

Litigation Support At A Crossroads

Law360, New York (March 28, 2013, 8:57 AM ET) -- As law firms recover from the aftermath of the recent financial and economic crisis, litigation support departments find themselves at a crossroads of a number of transformations currently sweeping the profession. The changes confronting the legal profession include technological advances in e-discovery and related technologies, pressures for cost reduction through project management, alternative fee arrangements, legal process design, and the threats and opportunities posed by legal process outsourcers. The combination of these disruptive forces has caused fundamental shifts in the role of the litigation support department and the skills required of litigation support professionals.

Research completed in the fall of 2012 by the Center for the Study of the Legal Profession at Georgetown Law Center and Epiq Systems examined the changing role of litigation support in large law firms.* Results of this research project indicate that as litigation support functions evolve in response to these changes, litigation support professionals must assume a more sophisticated role within law firms. Where litigation support personnel may have previously focused primarily on providing technical assistance, they now also have to serve a number of client service and consulting functions.

Despite cost pressures that have resulted in the downsizing of nonlawyer personnel, many litigation support departments are growing. Half of the respondents to the 2012 Epiq Systems/Georgetown Law Litigation Support Operations Survey indicated that their function has grown in size in the past three years, and over half of survey respondents indicated that current staffing levels are inadequate for the projected needs of the coming year.

While litigation support departments are growing in both form and function, training staff is one of the biggest challenges facing litigation support leaders. Over three-quarters of respondents to the survey indicated that the education of attorneys and department staff is one of the top three challenges facing the litigation support industry. In the paragraphs below, we explore the implications of the changing nature of the litigation support function for educating and training future professionals in this role.

Litigation Support: Technology Specialists

The rapid technological evolution of the discovery process and data storage has profound implications on the role of litigation support staff. One challenge stemming from technological change is the increased presence of “big data” in litigation. E-discovery now takes place in almost every case, whether it is needed or not, introducing complications and costs related to the storage and processing of sometimes very large datasets. The technologies that support big data in e-discovery suggest a new skillset for litigation support professionals.

The rise of predictive coding, for example, requires that litigation support specialists develop an understanding of statistics. While an appreciation for math and statistics is an important component of the effective application of predictive coding, these skills can be rare in a law firm environment. Consequently, traditional staff will not likely have the skills to excel at predictive coding — or to necessarily bring that option to the table in appropriate cases.

Further complicating the impact of technology on litigation is the 2012 change to the ABA Model Rules of Professional Conduct, which now requires lawyers to “keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.” Due to the rapid pace of technological change, many lawyers are inadequately prepared to meet this ethical obligation.

While this development provides an opportunity for litigation support professionals to step into the breach and assist lawyers in meeting this ethical requirement, our research indicates that even litigation support departments struggle to keep their staff apprised of the latest technological developments. As one litigation support leader observed, “I would say one of the major challenges would be just keeping up with the constant amount of change in the tech industry.” Another leader echoed this point: “Data changes every day so therefore we must change as well.” However, while litigation support departments wish to stay on top of the latest developments, few are keen to be on the leading edge. Only 36 percent of respondents in our survey indicated their department was willing to be a “first adopter” of new technologies.

The development of new and advanced technology presents an additional challenge for staffing and training: litigation support professionals need to develop technical expertise in an increasing number of areas, while at the same time keeping their “legacy” technological skills current.

Because of the range of technological tools that can be employed in a litigation support environment, it is no longer possible for individuals to become specialists in all of the skills and technologies required by the litigation support function. Consequently, litigation support professionals must become specialist-generalists, with each staff member having high-level knowledge about many issues and technologies, and deep knowledge about only a select few.

Each person in a litigation support department may, for example, develop mastery in one unique area, such that the department as a whole can provide all services required of them. As one leader remarked, “I don’t need everyone to know how to build a sanction database. I need half of them to know what it is and how you use it and I need the other half to know how to build it. I let them tell me which half they want to be.”

Litigation Support as In-house Project Managers and Consultants

Due to the pressure posed by changes in technology, the role of litigation support personnel has dramatically expanded. Traditionally, litigation support served as an order taking function; staff did what they were asked by lawyers to do. However, as technology becomes more complicated and ethical requirements become more explicit, the role of litigation support specialists is expanding far beyond order taking. Therefore, the skills required for the role are changing as well.

First, project management skills are increasingly critical for success. As the technological support requirements for cases have become broader and more intensive, organizational and management skills have likewise increased in importance. Litigation support specialists also act as a bridge between lawyers and technology. One litigation support department lead told us that, “increasingly, they have to be translators of technical capabilities to attorneys.”

