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Positioning Legal Counsel By Harnessing Technology

Law360, New York (August 17, 2009) -- There have always been industries that have been considered recession-proof. The legal markets, and especially law firms, have been relatively untouched by volatile markets and recessions — until now.

With tens of thousands of jobs cut and law firms all over the country shutting their doors, the impetus is on firms to change their business structures: less focus on billable hours and greater focus on providing thorough services while also cutting costs. Where and how can this be done?

Considering that the review phase of electronic discovery can run 70 percent of a typical litigation budget, and the fact that an estimated 90 percent of documentation for a given case is deemed irrelevant means that 63 percent of those budgets are wasted.

If we consider the \$23 billion in estimated costs for electronic discovery and legal review in 2008, corporations spent \$14.5 billion unnecessarily last year alone.

Electronic discovery has always been an arduous and lengthy process, but now, as datasets continue to expand, time constraints tighten, and the costs associated with discovery and review become more burdensome, the legal industry as a whole will need to look to new methodologies and practices that will help to improve processes, mitigate risk, and reduce costs.

Now more than ever, especially in light of recent economic downturn, corporations are seeking to identify cost savings and produce greater efficiency in litigation procedures, and they are looking to their legal partners for advice and solutions.

Law firms that can identify cost savings and produce greater efficiency and reliability will be viewed more favorably than their peers, and since technology has created the problem, technology will need to solve the problem.

However, attorneys and the legal industry as a whole, as with any major change in law, have been at a standstill waiting for others to set a reasonableness standard for the use

technology in discovery, but as evidenced by the more than 13,000 attorneys and law firm staff laid off by June 2009, it is clear that firms must act now.

The Rules Have Changed

The importance of e-discovery software was recently given an upgrade with an amendment to Federal Rule of Evidence 502. Permitting the return of inadvertent disclosures of privileged information, Rule 502 protects litigants from accidentally forfeiting the attorney-client privilege.

With the new amendment, however, “depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken “reasonable steps” to prevent inadvertent disclosure.”

This change represents the tipping point for technology directly impacting the standard of reasonableness, as the underlying technology behind the discovery operations could, in effect, have a material impact on whether inadvertently produced documents remain cloaked in privilege.

Highlighting the importance of understanding the technology behind the review process, Rule 502 has revolutionized the manner in which legal teams evaluate discovery information.

Lawyers involved in this process must comprehend the nature and basis of their claims, defenses and settlement options, and fully understand the data review process from a legal as well as technical perspective.

The Investment Gap

Realizing that investments in archiving, preserving and indexing data are viewed as capital expenditures, instead of operating expenses, corporations are now more likely to handle much of the data processing on their own.

By managing their own data, corporations also ensure integration into their enterprise systems so that they are not repeatedly reviewing the same information.

With much of the processing work being undertaken by the enterprise, law firms are slowly being engaged later in the discovery process, specifically during the review, analysis and production stages, and therefore need to understand how to redefine their relations with corporate counsel as expert consultants in a new role.

Determining Firm Culture and Identity

In order to maintain relationships with corporate partners and emphasize their importance in the discovery process, law firms must start by evaluating a firm’s core

client profile where they can determine how their expertise can make the greatest impact.

Moreover, law firms will need to begin to identify and accept their cultures and current relationship to technology, whether Tech-Savvy, Tech-Friendly or Tech-Averse, in order to develop the path most appropriate to improving, or in some instances maintaining business and client relationships.

Focused on solving complex matters with modern e-discovery techniques, Tech-Savvy firms are heavily reliant on technology and are comfortable with its integration throughout their corporate culture.

External-facing corporate blogs, participating in legal technology conferences, and considering the use and benefit of technology in all matters, Tech-Savvy firms understand and embrace technology and practice what they preach.

Creating centralized litigation support functions and providing clients with complete in-house capabilities, Tech-Savvy firms incorporate concept searching as well as advanced culling tools into their representation.

A number of progressive firms have already moved forward beyond instituting technology solutions and centralized staff, and have gone as far as creating electronic discovery practice groups, including Hughes Hubbard & Reed, Kaye Sholer and Hogan & Hartson, to consult, oversee and manage cases requiring discovery.

With a complete understanding of legal technologies and a full spectrum of internal services, these firms can provide advice on the selection of tools based on the needs of the matter and are seen as industry experts, enabling them to be true advocates and partners to their corporate clients.

Tech-friendly firms, falling just right of center in the spectrum, maintain a balanced approach to discovery by combining e-discovery task forces and dedicated e-discovery counsel on whom lawyers in different practice areas can rely.

In addition to task forces and specialized counsel, tech-friendly firms often utilize consultants to provide litigation support expertise combined with their in-house experience and thorough understanding of a variety of technological solutions and their applications.

In general, tech-friendly firms are focused on being seen as go-to experts in the intersection of law and technology and proactively counseling clients to build a new level of cooperation and, most importantly, defense.

At the far end of the spectrum, tech-averse organizations maintain familiarity with industry-standard software, including linear review tools and processing methods, and still continue using paper discovery.

When discovery needs are beyond the scope of their expertise, tech-averse firms generally outsource their technical requirements and provide general oversight.

The managed level of discovery from a technological perspective is limited; therefore these firms must accept case type limitations or work with co-counsel for larger or tech-heavy matters.

Conclusion

With corporations trending toward maintaining data internally until the review process, and with amendments to the Federal Rules of Civil Procedure and Rule 502 putting greater emphasis on the expertise of the review team and e-discovery tools utilized, law firms must come to terms not only with their new role, but also the technology that will be used.

As law firms become more comfortable with leveraging technology to demonstrate competitiveness and distinguish themselves from their peers, there will be an opportunity for increased focus on what they do best: consult and defend.

Investing in technology and understanding its impact on client engagements will prompt the formation of distinct e-discovery and tech-focused strategies, and lead to the ascension of technology experts, familiar with the technical lexicon, into leadership positions within the firm.

Under this paradigm, law firms must honestly evaluate their current expertise to properly define how technology is reflected in their future and see technology as a competitive benefit, rather than as an expense.

As a result, attorneys will understand how to apply varied technologies to a diverse caseload and integrated into the firm's vision and culture.

This will allow its lawyers to highlight their new expertise and capabilities to enhance business development, increase engagement success, and become better partners with their clients through technology.

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