

The Financial Crisis: How Can Corporate Legal Departments and Law Firms Manage The Aftermath?

By Mike Dolan and John Thickett

The business landscape has changed dramatically in the last 90 days. With the financial crisis in full swing, the number of lawsuits is steadily increasing. Leading up to the financial meltdown, Navigant Consulting reported a surge in subprime case filings in the first quarter of 2008, noting that the number of filings is close to exceeding the savings-and-loan litigation from the early 1990s.

As the crisis on Wall Street unfolds, midsize law firms are expected to pick up the pieces with the surge in litigation. Total legal expenses can average 1.34 percent of total revenues for major corporations, according to Fulbright & Jaworski's second annual litigation trends survey. All of that legal work means midsize firms, in addition to the Am Law 100, are in for a boon of business.

The face of the legal industry is changing. Key events are shifting the focus to outsourcing document review to decrease costs and increase efficiencies. With conflicts of interest among the top 100 law firms that have traditionally represented the bulk of financial institutions and the 2006 amendments to the Federal Rules of Civil Procedure, mid-market firms stand to benefit with new litigation work.

Such firms likely will need a credible resource for time- and resource-draining document review. Given the American Bar Association's recent Ethics Opinion 08-451, offshore document review has become a real option for firms looking to take advantage of the overflow.

With the implosion of numerous players in the financial sector, many experts expect there to be an explosive growth in litigation.

*CEO Mike Dolan and CFO/CMO John Thickett founded Austin, Texas-based **Tusker Group** in 2002 to specialize exclusively in advanced legal document review options to in-house and outside legal counsel. Harvard Business School graduates, they have helped multinational businesses drive profits by integrating operations in low-cost countries like China and Mexico. Tusker integrates its India- and U.S.-based operations with its clients' legal teams.*

"The banking industry's implosion means the banks with a piece of the \$43 trillion market in these unregulated instruments [credit swaps] are likely to sue to recoup their losses," the American Lawyer reported Oct. 3. "And who are they going to sue? Other banks."

As the crisis on Wall Street unfolds, midsize law firms are expected to pick up the pieces with the surge in litigation.

Key issues in this tsunami of litigation will be which law firms will be able to represent the banks in the litigation and how the firms will be able to manage the document review.

As many clients and firms have experienced, the explosion of electronically stored information and the amendments to the Federal Rules of Civil Procedure have significantly contributed to the surging costs of litigation. The new guidelines expanded the scope of discoverable documents to include all forms of electronic data, including e-mails, computer files, text messages, instant messages and all the electronic media people use to communicate.

As a result, the collection and retention of more than 100 million pages is not unusual in document-intensive cases such as intellectual property suits or those spanning the finance, medical, technology, or oil and gas sector.

For document-intensive industries, litigation often is the largest portion of overall legal expenses, and document review encompasses the lion's share of litigation expenses. Accounting firm KPMG estimates that for Fortune 1000 companies, the review of discoverable documents encompasses 58 percent to 90 percent of total litigation expenses.

The largest firms, with their sizeable document review capabilities, likely will be found on the sidelines because of numerous conflicts of interest stemming from who they

represented before and after the implosion. This means that “midsize” law firms will be called upon to represent the remaining financial sector business plaintiffs.

These law firms generally do not have the depth in litigation support to manage the proliferation of documents brought forth during e-discovery. A ready solution is for these firms to outsource document review to companies with a proven track record in managing document-intensive litigation.

Another key event positively affecting document review was the recent American Bar Association-issued Ethics Opinion 08-451. Initially, the waiver of attorney-client-privilege and the unauthorized practice of law were the leading objections that U.S. law firms raised against offshore document review.

Favorable opinions by legal ethics committees in New York, California and Florida have clarified the role of offshore review teams and addressed these objections. The ABA's ethics opinion confirms that offshore document review is proving to be a catalyst in decreasing costs for clients and enabling smaller law firms to work on larger, labor-intensive cases at more favorable rates.

With the increasing costs of document-intensive litigation, many companies are looking to minimize expensive legal fees. International document review runs about \$25 per hour. This is far less than the average domestic rate for associates at around \$200 to \$300 per hour. Currently, it is estimated that \$80 million of legal work is sent offshore annually and is slated to reach \$4 billion in India by 2015, according to Forrester Research.

Reducing Cost

Leaders are reducing outside counsel's billings by unbundling document review. Similar to moving corporate IT to IBM in the 1980s, EDS in the 1990s and Infosys in the 2000s, unbundling is gaining momentum in the legal industry.

