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Litigators Improving Efficiencies Through Offshore Document Review

DARIO OLIVAS, MIKE DOLAN AND JOHN THICKETT

Attorney client privilege and data security issues can be resolved to allow corporations to save significant sums by having documents reviewed internationally.

There is a proven correlation between a slowing economy and increased litigation. Although the Fed has not said the “R” word, a recent study by Navigant Consulting noted that 170 sub-prime federal lawsuits were filed in the first quarter of 2008, the same as in the last six months of 2007. Across most industries, as the economy slows and more cases are filed, companies can expect greater litigation expenses. As stated in the American Bar Association's recent legal opinion, legal process outsourcing has many benefits and should level the playing field by decreasing costs for clients and enabling smaller law firms to work on labor intensive cases.

The mountains of data that need to be reviewed in case preparation and higher attorney billing rates, are recognized as the main reasons for increased litigation expenses. The *American Lawyer* reports that profits per partner at the 100 largest law firms increased more than 50 percent in the last five years — to \$1.3 million from \$862,000.

The December 2006 amendments to the Federal Rules of Civil

Dario Olivas, vice president and general counsel of Tusker Group, is actively involved in overseeing advanced document review operations. Mike Dolan, Tusker Group's chief executive officer, and CFO/CMO John Thickett, the company's chief financial officer/chief marketing office, founded Tusker Group to specialize exclusively in advanced legal document review options to in-house and outside legal counsel.

Procedure have significantly contributed to the skyrocketing costs of litigation. The new guidelines opened the corpus of discoverable documents to include all forms of electronic communication, including e-mails, computer files, text messages, instant messages and all of the electronic gadgets people use to communicate. As a result, the collection and retention of more than one hundred million pages is not unusual in document-intensive cases such as those involving intellectual property, finance, medical, technology or oil and gas.

Fulbright and Jaworski's *Second Annual Litigation Trends Survey Findings*, notes that total legal expenses can average 1.34 percent of total revenues for major corporations. For document-intensive industries, litigation is often the largest portion of overall legal expenses and document review encompasses the lion's share of litigation expenses. For Fortune 1000 companies, KPMG estimates that the review of discoverable documents encompasses 58 to 90 percent of total litigation expenses.

Reducing these costs has a meaningful effect on corporations' profit and loss as overall litigation increases. The key to a corporation's success is focusing its law firm on its value-added, high-level legal work, while lowering the total expenses by reducing the costs of reviewing the data effectively.

UNBUNDLED SERVICES TO LOWER COSTS

Leading corporations are attacking outside counsel's total billings by unbundling document review from the menu of offered services. Separating and outsourcing services to the best cost and service providers has been a powerful driver of profitability in other industries — moving corporate IT to IBM in the 1980s, EDS in the 1990s and Infosys in the 2000s, are some of the many examples. Unbundling is gaining momentum in the legal industry. During the keynote speech of this year's New York Legal Tech, Robert Bjornsti, vice president of AXA Equitable Life Insurance Co. suggested that abdicating large scale document review to outside counsel was "like letting the fox guard the hen house."

Three approaches to the unbundling of legal services are rapidly gaining traction. Each has its place, depending on the corporation and type of litigation:

Retain a relatively permanent group of document reviewers in-house

Certain technical-industry companies successfully utilize this approach to curb costs. Good productivity and quality due to a stable workforce can result. In addition, a common electronic repository that retains knowledge on similar documents across different subject matters is another main advantage. This approach requires additional time and management bandwidth to implement and control, and has both utilization and flexibility challenges.

Hire contract attorneys on a matter-by-matter basis

Other companies reduce fixed and hourly costs by replacing outside counsel. However the complex review and advanced document analysis are still completed by outside counsel as contract attorneys often have higher turnover rates and, in some cases, less experience in reviewing from inception to completion. This approach sometimes results in paying to review the same documents multiple times.

Hire a company that specializes in document review

Companies such as DuPont and Trilogy have chosen to combine the best features of both solutions. Dedicated document reviewers often have broad exposure to a wide range of cases and the ability to focus on new software tools that improve efficiency, and can implement continuous quality-improving processes.

THE BROAD SPECTRUM OF DOCUMENT COST REVIEW

- Use your outside law firms' associates or staff attorneys.
- Retain a relatively permanent group of document reviewers in-house.
- Hire contract attorneys on a matter-by-matter basis.
- Hire a company specializing in document review.



WHAT DOES DOCUMENT REVIEW REALLY COST?

In recent years, corporations have made a tremendous effort to lower costs by outsourcing non-core tasks. Consistent with the evolution of information technology, manufacturing, accounting and R&D, the value, skill and capabilities of international workers has been proven and accepted by the boards of most major corporations.

For leadership, there is a level of frustration with in-house or retained legal counsel, as many legal departments have been slow to adopt the management and measurement practices that simultaneously reduce costs and increase quality. Often, the reasons are not unlike those raised in the 1970s when the automobile and electronics manufacturing industries started the off-shoring of the production of component parts, or when IT departments were scrambling to make system updates for Y2K. In both cases, and countless examples in between, the results of off-shoring have been positive when the correct people, processes and technology have been in place.

5 QUESTIONS TO ASK GENERAL COUNSEL:

- Do outside counsel itemize document review on their invoices?
- If costs are billed in dollars per hour, how can productivity be measured?
- How can quality be measured?
- Do you review too many documents?
- Are you finding the right “smoking gun” documents?

Legal process outsourcing (“LPO”) industry experts note that more clients now demand an international element in annual contracts to reduce costs; but, white-shoe law firms have been hesitant to engage in or announce the arrangements. Currently it is estimated that \$80 million of legal work is off-shored annually, and the unwillingness to disclose the

work may be an attempt to balance billings and protect a sphere of influence. International document review runs about \$25 per hour. Compared to an average domestic rate for their associates of \$200 to \$300 per hour, it is easy to see why many firms are reluctant to let this work go.

