

From the
Board Room
to the Courtroom:

**THE KEY TO
WINNING CASES IN
A BAD ECONOMY**



WHITE PAPER

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ABSTRACT

Winning cases in a bad economy requires the right resources. People and Technology are the antidote to the cost conundrum that is ailing the legal industry. It is only through a combination of the right talent and tools that true streamlined economic efficiency is possible. As we shall explore, often the decision and direction to create an economically prudent model for litigating cases originates from a leader in the organization, whether it is the corporate client at the executive level, a partner at a law firm, or other stakeholder. That leadership requires a deep understanding of the market and the changes necessary to realize heightened expectations.

From the presidential election to the financial crisis, change is the theme of the year. Like many industries, the legal community has seen an economic impact on cases going into or currently in litigation. Clients who are concerned with the struggling economy want to win their case, while cutting costs where ever possible. This has resulted in disparate teams of professionals struggling to support a scattered system, reign in costs, manage an explosion of electronic data and harness the power of ever-evolving technology. This year of change is certain to yield an era of transformation in processes, personnel and technology.

THE PROCESS EVOLUTION

Management of the litigation process is organically uniting because the complexity is growing. To control the confusion more effectively, organizations want to work with fewer parties, who each have greater capabilities. They often want a single point of contact.

This single point of contact model is attractive because it places the responsibility for project oversight on the outside vendor. That said, it requires extraordinary trust that is only established over time and the passage of a battery of experiential tests.

In the same way that a law firm client wants a seasoned trial lawyer to lead the case into the courtroom, that lawyer wants those skilled in trial preparation to set the stage and others tested at executing while on trial to be by his or her side in the trenches.

It has traditionally been acceptable for a wide range of service providers to support large scale litigation, but with the proliferation of data and the challenges associated with modern litigation it is more efficient to have one entity assist with every aspect of the process, including the conversion of the universe of data and how it is treated under ever-expanding regulation.

Impact of Electronic Data

The explosion of electronic data and the need for expedited yet accurate review is fueling evolution of the process. The ballooning cost of modern litigation is similarly impacting this trend.

In preparing its Fourth Annual Litigation Trends Survey Findings, Fulbright & Jaworski questioned 253 U.S. corporate counsel and 50 U.K. corporate counsel on various aspects of litigation. 44% of U.S. companies said their annual litigation spending is \$1 million or higher.ⁱ More than half of those surveyed reported spending over 5% of their litigation budget on pre-production review. 30% estimated that privilege review comprised 6-10% of their litigation costs, while 16% said that number was between 30-50%.ⁱⁱ

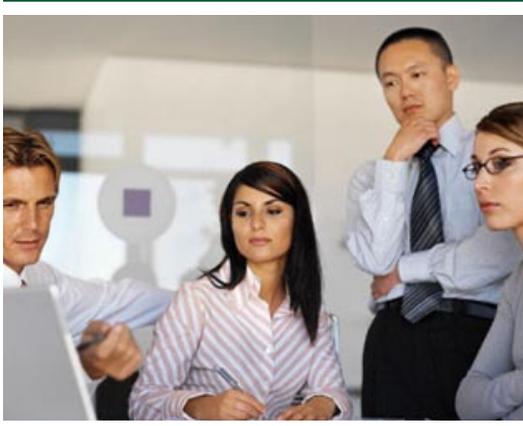


The cost of litigation is forcing general counsel and law firm partners to reevaluate their existing staffing models and consulting arrangements. As the cost of litigation skyrockets, expectations for success become too burdensome. This trend is only going to more deeply impact the legal community.

In fact, a Forrester Research report concluded that spending on e-discovery technology is expected to reach at least \$4.8 billion by 2011, largely driven by an estimated 40% annual increase in gigabytes to be processed.ⁱⁱⁱ This will have a critical influence given that some estimates place the cost of reviewing a single document at between four and ten dollars.^{iv}

Current Collaboration Trends

Law firms that are following the lead of their clients by creating partnerships with vendors are providing additional value beyond high-quality legal work.



