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Bowen Tucker: An Experienced Inhouse Trial Lawyer Facilitates The Selection Of Law Firms — Online

*The editor interviews Bowen Tucker,
Vice President, eLawForum, and consultant to FMC Corporation.*

Editor: *Bowen, tell us about your background?*

Tucker: After graduating from Brown University and the University of Michigan Law School, I joined a law firm in Providence, Rhode Island to gain experience as a trial lawyer. Several years later, I joined Caterpillar's law department in Peoria, Illinois, where I enabled them to lower outside legal costs by bringing all of the Illinois Workers' Compensation claims and litigation inside. Later, I organized its litigation program and internal reporting system. In addition, I had the opportunity to handle a wide variety of projects for them, including major contracts, real estate transactions, environmental matters as well as some legislative work. After many exciting years, I joined FMC where I had the opportunity to establish a litigation management program, that included significant product liability matters. In addition to a variety of other matters, I was business counsel for FMC's construction equipment group. Through the seventies and the eighties there was rapid growth in litigation, and particularly product litigation. I initiated efforts to develop a new approach to product safety labeling that is now the national standard and helped coordinate national efforts to restore balance and fairness to tort litigation. As litigation exploded in volume and severity, I focused on controlling FMC's rising litigation costs. Currently, I serve as a Vice President of eLawForum and continue to serve as a litigation consultant for FMC.

Editor: *What is eLawForum?*

Tucker: eLawForum is an online method for conducting RFP's that offers corporate counsel the ability to select from a much broader universe of law firms than would otherwise be feasible. It also provides corporate counsel with a matrix that enables them to quickly construct a state-of-the-art RFP.

Editor: *What steps did you take to control FMC's litigation costs?*

Tucker: We had to create ways to control and to reduce rising litigation costs. As early as 1975 I recognized the need to track cases and their costs, and, with the aid of a consultant, I designed and implemented a computer-based case management system. This enabled me to prepare reports for senior management to understand and respond to litigation throughout a complex and diversified corporation. In 1980, we added complete financial information that established the ability to track all outside legal expenses. By the time we faced the litigation wave of the 80's, an effective case management system was in place.

Editor: *How large is FMC's inhouse litigation staff?*

Tucker: The litigation group varied in size over time. At the pinnacle of our effort, in about 1994, to consolidate and maximize our litigation expertise, our team consisted of two attorneys, two legal assistants and myself. As we succeeded in cutting our litigation load by more than 50%, we were able to reduce our team to an administrative assistant, a litigation manager and me. That team managed all FMC litigation worldwide. In the 80's our litigation docket peaked at several hundred cases, but the number has now dwindled to a few dozen cases. We directed the strategy of all cases with an emphasis on early case resolution, including motions to be filed, depositions to be taken, trial strategy and resources to be allocated to individual cases.

Editor: *It's amazing that you are able to do this with such a small staff. I also understand that you have drastically reduced the number of your principal outside firms?*

Tucker: We now have only four "coordinating trial counsel." Let me describe how we got there. After the spending spree of the 80's when few corporations focused on outside legal expense, I realized that costs had risen dramatically and were in danger of getting totally out of control. At the time we had as many as 25 or 30 firms across the country reporting directly to our team on

the cases assigned to them. We needed to introduce a discipline upon outside counsel that would enable them to participate with us in taking responsibility for all litigation costs, including their own. Thus, in 1990, I commenced this effort by requiring all of our outside counsel to develop a budget for each case expected to cost more than \$25,000 during the year. Budgets were broken into a few basic elements that would make it easy for them to report and easy for us to review in the billing — investigation, pleadings, motions, offensive discovery, defensive discovery, and trial. From our own data, we already knew what these costs should be, but it served to educate the firms about litigation costs. Then, in 1994, we embarked upon an aggressive program to share the risk of costs with our law firms. I established seven geographic regions that corresponded to the dispersion of our case load and selected three of our law firms within each region. I sent a letter to each of those twenty-one law firms asking them to provide me with their most creative proposals for alternative billing that would best help us cope with litigation costs over the next three years. I provided some suggestions of my own, but I told them that this was illustrative only and should not limit their efforts to be creative. After reviewing their responses, I selected one firm in each region.

The firms proposed various approaches to billing; few were creative. I decided that from our standpoint the most attractive method to control costs and to meet a corporate budget was to establish a fixed dollar cap for all litigation (excluding such extraordinary lawsuits as criminal and antitrust which we did not have at the time) within each region. The only exception to the cap was for new lawsuits for which the annual expense exceeded 35% of the cap or \$200K whichever was smaller. All of the firms selected agreed, on an annual basis. Each year I established a new cap to reflect my projections and budget for the year. I emphasized to the firms that we would continue to exercise management control of the cases.

Editor: *Does the cap apply to local firms in the region covered by one of these seven firms? How are these local counsel selected?*

Tucker: Yes. The cap assigned to the regional firm covers all costs including local counsel and expert witnesses. The regional firm could suggest local counsel, but I would not defer to them if we had a preference based upon our experience.

Editor: *Was this program a success and have you continued the program?*

Tucker: The effort was a total success. Costs were reduced below budget each year, and the law firms continued their outstanding performance. In a couple of cases I made a small year-end adjustment with the firm due to extraordinary events that caused the cap to be exceeded. The adjustment did not match the cost overrun, and there was no contractual obligation to make the adjustment; nonetheless, the firms were pleased and stayed with the program.

