Unbundling . . .

A Multidimensional Solution to the Problems of Runaway Discovery

In 2010, the legal services industry—and for that matter almost every industry—faces a new landscape that requires not only a different way of thinking but also a different way of doing business to ensure short-term survival and long-term success. The body of survey and industry data developed in the past six to 12 months suggests that the traditional legal service delivery model for litigation needs to be reworked.

Three key overarching considerations in 2010 for corporations are:

1. Maximizing value received from every legal task performed;
2. Applying a "lean" process-efficient manufacturing mentality to legal services; and
3. Moving away from the single-firm model and retaining the most efficient outside counsel and other vendors to handle separate portions of processes, particularly litigation

Although corporations are focused on reducing legal expenses, survey and industry data all point to the same conclusion: 2010 will be an increasingly litigious environment. The most recent data compiled by BTI Consulting predicts a 2.3 percent increase over 2009.

The economic turmoil of 2008 and 2009 will continue in 2010 to drive demand in both bankruptcy and labor/employment litigation. With changes in the regulatory environment and anticipated GDP growth, we can also expect an uptick in antitrust, securities, and intellectual property litigation. Finally, class action litigation is expected to increase in the coming year as well.

Discovery Trends

Litigation costs and risks have increased along with the sheer amount of litigation. Litigation spend typically comprises two-thirds of the overall outside legal spend for most corporations, and discovery can comprise nearly two-thirds of these litigation costs.

As such, discovery costs dominate case budgets and are often the single largest line item in a law department's budget. These costs figure not only in cases that are tried but also in the 95 percent of cases that never see an opening argument at trial.

There are many causes for the pileup of discovery costs. First, computerized data is proliferating. Everyone now has at least one computer. And, computer storage is so inexpensive that no one thinks about deleting anything until big litigation hits and every one of those tens of thousands of items must be processed, filtered, and reviewed.

Email is another reason for cost increases. Email is now the primary mode of business communication. Email is often carelessly drafted and sent to multiple recipients who then forward their copies to other parties. Now, what was once a single letter (and perhaps a file copy), can balloon into hundreds of versions and thousands of copies.

Another factor is that new modes of communication are surfacing every few months. Discovery in *one case* in today's environment could encompass email, chat rooms, instant messaging, text messaging, blogs, Facebook, LinkedIn, and tweets. No one knows what else will be next. It is all difficult to control, delete, and review.

The federalization of discovery is yet another factor. An evolving and confusing jurisprudence has been developed by distinguished jurists who themselves aren't even comfortable with floppy disks. Many judges

cling to the very flawed assumption that, just because something is electronic, it can be produced and searched instantly.

Notwithstanding the attempt by some courts to control the cost of modern-day discovery, courts simply cannot be relied on to control costs. Most discovery matters are handled by judges and magistrates who are reluctant to deny all but the most excessive discovery requests, despite the potential burden.

Many judges and magistrates also underestimate the difficulties associated with electronic data. Moreover, unlike the case where parties can point to hundreds of boxes of paper documents, litigants today are often unable to determine the full burden of electronic discovery without spending tens of thousands of dollars just to put electronic discovery in a reviewable format.

The cost of discovery is beginning to surpass loss exposure as a strategic consideration in litigation. Indeed, some parties are using the prospect of discovery costs to extort settlements in weak cases. Some commentators have suggested that these costs even threaten to bring about the demise of the right to trial.

Additionally, many litigants are attempting to create claims of discovery abuse, failure to implement litigation holds, and spoliation. They are seeking Rule 37 sanctions, default judgments, adverse inferences, and punitive damages. Most corporate legal departments surveyed agree that actively managing discovery is the best way to move the focus back to the merits of the case.

The Case for Unbundling

The traditional litigation model relegates discovery to a secondary role. That traditional model also provides a powerful incentive to use expensive and underused personnel, negatively impacting the result. Some law firms have actually marketed "in-sourcing" of discovery.

In an effort to bring an innovative discovery management solution to a legal market that is seeking options to reduce litigation and electronic discovery costs, Dykema, a leading national law firm, and Lumen Legal, a global legal staffing and consulting company, launched Dykema-Lumen Discovery Management Solutions (DMS), a flexible, unbundled model for delivery of legal services.