In a research study conducted in the spring of 2008, Ari Kaplan Advisors interviewed 28 corporate counsel or other high level executives responsible for litigation in Fortune 500 companies in the areas of financial services, healthcare, manufacturing, pharmaceutical and technology. 61% cited cost as a major factor in their decision-making.^v

While cost was raised most often in the study, participants noted that responsiveness, experience and the collaborative nature of partnerships with vendors was of critical importance. All reported wanting skilled individuals that provide solutions to their problems. It is less an issue of cost and more an issue of integrity of the vendor partners with whom lawyers will work. 36% reported having a preferred provider agreement in place and others admitted to a preference, albeit informal, for a teammate.^{vi}

This is consistent with the growth in the usage of outside support. In 2006, the Fulbright survey found that 37% of corporations in the U.S. used outside services to assist with litigation, while that number jumped to 51% in 2007, regardless of company size.^{vii}

The Corporate Solution

E.I. du pont de Nemours and Company (DuPont) was founded in 1802 and is primarily a science and technology leader in areas including the production of Teflon, Lycra brand spandex, Stainmaster stain-resistant carpet, Kevlar, Corian, Mylar and Tyvek. Its revenue regularly surpasses tens of billions of dollars per year and it has over 70,000 employees. With its vast global brand and corporate reach, its legal concerns range from commercial and intellectual property to securities and employment, among others.

In 1992, to manage its vast budget, streamline its internal operations and strengthen relationships with outside counsel, DuPont introduced a new model for law firms and corporate legal departments to

improve the quality, cost and efficiency of legal services. It defined a process to encourage strategic partnering and collaboration that would yield long-term relationships. Rather than recreate resources, it reuses them in preparation for each subsequent legal matter.

When DuPont conceived its legal model, it used 350 law firms and scores of outside vendors (consultants that would provide expert analysis, jury consultants, document management, etc.) to handle its various legal projects worldwide. From 1992-96, the company studied its use of legal services and reduced these numbers to 40 law firms and 10 primary service providers / diverse legal suppliers, including Kelly Law Registry. It also increased its staff of paralegals from 6 to almost 40.

These vendor partnerships are characterized by trust, collaboration and common vision for problem solving and client counseling. Much of it is based on Six Sigma, which challenges individuals to focus on a given defect and to find ways to make corrections. In addition to extensive interviews, partners are evaluated on their commitment to excellence, financial success, technological prowess, dedication to diversity and capacity for risk and innovation.

The Model relies on early case assessment methods to shift the focus from processing a lawsuit to resolving the business problem, by defining what DuPont would consider a favorable resolution of a particular issue and charts an appropriate strategy that meets both business and litigation objectives.

The DuPont Legal Model demonstrates the convergence of process, people and technology. It is the ultimate example of corporate evolution in favor of efficiency.

The Law Firm Solution

Law firms strive for that same efficiency. Foley & Lardner LLP is consistently ranked close to the top quarter of the AmLaw 100 survey of the largest law firms in the country, with 18-20 offices located across the globe and revenues of more than half a billion dollars. In 2007, the firm followed the spirit of the DuPont Legal Model in an effort to establish consistently high quality trial preparation and presentation services for its clients while managing costs.



At Foley, individual attorneys had the discretion to hire vendors and, therefore, pricing and quality of services varied significantly. Yet, given the erratic nature of trial schedules, the firm did not want to

incur the overhead of engaging permanent employees dedicated to trial preparation. The firm sought to partner with a single outside vendor that carried a national reputation for excellence, but was also know for its integrity as a business partner.

It chose inData Corporation to be its preferred trial preparation and presentation vendor based upon its technology expertise (inData also develops TrialDirector®, the leading trial presentation software). inData handled numerous arbitrations and trials in 2008 under this 'one call' program. Bruce Blank, National Director of Litigation Services and Support, who spearheaded the initiative, along with other senior partners and management, expects usage to double in 2009. "It is one thing to go to trial, it is another to go with consultants," he said. "Anytime inData has gone with our attorneys, they absolutely give them an A-plus; the knowledge that they bring is invaluable," he adds.