This year, due to the dramatic drop in the number of cases, we modified the program. There is no cap, but costs for the first three months are fixed and we provide incentive bonuses for early resolution and cost reduction.

Editor: *Tell us about your current role at eLawForum.*

Tucker: I am a Vice President of eLawForum. My responsibilities include working with companies and law firms that want to participate in eLawForum. I will help companies prepare online RFP's that will reflect their needs and assist them generally in making the most effective use of eLawForum. The challenge for most companies is to gain control of outside legal expense, and these expenses are usually driven by litigation.

Editor: *So you will now be sharing the vast experience you gained at FMC with those using eLawForum?*

Tucker: Yes. I can be helpful because I established the RFP process at FMC and am familiar with the bases that should be covered in an online RFP. I am available to share with users of eLawForum my experience and knowledge of the whole range of alternative billing arrangements and other aspects of the law firm selection process. There are many ways to share cost responsibility with law firms. Annual caps are only one of them. Incentives based upon result, cost control, trial success, fixed fee, contingent fees and combinations of these must be thoughtfully selected for specific situations. I have used most of them at one time or another.

Editor: *Are there particular types of cases where eLawForum is particularly useful; for example, commodity type litigation?*

Tucker: No. The competitive bidding process is a useful device to reduce costs whenever outside counsel is retained. However, there is a general misunderstanding about what commodity litigation means. The phrase word is often used, but it means different things to different people; it is like using the word "heart attack" to describe a coronary thrombosis. To some people it simply

means routine cases, automobile accident cases of low exposure or a typical slip and fall case. Used appropriately it simply means litigation with common elements — without regard to dollar exposure.

It is a fallacy to think that eLawForum and a bidding process should only be used for commodity litigation. The great benefit it offers is to expand the total universe of firms that bid on any case. This is true whether it is a relatively small case or a large challenging case with significant costs. Occasionally, we lose sight of the fact that as the number of lawyers in the U.S. approaches one million, there are many outstanding trial lawyers across the country, and not all are in large firms with familiar names. An individual in a corporation managing litigation cannot be aware of most of them and it is simply not possible to go out and interview any significant number. eLawForum gives you the opportunity to direct your RFP to a large number of lawyers like trolling for a record catch in the sea. Among those firms there will be firms with an outstanding track record handling your type of case. You may find firms that are willing to do the work on an attractive fee basis because they want to establish a relationship with your company or because they benefit from lower cost structure by reason of technology or geography.

I would never have been aware of the willingness of FMC's regional firms to accept a capped cost arrangement if I had not gone through the time-consuming process I described to you. eLawForum enables you to get reactions from law firms about their willingness to accept innovative fee arrangements in a much faster and easier way.

I can help corporate counsel design RFP's that will solicit responses from firms about innovative fee arrangements that will achieve significant cost reductions as I achieved for FMC. I believe that one of the reasons that more legal departments are not using innovative fee structures is a reluctance to discuss this subject with their existing law firms. An online RFP is an ideal way to break down the psychological barriers to exploring all the alternatives.

Editor: *Many corporate counsel select outside counsel on the basis of referrals from colleagues. Does eLawForum offer advantages over this and other traditional ways of selecting counsel?*

Tucker: Referrals provide you with a relatively small universe from which to choose. Even if your friend likes a particular lawyer, that is no guarantee the chemistry will be right for you. Finding the right firms was so important to me that I visited at least three cities each year to interview law firms in those cities. I wanted to become familiar with who might be available if someday I needed to retain a lawyer in that city. That is a very expensive process and one that takes a lot of time. Also, through this process you develop such a small sample that it is hard to get an aggressive bidding process going. Using traditional selection methods you have a very limited pool from which you can make a choice and you may still not have found the firm that will give you the greatest cost advantage.

Editor: *Are the best firms willing to engage in an online billing process?*

Tucker: A large number of the best-known quality firms have registered with eLawForum. We also have smaller and less well-known firms. Some of the finest trial counsel in the country are in smaller firms. Firms that fail to register with us will lose opportunities for business — not only from new clients but also from existing clients that see us as more efficient way of selecting counsel. If you issue an RFP on eLawForum, you can select the firms you wish to bid from among the firms registered with us. If you don't see a firm on our list you can suggest to them that they register. If they don't, they have missed a business opportunity. I don't buy the idea that if you want great talent, you have only a limited range of high-priced firms from which to choose. eLawForum is changing all of that.

Editor: *Given the vast experience you have had in managing litigation and selecting law firms to handle it, what is the fundamental advantage of using a tool like eLawForum?*

Tucker: I have mentioned a number of specific advantages. However, the fundamental point is that eLawForum gives corporate counsel a perspective on the legal market that cannot be provided in any other way. I know from experience that if you look long enough and hard enough, you will find firms that will do high quality work at a reasonable cost. This is particularly true in today's highly competitive market. There is no reason to pay the very high costs that many companies are today paying for talent. What eLawForum does is a convenient and time saving way to find quality firms that are willing to accept innovative arrangements that will help companies to dramatically cut their legal expenses.