you met with resistance and you really, really need that firm then you could put it right in the retainer letter and kind of hold them accountable.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

I think you're right Stu. I mean the key is alignment and what we keep telling the law firms is this is a partnering relationship and if you perform under this you are going to make more money and our objective is success. Your objective is revenue. We want you to start focusing on profitability instead of revenue maximization. We want to free up your inventory of hours to sell it to somebody else. We'll pay you a higher respective hourly rate for a fewer number of hours assuming that you're successful and you're absolutely right. A lot of the resistance comes from firms and opening the flood gates and oh this is too hard or my accounting system won't accommodate it and our very simple answer to that is well then you're free to go work for somebody else but if you want to work for instance technologies this is the only way that we will engage firm.

Now I'm actually more interested in the resistance internally than externally because firm after firm you go to I mean you say are you willing to do alternative fees and they say sure but our clients at the end of the day revert back to hourly. I think the problem is more on our side of the table and it's that we have to insist on it and we have to run our department in such a way that we simply don't let our attorney take the easy way out which is the hourly rate. Spend a little bit more intellectual brain power and try and come up with something that aligns the interests of the firm with the interests of the company at least in our shop here none of my lawyers can engage a new firm without my approval because we want to stay within our network of firms and none of my attorneys can engage - open a new matter on an engagement basis other than an alternative fee basis without my approval and that sound draconian and that's sounds like I'm a control freak but have you ever noticed that all the other people are control freaks?

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Thank you. I think we've covered most of the questions we had on fees just in our general discussion and there's just one thing here and if people could address this maybe pretty quickly. Probably Deanna and one of you from American Express given that Jeff uses primarily alternative fees. How do you handle a request from outside counsel for rate increases if you are using hourly fees? How do you respond to those requests or when they just simply do it and don't ask about it.

Deanne Tully - *Tier Technologies, Inc. - VP & General Counsel*

I don't really got a lot of requests. I get a lot of notices but it's that the hourly rates are going up. I guess from our perspective, the hourly rate is really just one factor that we look at for outside counsel and I hate to say this to outside counsel - I don't say this to outside counsel. I even hate to say it to other in-house counsels so that it might get repeated. But I really don't even look at an hourly rate as one of the top two or three factors. I look at, are you experienced? Do you give me good service and get me good results? Do you get me - do you help me succeed, as I think Jeff mentioned. And those are the people where the hourly rate even if it goes up \$10 or something like that an hour or 25 isn't really going to break our relationship if we have a good relationship and a long, successful track record, the hourly rate is not something that looms all that large, even when we are exclusively an hourly rate payer.

So I think that it is something we look at and we do compare it to the going rate in similar locations. And if it's way out of line, I call them up and said, this is just so far out of line as to what we think we have. Despite our successful relationship, I'd like you

Jan. 18. 2006 / 1:00PM, **ACC - Managing Outside Counsel Getting Off on the Right Foot—And Staying in Step

to consider giving us an alternative and not - or getting us - staying with your old rates for at least another year or at least until this matter is done. And I've found that I've met with moderate success in that regard.

Stuart Alderoty - *American Express - Chief Litigation Counsel*

Rob, this is Stu.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Yes Stu, thanks.

Stuart Alderoty - *American Express - Chief Litigation Counsel*

Just real quick. What we do - probably three things. Put fixed fees or alternative fee aside because I think that, as Jeff said, alternative fees are meant to take away the relevance of the hourly rate. But with hourly rate cases, when that case is first opened in the system, the outside law firm has to enter all of the timekeepers that they believe are going to work on the case and their rates. And if they bill-- and all of our bills are electronic - if a new timekeeper enters the matter or a recorded timekeeper with a new rate, there's a heart stop in the system. The system will flag the new timekeeper and flag the new rate and will automatically reject it. So there's a heart stop in the system where we can call up and say hey, who's this new attorney or why did the rate go up, which I think is-- again it's a reality check for the outside counsel to let them know that we're watching.

The other piece to this, though, is no matter how aggressive you can get on any of these things, ultimately firms believe - Mark and I were there and I'm sure a lot of people on the phone were there for a very long time-- firms believe that there is sort of a sense of entitlement, that each year they get to raise their rates because a lawyer has one more year of seniority or moves from associate to counsel position or counsel to partner positions. So we've thought a lot about that, and we actually are in the process of implementing some discipline around this rate increase process and unfortunately, I have to leave it as a bit of a teaser because we're actually applying for a patent on what we think is our modest solution to this problem. A solution is probably an overstatement because we're not going to floor the rate increase sense of entitlement.