THE PEOPLE



As the process evolves and grows more complex, it is the people and the style with which they operate that ultimately impacts the outcome. Cultural consistency is an important issue in this uncertain economy. The objectives and commitment level must be uniformly appreciated and applied for any elusive goal, such as a victory in high-stakes litigation, to be realized. There are a number of personnel techniques that will allow an organization to achieve certain desired results, while allowing its staff to operate at the maximum ability.

Establish Roles Early

Given the varied hourly rates for paralegals, attorneys (ranging from junior associate to senior partner), consultants, and support staff, there is a cost advantage in establishing roles early on in a case. Just as partners should not make photocopies, paralegals should avoid rearranging war rooms. Developing an understanding at the outset of the skills and abilities of each team member will allow for optimal efficiency and minimal frustration.



Temporary or contract personnel are a key component in this equation. It was critical to the success of the DuPont Legal Model and it remains a hallmark of economical operations today. By defining specific roles and matching them with individual capabilities that will address anticipated needs, a litigant can properly set a realistic budget. It can also establish a timetable for an early case evaluation and measure the longevity of each phase of the case lifecycle.

Breadth of Knowledge

That evaluation is only possible when the team considering the options is knowledgeable and experienced in the exact type of litigation at issue. Members must also know which resources to assign at specific milestones in the process. Without that insight, plans will be made for some courses of action, and others will be left unattended.

Such breadth of experience will not only assist in planning, but will aid in assessing the impact of inevitable obstacles and unexpected opportunities. For example, if a last minute ruling precludes certain evidence and requires immediate changes to a central argument, a team capable of making that change without disturbing the flow of a particular argument is invaluable. While litigants can often only overcome obstacles and seize opportunities when they see them, those supporting the legal group at every stage of the process can identify advantages and disadvantages in the protocols, and make suggestions for adjustment, particularly in the delivery, tone and pace of a presentation. Those who have a broad range of familiarity can make pivotal observations that will meaningfully influence the case.

Leadership

Often, those suggestions will come from the top, which makes dynamic leadership a critical component of success in the litigation archetype. Not only must those responsible for legal matters understand the substance of the case, but they must also know how to address each element from the initial review of the complaint and collection of potentially responsive documents to staffing and multi-media cross-examination of a key expert.

Proper administration starts with project management and the preferred model of such management is one that offers a single point of contact. For that reason, those offering distinct skills along the trial continuum are joining together to offer a unified response led by leaders that know when and where in the matrix to apply each. They are also familiar with the tools necessary to maximize output and pursue every advantage.

Skilled project managers will provide regular status reports that indicate areas of delay and concern, as well as suggestions for modifying current practices. They will also have an intuitive understanding of how to implement internal technologies to keep discovery on schedule, including familiarity with databases to track, audit and monitor progress in real time.

THE TECHNOLOGY



Technology tools allow the talented members of the team to use their time for strategy over function. They often supplement and amplify the core message.

This trend toward technology supplementation is growing. The authors of the Sixth Annual Socha-Gelbmann Electronic Discovery Survey have reported “[w]e see a shift in the market from a primarily services-based approach to one where software plays a substantially larger role.”^{viii} Most courtrooms are wired in some way for technological displays and “[i]n courtrooms where a judge allows jurors to take notes, the retention rate could be as high as 80 to 85 percent with the use of a computer-generated presentation.”^{ix} Judges are also inclined to support the use of technology for the sake of clarity and efficiency.

What to Look For in Technology

Technology that enhances the capabilities of the trial team will exponentially increase the chances of victory. It will permit a judge and a jury to receive the same message in an equally simplified manner. Technology can level academic, socioeconomic and cultural differences in interpreting the facts and the law. It promotes the fairest aspects of the American judicial system.