INTERNATIONALIZATION OF LEGAL WORK

While high level legal work will most likely remain in the U.S., proactive general counsel and forward-thinking law firms are looking at international options. Recent studies predict continued growth in the off-shoring of legal work at many levels; clearly it is poised to become a standard practice in the coming years. Boston-based Forrester Research estimates the current value of legal work shipped overseas at \$80 million; that amount is expected to grow to \$4 billion to India by 2015.

Recently, Scott Rickman, the associate general counsel of San Francisco-based Del Monte Foods told *The Recorder*, a California law magazine, that “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.” Technology firms which already rely on a global work force, such as Microsoft and Cisco Systems, are wondering why they need to pay high hourly rates for “grunt work” that can be effectively sent to India for \$25 an hour.

WHAT TO CONSIDER WHEN EVALUATING INTERNATIONAL DOCUMENT REVIEW?

Initially, the waiver of attorney client privilege and the unauthorized practice of law were the leading objections that U.S. law firms raised against off-shore document review. Recent favorable opinions by legal ethics committees such as the American Bar Association (ABA), New York (New York City), California (Los Angeles and San Diego Counties), and Florida have clarified the role of off-shore review teams and have addressed these objections.

A larger concern had been for the security of the information once it was sent to the review team. Today, international review firms often 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 no internet access. Finally, it is a common practice to prohibit cameras or memory devices, like flash drives, to enter or leave a review center.

As in any successful business unit in a competitive field, success factors often go beyond logistical or industry-wide issues. Certainly true for off-shore document review, is the fact that the capabilities of the people, process and technology appear to make the greatest difference in results. When these three items are correctly balanced, world-class results are achieved.

5 QUESTIONS TO ASK YOUR LPO

- How are review teams integrated with inside and outside counsel?
- What metrics are used to manage quality and productivity?
- How is technology used to improve quality and reduce costs?
- Can references confirm that document review by India-based attorneys was instrumental to the case team?
- Do the processes in place assure security compliance with ISO 27000?

PEOPLE

Like other industries, a best practice in document review is the establishment of a team to work a project from start to finish. For U.S. firms, the turnover of reviewers is a significant problem as associates are multi-tasking for several clients. Based on conversations with associate attorneys over the years and the several blogs dedicated to document review, many simply do not value the work. By contrast, Indian lawyers, who are

also trained in the common-law system, seek these jobs and remain dedicated to the case.

PROCESS

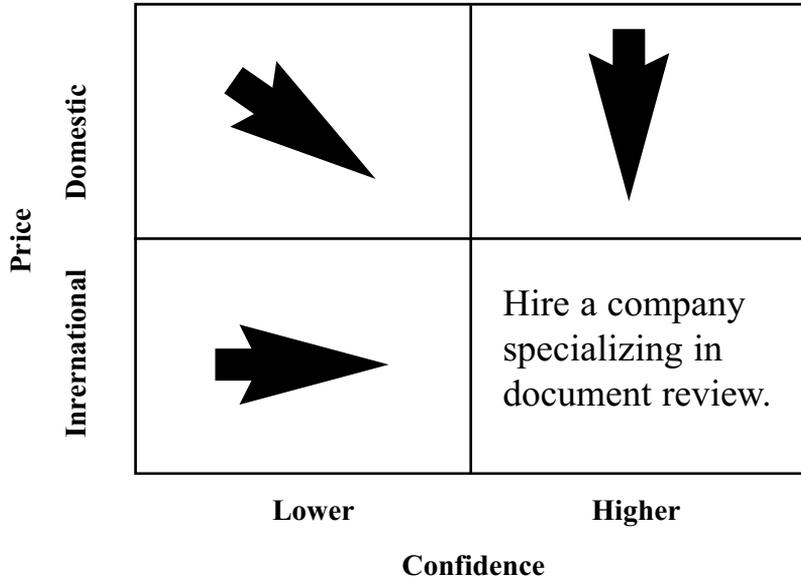
The right process assures better quality and lower costs. Savvy leaders in the field continue to excel by improving the process to maximize the capabilities of new software and staff. More often, reviewers are consulted in the meet-and-confer process to limit the quantity of documents, build the review strategy and conduct pilot tests on sub-sets at the beginning of discovery.

Processes are being adapted to document review from other information-based industries. Best-in-class operations are applying processes like SPC (statistical process control) and six-sigma DMAICS (define, measure, analyze, improve, control, and sustain) to improve productivity and quality. Using these tools, document review organizations are helping clients accurately forecast budget and time requirements, drive down costs, improve quality and increase the confidence of U.S. legal peers.

TECHNOLOGY

Choosing the right tools for the case and using them to capacity is a central part of a successful document review. Leading LPOs are agnostic when choosing software programs. Instead, several tools are evaluated by the type of case, timeline or the desired results. As a result, review teams are often versed in multiple review tools and often consulted when the client is choosing the correct tool for the particular legal matter.

Recent improvements in software capabilities give reviewers the ability to group documents by relevance across multiple custodians and data sets. In some cases, “clustering” of data can double the output of a skilled reviewer and significantly impact the expense and time of a review project.



IT'S ALL ABOUT WINNING THE CASE

All parties involved in litigation realize that the real issue is winning the case — not the price. However, given that review typically comprises the bulk of the costs, outsourcing to a firm that specializes in document review allows a client to gain the efficiencies of focus and experience. Many leading in-house legal departments are migrating to the dedicated firm approach and outsourcing document review. The results have proven to be higher quality work, higher client confidence and significantly lower rates.