Perhaps most importantly, litigation support specialists must take on a consultative role within their firms. Sixty-nine percent of survey respondents ranked case consulting as one of the top three growth opportunities for their department. According to one litigation support lead, their project managers have begun filling this role already: “Our project managers are like consultants. They provide support and advice on e-discovery strategy, they do the IT interviews to help lawyers, and they help lawyers to identify where potentially relevant information might exist in connection with the litigation.”

Hiring and Training Challenges

Ultimately, change in both technology and the role breadth of litigation support work make it increasingly difficult to find, train and retain talented litigation support specialists. One interviewee expressed the difficulty of finding technically and interpersonally competent staff who can both advise and consult with attorneys on cases and understand the relevant tools: “I can probably count on my hand the people in this field who I think can really do it.”

Consequently, the market for talent in this area is tight, with good staff in high demand and most firms relying on long-term experienced talent. This demand, and the specialized skillset required of litigation support staff, may result in a skill shortage in the coming years, especially as litigation support departments are expanding in size.

Because of the specialized skillset required, most litigation support departments hire staff based on personality, fit with their department and firm, higher level integrative skills, and project management/interpersonal skills. For example, one litigation support lead told us, “We definitely look for the chemistry ... people that work hard, get along, and that we think our legal teams would like.” Similarly, another leader indicated that, when hiring, she prefers to “take really smart, easygoing happy people that want a job, and then teach them what they need to do.” Notably, most departments report that they do not make hiring decisions based on technological skills. Instead, they hire staff based on their “soft” skills; new hires are then trained in the “hard” skills after they begin working in a litigation support department.

Since litigation support departments hire largely based on personality and interpersonal skills, survey and interview respondents report that litigation support talent comes from a variety of backgrounds. However, lawyers are rarely used as litigation support staff; most survey respondents indicated that JDs represented less than one-quarter of their departments. In general, attorneys are seen as too expensive: “It’s rare to get a JD; you pay through the nose for it.”

When lawyers are hired, they are typically hired at higher levels within the litigation support department. As one interviewee explained, “There’s a trend of JDs becoming CIOs, heads of knowledge management, and heads of practice support, because they come with instant credibility.” The tendency to hire JDs in at higher levels can create tension and resentment amongst non-JD litigation support professionals, who have worked in the field for a long time but may not have the same upward mobility options as JDs.

However, given the level of overcapacity in the junior attorney labor market, JD hiring into litigation support departments is likely to continue.

In summary, the role of the litigation support department is evolving rapidly. Litigation support departments must begin thinking about the new skills — and perhaps the new types of people — who can best excel in this evolving role, and then focus on improving and enhancing the training and education of their staff.

Consistent with this perspective, 79 percent of respondents rank education as one of the top three biggest challenges facing the industry, with 40 percent of our survey respondents ranking education as the biggest challenge. Litigation support departments must rise to the challenges and opportunities of hiring and training if they hope to keep abreast — and ideally ahead of — the changes in the industry. “We’re at an industry crossroads right now as a result of predictive coding and some of these other tools,” one interviewee reflected.

“It’s like 2005 when we were trying to crack the e-discovery project management role. I think we’ve got some maturity in the e-discovery project management role but I see that some of the people that really have made good e-discovery project managers aren’t necessarily able to make that shift to true consultants. You almost need two pieces — you need the people who are managing the discovery process and coordinating the process from collection, preservation and beyond. And then you have these experts on data analytics, consulting on how to do the culling and filtering up-front, how to do the testing, the sampling, etc. who can move it from these culling and filtering tools up front all the way through. And so that’s the challenge: How is our industry going to grow that skillset now and take it to another level? And is it that same profile that made a good e-discovery project manager? Some yes, some no. So that’s where I think our industry is in terms of the challenge.”

As pressures from clients around cost and predictability of litigation expenses continue to impact law firm budgets, litigation support leaders have an opportunity to increase the influence and reach of their departments by providing high quality guidance and support to litigators and the firm’s clients. Given the pace of technological change and the evolving legal market, litigation support professionals are poised to play an important role in helping their firms adapt and succeed in a complex environment. However, in order to do so, they must successfully grapple with the challenges and opportunities posed by continuously evolving technologies in order to realize fully the growing role of the litigation support professional.

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* Forty-five firms responded to the 2012 Epiq Systems/Georgetown Law Litigation Support Operations survey. On average, responding firms had nine offices and 526 attorneys. About 50 percent of responding firms have their largest office in the Northeast United States. We also conducted followup interviews with the leads of litigation support departments (primarily CIOs and directors) of eight law firms.

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