But the process that we're trying to implement is to make to various firms that this is not a sense of entitlement and they're going to have to demonstrate to us why they believe the rate increase makes sense and in my view, a rate increase only makes sense if that attorney is going to be more efficient and smarter about the case. So unfortunately, I have to leave you with a little bit of a teaser on that one and more to come. Maybe after we get our application filed in the next month or so, on the next call we can share it.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Great. Coming attractions. Actually, Jeff hasn't FMC applied for a patent on your process that you described as well?

Jeff Carr - *FMC Technologies, Inc. - VP, General Counsel & Secretary*

Yes. The ACES through litigation process have a pending business process patent. Happy to license it to anybody who'd like to have it.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Great well-

Jan. 18. 2006 / 1:00PM, **ACC - Managing Outside Counsel Getting Off on the Right Foot—And Staying in Step

Jeff Carr - FMC Technologies, Inc. - VP, General Counsel & Secretary

Also available through Serengeti, I should mention.

Rob Thomas - Serengeti Law - VP, Strategic Development

Terrific. Well unless anyone has anything else to say about what we've covered. Let's move on to some questions here. We've got 5 or 10 minutes or so. Karen has sent me a note saying we can go over a little bit if we need to. Let me pose some of the questions that Karen has sent me.

Someone has asked a question saying that it seems like most of the discussion has been focused on litigation. They wonder whether the process of getting a budget and using a budget and managing through that budget is different for transactional work or various contract matters? Deanne, I know that you mentioned that you have some transactional work and done some things there. Perhaps you could start us off here as well talking about whether there's any difference in the way that you handle transactional or contract work from litigation.

Deanne Tully - Tier Technologies, Inc. - VP & General Counsel

I think the process is fairly similar. I think for transactional work it's actually easier just to come up with a meaningful budget because you have a little bit more control over the process and for example we just implemented a rights plan and from the very start we worked with our outside counsel and we said this is a finite task. Give us a budget and as we went through it we were able to I think realize substantial savings by saying you seem to have a lot of people working on this. Six or seven attorneys. If you think you need that many attorneys we are amenable to that but we're not going to pay for a bunch of conferences between you.

We really think this might be handled by fewer attorneys and we actually crafted it down to a budget that in effect was a flat fee because we pretty much said there's - unless something remarkably different happens this ought to be what it comes in at or less and it did. It came in slightly less and it did force them to focus in more and I think align themselves with our interest which is - sometimes the lawyers they want to come up with the best possible rights plans in the world and as internal people - as business people you're saying I just want one that's good enough. It doesn't have to be gold plated and so we were able to sort of align those expectations and that's actually true. We've had similar success with acquisitions and I think you can predict to some degree the due diligence and the steps you're going to go through. The attorneys who are going to work on it. Make sure you're being efficient. I think probably the budgets that have been the most accurate for us have been on non-litigation matters for that reason.

Rob Thomas - Serengeti Law - VP, Strategic Development

American Express. I think you guys are primarily doing litigation so maybe we should ask Jeff anything that's unique to the way you handle transactions? I know you described you handled it with a report card instead of the way that you handle litigation. Is there anything else?

Jeff Carr - FMC Technologies, Inc. - VP, General Counsel & Secretary

No, I agree with Deanne. I mean a project to project whether it's a patent application, a transaction, an annual retainer or securities advice or a piece of litigation I think all of those things can and should be budgeted for.

Jan. 18. 2006 / 1:00PM, **ACC - Managing Outside Counsel Getting Off on the Right Foot—And Staying in Step

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Here's a really unique situation. How do panel members handle obvious over billing situations? We have an example here where something like a formal agreement should have taken an hour and they billed 10 for it or you get an invoice the night before closing with an indication that the invoice isn't signed the opinion won't be delivered at closing. How do panel members handle that and actually this person asked have you ever reported egregious conduct to the Bar Association?

Deanne Tully - *Tier Technologies, Inc. - VP & General Counsel*

I've not reported anything to the Bar Association but I have had someone once outside counsel threaten to withhold an audit letter on a similar basis and I was fairly blunt in sharing with him I thought that it was not - that they really ought to query whether that was something that was appropriate under the circumstances and they backed down from that. On egregious cross billing. The best way in my experience to stop over billing particularly with a new firm or a new partner or an attorney in that firm take a very careful look at the invoice as they come in and call them on it right away. If the first time they bill you and you've looked at something - I do this quite frequently. I just say you know 30 hours is just too much for this motion or this form or this contract. I'm just hard pressed. This person wasn't qualified or wasn't supervised and you do that two or three times and you find that the invoices that come in start to be a little bit more finely honed.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Anything to add from you the panel members or haven't you had - hopefully haven't had such experiences?

Mark LoSacco - *American Express - Head Litigation Counsel*

Go ahead.