The cost of discovery is beginning to surpass loss exposure as a strategic consideration in litigation.

The new unbundled discovery model focuses on the selection of a discovery management team with a singular focus on efficiently managing the discovery process at every stage; paying attention to each detail in the process; using dedicated, lower-cost reviewers; and constantly improving the process to enhance efficiency at every possible level.

The results can be immediate—less data to review, review performed by appropriately trained and priced attorneys, fewer levels of review, faster review, and better results—all with one review pass instead of multiple stages of review by various levels of attorneys with increasing billing rates. Moreover, a proven, structured, and replicable process can avoid mistakes that may not only be costly but also potentially devastating to the case.

How Unbundling Works

Discovery management starts before there is any litigation on the horizon. Experienced attorneys and litigation technologists can examine processes for creating and preserving active and backup data. They can recommend ways to organize and minimize data so that, when a lawsuit hits, the data population is smaller, easier, and cheaper to collect, process, and produce.

In litigation, discovery management focuses on a number of separate phases. First, before

a single page is reviewed by a human being, discovery managers can filter out a substantial volume of data by focusing on core custodians, core file types, and objective document characteristics, and then weed out copies by de-duplicating and grouping email threads. Discovery managers also negotiate with vendors best suited to host large volumes of data.

> *Discovery management starts before there is any litigation on the horizon.*

Second, in the review stage, documents can be channeled to the appropriate level of attorneys. More experienced attorneys can handle the privilege review and documents likely to contain critical information. The bulk of the data can be reviewed by highly trained and supervised contract reviewers who are almost always far less expensive than even the most junior attorneys or legal assistants. They also tend to be more efficient, since they are dedicated to a particular project and do not face the ever-present conflicting demands that full-time attorneys face.

Discovery management processes are constantly modified in response to information that emerges during the course of review. Through established feedback loops, reviewers can identify information that may be critical in a case or issues that may threaten to slow down the review and production processes. For example, some datasets may contain similar documents that are amenable to automated processing and coding that can save tens of thousands of dollars in review costs.

Small details do matter in discovery management. With the wrong software, the wrong Internet connection, or a poorly designed reviewer interface screen, precious seconds can be lost on every page. Two seconds may sound inconsequential, but can add up to $55,000 per million pages of document review.

Every additional gigabyte of unnecessary data may waste $30,000 or more. A single hard drive costing $75 can hold 500 gigabytes of data. Without meaningful filtration, it could cost $10,000 to process even at a basic level and can cost hundreds of thousands of dollars to review.

Companies can proactively target the single largest line item in litigation budgets to attain cost savings in every case. Additionally, unbundling the discovery process can give companies more freedom in selecting trial counsel. They can even choose select boutique firms that may not have the capacity to handle large-scale discovery.

The time to consider discovery management is before litigation hits. It is far easier to select a discovery management team when not in crisis mode. Discovery managers may also be able to proactively reduce and organize data when litigation is not on the horizon. When the summons arrives, the data will be more readily accessible and the volume of data will be far less.

The future of effective discovery management starts now. ■

—Howard B. Iwrey, Dante A. Stella, David J. Galbenski

Howard B. Iwrey, a Dykema antitrust and trade regulation attorney with more than 23 years experience, represents companies from a broad range of industries including health care, technology, defense, automotive, sports, art publishing, utilities, retail, and brokerage services. He can be reached at hiwrey@dykema.com. *Dykema attorney Dante A. Stella focuses his practice on complex, high-exposure commercial litigation. Mr. Stella has vast experience at the trial and appellate stages in business torts, land issues, and mass toxic torts. He can be reached at* dstella@dykema.com. *David J. Galbenski, Esq. is CEO of Lumen Legal, a leading Royal Oak, Michigan-based provider of direct hire and contingent staffing services for the legal industry. Over the past decade, Galbenski has pioneered domestic outsourcing for corporate clients and law firms and guided development of innovative database-driven human resources systems. He can be reached at* dgalbenski@lumenlegal.com.