There are three approaches to the unbundling of document review:

- **An in-house document review team:** Several financial companies are successfully using this approach to control costs. Advantages include good productivity and quality due to a stable workforce and a common, electronic repository that retains knowledge. The approach requires additional time and management bandwidth to implement and control. For most companies, there are utilization and flexibility challenges;
- **Contract attorneys:** Other companies reduce costs by supplementing outside counsel with contractor attorneys. However, high turnover rates can pose significant challenges, and the time needed for hired guns to catch up to speed can affect the pace and consistency of the review; and
- **Specialized firms:** Dedicated document review firms often implement continuous quality-improvement processes for maximizing each project. Staff usually has broad case exposure and experience with multiple software platforms that allow them to identify and use the best tool for each review. Several specialized firms, including Tusker Group, leverage offshore document review teams at a far less expensive rate.

Recent Success

Recently, the lawyers of DiNovo Price Ellwanger LLP were tapped by Bluecurrent, an Austin-based technology company, to assist with an intellectual property trade secret case against Dell Computer Co. Austin-based DiNovo Price is a litigation firm that specializes in complex litigation for IP and commercial disputes.

A ready solution for midsize firms with limited resources is to outsource document review to companies with a proven track record in managing document-intensive litigation.

A common problem in “David vs. Goliath” cases is the tremendous amount of electronically stored information and the exorbitant expenses incurred by the parties. These expenses may affect David much more than they affect Goliath. With terabytes of data involved, this case was no exception, and Bluecurrent's ability to bear the potentially significant expenses associated with the suit was a major concern from the start.

Facing more than 40 attorneys at an Am Law 50 firm and millions of pages of resulting electronically stored data, DiNovo Price immediately began looking to leverage technology and evaluate alternative document review options.

After DiNovo Price and Bluecurrent evaluated the options, they agreed that combining a small team of domestic attorneys with a larger team of offshore document reviewers at \$25 per hour had the potential to be a sound alternative for leveraging the budget. As with many law

firms, DiNovo Price was hesitant to jump headfirst into this option without carefully evaluating the ethical, confidentiality, security and quality concerns.

Using offshore document review allowed Bluecurrent to litigate against one of the world's largest companies for 18 months until a satisfactory resolution could be reached. When the case was settled, it was estimated that Bluecurrent spent one-fifth to one-tenth of what it would have cost to use traditional practices and use a team consisting entirely of domestic attorneys for the review.

Trends in Offshore Document Review

While high-level legal work will most likely remain in the U.S., companies looking to keep litigation costs in check and mid-market firms seeking to take on the spillover as a result of the financial crisis litigation are evaluating offshoring as potential opportunity.

Recently, Scott Rickman, the associate general counsel of San Francisco-based Del Monte Foods, told *The Recorder*, a California law magazine, "It doesn't make sense to pay \$150 or \$250 dollars an hour at some of the larger firms to do the document review — it just seems like overkill."

Mid-market firms seeking to take on the spillover as a result of the financial crisis litigation are evaluating offshoring as potential opportunity.

Technology firms that already rely on a global workforce, such as Microsoft and Cisco Systems, are wondering why they need to pay high hourly rates for lower-level legal work that can be effectively sent to India for \$25 an hour.

India is proving to be a country that many firms are turning to for offshore document review. Perfectly positioned, India is the second largest English-speaking country, with more than 70,000 law students graduating annually. It offers a highly skilled workforce at a fraction of the cost.

Furthermore, India's legal system is based on English common law, and therefore legal analysis is consistent and transparent.

Another attractive consideration is the time differential, which allows for around-the-clock document review.

A larger concern had been for the security of the information once it was sent to the review team. Today, international review firms do not store the data onsite. Instead, reviewers work directly on their clients' servers through a secure Internet connection.

In many cases, reviewers work on computers with inoperable USB ports, disabled CD burners, no printers and restricted Internet access. It is also a common practice to prohibit cameras or memory devices, such as flash drives, to enter or leave a review center.

Outsourcing offshore document review will increase as the numerous lawsuits stemming from the financial crisis put extreme demands on law firms. With the top 100 AmLaw firms having to recuse themselves from pending litigation because of conflicts of interest, smaller firms absorbing the extra case load will naturally turn to offshore document review to decrease costs and increase efficiencies.

THOMSON

 WEST

WEST DOCUMENT RETRIEVAL

West Document Retrieval provides on-demand research and document retrieval services nationwide from all federal, state and local courts and government agencies as well as from legislatures, libraries, online sources and other public domain documents.

Areas of document research and retrieval include:

- Federal and State Litigation
- Bankruptcy Litigation
- Corporate Records
- UCC / Liens and Judgments
- Patent, Trademark and Copyright Office
- Federal and State Agencies
- Nonprofit Organizations
- And much more

For a complete listing, e-mail us at:

WDR@thomson.com