Solutions

That system is plagued by uncertainty and inefficiency. It has traditionally been characterized by talking and listening, as opposed to showing and describing. The advocacy process is typically one of persuasion, rather than education. Technology marries the two techniques to effectively persuade by educating the audience, whether judge or jury.

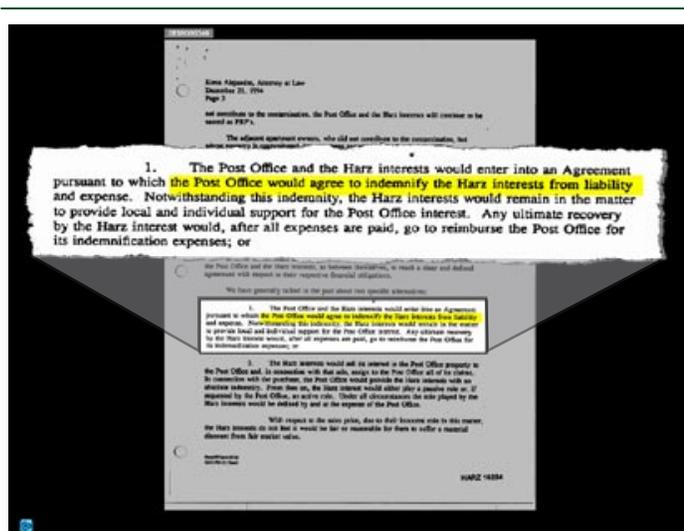
To that end, there are a number of popular products available to achieve various aspects of the discovery process. CT Summation iBlaze®, LexisNexis Concordance®, CaseLogistix™, and

Relativity™ are leading programs in the area of evidence management and review. Certain tools, such as CaseMap® and TimeMap® from LexisNexis, clarify the story so that the advocate himself or herself can focus on the substance and the style. Presentation software such as inData TrialDirector® relieves the legal team of the burden of logistically making the presentation with hard copies and complicated demonstratives. There are no tabs to miss, no Redweld folders to cull through and no documents to misplace. The entire dataset is instantly retrievable at the touch of a button.

Adaptability

That button should, however, only be pushed by those who know the consequences. While technology provides many advantages, those advantages are often best accessed by trained consultants. They are experienced in the routine and the suddenly catastrophic drama of trial.

While the capability of trial presentation tools may be sophisticated, the overwhelming success of their application is in the simplicity. Such tools simplify even the most complex case into key documents, relevant testimony and consistent messages. When the equilibrium shifts due to sudden document or case management challenges, or an adjustment in staffing to meet requirements of changes in trial schedule, it is the project manager or trial consultant who will make the necessary modification.



Screenshot of TrialDirector Software

The legal team will seem almost immune from any reaction to courtroom commotion. It is the technology, however, that must allow those seamless shifts and maintain an inherent adaptability.

The Advantages of Technology

While adaptability is a comforting factor to trial teams, it not the only reason that technology is often an essential tool in modern litigation. Most are motivated by the ability to deliver a clear and concise message. Juries have come to expect the visuals they see on television. Rather than fumble with slides on an overhead projector or balance charts on an easel, technology permits focus on the single point or series of points a legal team would like to convey.

This ability enhances efficiency by allowing each team member to participate in the area that presents an opportunity for him or her to display only his or her strengths, which as discussed above, is an essential component of triumph in the courtroom. Understanding those strengths fosters a positive division of labor and collaboration. That collaboration yields a commitment to the consistent messaging.

From a logistical perspective, there is a key distribution advantage to technology. A legal team can simultaneously offer material to an adversary, the judge and the jury in multiple formats and various types of media. That material can then be preserved and retrieved instantly if there are questions or follow-up issues. For instance, the same material might be used on direct examination, cross-examination and in closing arguments.

Ultimately, the greatest advantage of trial technology is the visualization it offers for the decision maker. Since human beings retain exponentially more information from seeing than hearing, a legal team substantially increases the probability of victory when it shows, rather than just tells.