Stuart Alderoty - *American Express - Chief Litigation Counsel*

I mean well to. I'm (inaudible) to reporting to the ethics committee but I think somebody was literally holding up the time of the essence opinion letter because of the outstanding bill that's quarters on an ethics violation. And then secondly I think as Mark and I described this budgeting - the budget analysis. A piece of it is when we go to an outside counsel and there is no reasonable explanation as to why the budget is wrong. There is no material change of circumstances. It is simply that they were just inefficient. We then basically negotiate - we try to negotiate a very aggressive discount for the balance of the year and basically ask them to share some of their fame with us. If they're online to do that in the most extreme circumstances will substitute out the case. That's the exception rather than the rule, but I could tell you certainly that firm's not going to get the next case but I think that's the best way to perform. Either fire them or don't send them any more work.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

We had a question about the use of systems both American Express and FMC refer to electronic billing and systems automatically produce reports and so on related to spending versus budget. We had a question. Do you also require firms to submit regular status updates, documents, tracking of deadlines and so on through that system?

Jeff Carr - *FMC Technologies, Inc. - VP, General Counsel & Secretary*

We do and in fact we have stopped the firm practice of doing litigation status reports. We only accept reports through Serengeti. Invoices won't be approved unless status reports are current. It's important to note though what we look for. I don't want to know what people did on their summer vacation. I don't want to know the ins and outs and turns and twists in every deposition.

Jan. 18. 2006 / 1:00PM, **ACC - Managing Outside Counsel Getting Off on the Right Foot—And Staying in Step

I want people to tell me things that my management needs to know. Where I need to know the GC of the company and then my individual lawyers may work out with their law firms that they need more information that's appropriate that's fine and they might pose something to Serengeti which might be a more fulsome report but you only have to look at one of the reports as it comes out. A matter status report to see firms that get it and firms that don't get it. It comes through pretty clearly.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Let's finish with maybe one last question. Someone has asked situations where you're getting budgets done on an annual basis only. Do you also get some sort of life of matter budget so that you can get a sense of what the entire overall cost will be and do the firms charge you for putting together budgets when you're asking for budgets on every assignment?

Mark LoSacco - *American Express - Head Litigation Counsel*

This is Mark. We do edit for a life of matter budget but it's not something frankly that we utilize to any great extent. Our focus is really on the yearly budget to help with our reporting up that we need to do. Rolling up for the GC but also because that to us is the best measure of the ability to really manage the outside counsel. What they're going on a case with the yearly budget. The life of matter budget we find is usually much more of a real shot in the dark and so while on orders of magnitude it might be helpful. It really isn't something that we focus on that we can get it.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

We've just got one other good question and let me just ask that quickly and see if we can get a quick response before we wrap up. We've talked a lot about the fees. What reproaches do you have to minimizing outside counsel disbursements. Things like travel time, copies, hotels, et cetera. Is there anything special that you do to monitor those expenses and track them and control them?

Deanne Tully - *Tier Technologies, Inc. - VP & General Counsel*

Well each department no matter what size should have guidelines for outside counsel for travel and things of that nature so you're not paying for first class travel or anything of that nature and so we do have guidelines and to the extent that they can collect with any retainer letter provision we insist that our guidelines prevail and so that helps. That addresses a lot of the disbursement issues. I also require receipts for any disbursement over a certain amount. It depends on the matter and then I also will require that any computerized research over a certain amount that I kind of vary from case to case be pre-approved by me because I'm tired of getting \$1,600 West Law research charges on these types of things. So I think you can do some things that are fairly simple and straightforward no matter what you're size is to control disbursements.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Those of you who have electronic billing systems are you using those to somehow catch expenses that are violating the billing guidelines.

Jeff Carr - *FMC Technologies, Inc. - VP, General Counsel & Secretary*

Yes, we do through Serengeti we have certain flags that are set up for things that are not permitted under our retainer agreement whether it be the amount per page on a copy or legal research - electronic legal research. Things of that nature. We'll get a flag and then our first line billing manager will make a decision whether or not to reduce the invoice by that much electronically or to make an exception under certain circumstances and also our first line billing manager does look at certain disbursements to

Jan. 18. 2006 / 1:00PM, **ACC - Managing Outside Counsel Getting Off on the Right Foot—And Staying in Step

see that they make sense and again more in orders of magnitude than anything else rather than getting it line by line because of the sheer volume of invoices that we get.

Rob Thomas - *Serengeti Law - VP, Strategic Development*

Terrific. Well we've gone about five minutes over our time so I think we'll conclude our discussion there. Thank you very much to each of the panel members for an excellent discussion with a very wide range of perspectives. That's what we'd hoped for in having this panel come together. Thank you again to Karen Palmer at the Association of Corporate Counsel for hosting today's session. If you found this program useful you might want to keep an eye open because ACC has plans to have additional programs on related topics. Thank you for participating in today's program and good bye.

Deanne Tully - *Tier Technologies, Inc. - VP & General Counsel*

Thanks Rob.

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