

COMPLIANCE WEEK

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Tough Times for Corp. Legal Departments

By Jaclyn Jaeger — February 3, 2009

A new study of corporate legal departments confirms what most general counsels already know: 2009 is going to be a rough year.

Forty percent of legal departments expect a decrease in their overall operating budget for 2009, compared to only 8 percent last year. At the same time, however, litigation activity is rising—particularly for the financial sector, besieged by investors unhappy with the sub-prime mortgage meltdown and victims of the Bernard Madoff Ponzi scheme.

“Even though budgets are being tightened, litigation is going up,” says Rick Wolf, CEO of the consulting firm Lexakos, which conducted the survey. “What it suggests to me is that they’re being asked to do more with less.”

David Cohen, co-chair of the e-discovery analysis and technology group at the law firm K&L Gates, has observed similar trends. “Corporate law departments are facing two realities. The first reality is that litigation does not go away in troubling economic times, and the cost of that litigation tends to go up, not down, every year,” he says. “General counsel are left on the horns of a dilemma: how to cut litigation costs in the face of no decrease in litigation, and often increasing e-discovery demands.”

Those pressures should lead in-house legal departments to prune back the volume of work they leave to outside law firms by doing more work themselves. But law departments are now under their own pressure to cut back on staff. “The result of all of that, paradoxically, is that lawyers are stretched even more thinly than they have been in the past, making it difficult to bring more work in house,” Cohen says.

As a result, law departments are getting more creative in how they cut costs and managing themselves more efficiently, Wolf says. For example, only 32 percent of law departments last year used a centralized litigation group; that number jumped to 49 percent for 2009. And while only 20 percent of respondents last year said their legal departments had a strategic plan for the year, that number soared to 57 percent this year.

“I think the reason for that is because they’re being asked to do things that are not traditionally legal functions,” Wolf says.

E-discovery Woes

A particularly vexing challenge for legal departments is electronic discovery, and the challenge of sifting through volumes of data to turn over relevant material to litigating parties. “E-discovery definitely continues to be a major headache for companies,” Wolf says. “That is not getting better.”

Data from the Lexakos survey backs those claims. When asked which corporate department has ultimate responsibility for records and information management, 46 percent of respondents said their law departments do, up from 42.5 percent last year. Respondents who say their compliance departments (close cousins to legal departments) have e-discovery responsibility jumped from 8.2 percent to 15.7 percent.

Wolf is quick to argue that while e-discovery continues to cause headaches for corporate law departments, it is only “a symptom of a problem, not the problem itself,” he says. “The problem is the over-accumulation of information in companies, and lawyers are strapped with the responsibility of finding a fix.”

Cohen also notes that training courses for e-discovery are still hard to find, both for practicing lawyers and students in law school. That lack of understanding contributes to e-discovery cost, he argues.

“There are multiple steps in the process, and it helps to understand what those steps are to figure out where the money is being spent, as a starting point to controlling those costs,” he says. Cohen refers to the Electronic Discovery Reference Model as a good starting point to use. The model is published by Minnesota-based EDRM, a guidelines and standards body designed to educate about e-discovery challenges, vendors, and processes. The founders of the organization, George Socha and Tom Gelbmann, each provide consulting services through their independent endeavors.

Some law firms and vendors have come up with creative solutions to slash costs, including better use of technology to filter electronic information, retention of special e-discovery counsel, and use of lower-cost lawyers to perform large-scale document review. “We are seeing great interest in those solutions from corporate legal departments looking to cut their litigation budgets,” Cohen says.

Companies are slowly showing improvements in their ability to audit e-discovery processes as well. In the Lexakos survey, 47 percent said they have auditing standards, up from 27 percent last year. “They’re heading in the right direction, but there is still a lot of work to do,” says Wolf, adding that he expects these numbers to go up more next year.

Cohen warns of the reality that when e-discovery involves millions of records, inevitably one party will accidentally turn over information that’s protected by legal privilege. General counsels might not like it, but they should accept it.

“That’s just the reality,” Cohen says. “Mistakes are sometimes going to be made, and so all you can do is try to minimize those mistakes and protect against waiver through appropriate technology, sampling, and quality control procedures, and obtaining non-waiver agreements and orders.”

For example, companies can tailor discovery searches to flag certain words or names likely to be found in privileged documents. When found, those documents can then be set aside for further review to determine if they are, in fact, privileged.

Another notable trend is an increasing shift by law departments to improve their alignment and communication with outside counsel, which most respondents of the Lexakos survey ranked as a “critical” initiative for 2009. In addition, respondents ranked “controlling outside counsel legal spend” as an equally important goal.

Wolf concludes that centralizing more litigation in-house with qualified personnel, and using existing technology to more efficiently manage litigation-related content, ultimately will do the most to improve internal communications and reduce cost.

2008 BUDGET PREDICTIONS

I anticipate my department’s overall operating budget to:

	2008	2009
Increase	45.24%	22.0%
Decrease	8.33%	40.0%
Stay about the same as prior year	46.43%	38.0%

Source

Lexakos: Annual Law Dept. Strategic Planning Survey (2008 - 2009).

WHY THE CUTS?

The anticipated change in my budget and staff is mainly attributable to:

	2008	2009
Organic growth of my company's operations	34.5%	13.9%
Spending on technology initiatives	6.0%	4.6%
Decisions to in-source more litigation-related functions	11.9%	9.9%
Decisions to in-source more intellectual property work	6.0%	8.6%
Global expansion of my company's operations	15.5%	6.6%
Outsourcing more to legal service providers	11.9%	5.3%
Pressures to reduce overall legal spend and improve services	29.8%	51.0%
Acquisition	10.7%	10.6%
Divestiture	2.4%	1.3%

Source

Lexakos: Annual Law Dept. Strategic Planning Survey (2008 - 2009).

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