Technological Success Stories

For firms across the country, technology has been a significant factor in their victories. These are a few that stand out.

Frilot L.L.C. (New Orleans, LA)*

This 46-lawyer litigation and labor and employment firm, which handles matters on a local, regional and national basis before all courts and administrative agencies, used TrialDirector in defense of five companies sued in 23 class action suits filed by various attorneys general in separate forums throughout the United States. Counsel ultimately tried the case against a product manufacturer in Civil District Court for the Parish of Orleans in Louisiana.

Its lead attorney used CT Summation iBlaze to review relevant documents and TrialDirector software to highlight for the jury using documents and deposition testimony that the defendant had not given notice of a change in product specifications, which was a key issue in the case. The cross-examination was so overwhelming from a visual perspective that the company's vice president admitted that he had given inconsistent testimony under oath. The jury awarded the client the full amount of its demand.

Holland & Hart (Denver, CO)^{xi}

Pen Volkmann, the firm's Director of Graphics & Video Services, won the Law Technology News award in 2006 for most innovative use of technology during a trial, in which attorneys at Holland & Hart used TrialDirector to win a two-month trial ending in a \$110 million jury award. Using Maya 8 from Autodesk to create 3-D animations, the firm's team translated complex testimony into appealing graphics that helped the lawyers show the jury the entire process of growing, picking, packing, and shipping leather leaf ferns from Costa Rica to Europe. Using Caseshare from Catalyst Repository Systems for review, the team also converted science and accounting data into a visually engaging display that jurors of varied educational backgrounds were capable of evaluating.



Fennemore Craig (Phoenix, AZ)

This 200+ lawyer firm won a complete defense award in a real estate arbitration in which the plaintiffs sought \$72 million in damages. The case, which Fennemore Craig litigated for two years, included two trips to the Court of Appeals and involved claims for usurpation of a corporate opportunity, breach of fiduciary duty, breach of contract, and punitive damages. Counsel used Microsoft PowerPoint® and TrialDirector to incorporate over 100 documents into his cross-examination, and to deliver both the opening and closing arguments. The AAA panel praised the firm's effective and judicious use of technology.

Neal & Harwell (Nashville, TN)^{xii}

This 28-attorney firm in Nashville with multiple practice areas successfully implemented CT Summation's Blaze LG Gold, PowerPoint and TrialDirector in a Medicare fraud and abuse trial in the United States District Court in the Eastern District of Tennessee in Chattanooga. Following success in this trial and others, the firm's attorneys view these tools as indispensable when managing litigation cases.

CONCLUSION

The legal community is experiencing a sea of change in its approach to litigation. Rather than address each challenge in stages, more sophisticated legal teams are viewing the lifecycle more broadly by maintaining consistency in staffing and streamlined use of technology from discovery to trial. In today's stagnant economy, smart collaboration is the only option for success.

About the Authors



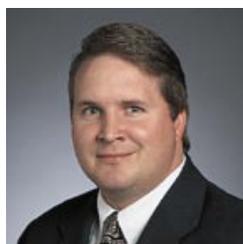
Gary M. Buckland

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Mr. Buckland's professional career spans 24 years. Prior to joining Kelly in 2007, he served as president and managing director of The Atlantic Group, a part of executive search firm SearchPath International. He also served as president of LegaLink, a global court reporting, legal videography, trial presentation, and litigation support company, prior to their acquisition by Merrill Corp.

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Derek Miller is the CEO and President of inData Corporation. He has been involved in the management and presentation of information for over 18 years. Mr. Miller currently serves as a technical committee member of IASTD (The International Association of Science and Technology for Development) and is a member of the ASTC (American Society of Trial Consultants). He has also served as a special consultant to the U.S. Trustee in large bankruptcy cases. Mr. Miller has spoken at multiple American Bar Association functions, accredited seminars and luncheons, and has been quoted for numerous magazine articles nationwide.

FOOTNOTES

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