

Texas – Service Providers

Texas Survey: Litigating On Reduced Budgets And Its Impact On Law Firms

The Editor interviews Mark Habbinga, Esq., Director of eDiscovery Solutions, Epiq Systems, Texas. Habbinga recently completed his second annual Texas Corporate Counsel Survey, a qualitative survey that focused on issues facing corporate counsel and law firms. Habbinga, licensed to practice law in Texas, has worked in that market since 1996.

Editor: Mark, tell us about the e-discovery solutions and services offered by Epiq Systems.

Habbinga: Since our entry into the electronic discovery space 15 years ago, our overarching philosophy has been to partner with our clients to reduce overall litigation project spend while maintaining the highest quality standards and full defensibility. Since we are a true end-to-end e-discovery provider, Epiq can combine strategic consulting with cutting-edge review functionality throughout the process to both accelerate review and drive down its costs.

Our full range of e-discovery products and services provided worldwide include e-discovery consulting, forensic collections, data analytics, filtering, processing, prioritization, hosting, managed document review, production and repository management capabilities (litigation and corporate). Our products, services and staff are all focused on helping clients locate relevant documents early, which enables the legal teams to assess the strength of a matter and only apply resources to those materials that are deemed critical to the outcome.

Editor: We understand that you just completed your second annual survey addressing a range of critical concerns of corporate counsel in Texas. Can you tell us what your objectives were in managing this outreach and survey?

Habbinga: We think it is key to communicate with law firms and in-house counsel in a meaningful way. Therefore, by reviewing the top corporate counsel concerns regarding budgets, litigation activity and their relationships with law firms, we hoped to uncover important trends in the Texas legal marketplace. As a result of our informal survey of 75 corporate counsel and law firms, which included in-depth personal interviews with many participants, we were able to uncover some significant trends in our market area that are applicable on a national level in terms of “lessons learned.”

Our survey polled counsel primarily located in the Dallas-Fort Worth and Houston areas, covering such industries as banking, entertainment, hotel, oil & gas, outsourcing, professional retail, services, software and transportation. Survey questions addressed a range of topics, including litigation caseloads, department budgets, team size, and alternative fees – as well as relations between law firms and GCs.

Editor: What do you think the most startling learning was that came from your survey?

Habbinga: The most startling learning

may be the fact that corporate counsel are very carefully managing their use of law firms, which reflects business model and strategic changes on both sides of the relationship. One critical question we asked was, “Have you used new firms (this year) other than your traditional law firm partners?” Almost 90 percent of respondents said that they were using new firms outside their standard relationships or, at a minimum, were requiring firms to compete against one another for their work. Last year, only 35 percent of those surveyed said they had moved to using new firms.

In many cases, this response demonstrates activity where more nimble, smaller firms were picking up business from larger firms who typically could not be as flexible in changing their business models and billable hour structure. As one general counsel from a technology company explained, “The paradigm has changed, and I do not see it ever changing back.”

According to those surveyed, corporations are now accessing successful, former big firm lawyers at smaller firms to take their cases at a lower billable rate, as well as getting agreement to use a number of alternative billable models.

Editor: What were corporate counsel views on department workload generally and, specifically, litigation caseload?

Habbinga: For the past two years, 100 percent of respondents to the survey said that their workload had increased significantly. One general counsel from a transportation company equated this to an ethical issue, asking, “At what point does the expanded workload and reduced budget become an ethical issue for the GC?” In terms of litigation caseloads, 50 percent of respondents said caseloads had increased last year, and this year that dropped to 31 percent.

While it may be safe to say caseload work is relatively flat, we note that the trend reflected that different types of cases were dominant from year to year. This year, there was a significant increase in employment/labor matters, consumer cases, and federal investigations and inquiries, with commercial litigation and shareholder suits being the areas that saw the largest decrease in new cases. Intellectual property cases continued to be a hot area of litigation again this year.

Also notable is the amount of litigation that has surfaced around the few M&A deals occurring right now. Next year, it will be interesting to observe the impact that the BP oil spill crisis has on the Texas market and the caseload question.

Editor: How were budget issues addressed in your outreach?

Habbinga: We talked about budget concerns in a variety of ways. First, we asked



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if budgets were cut or frozen both years, and we inquired about reduced head count. Nearly 92 percent of those surveyed said budgets were cut in 2008; in 2009, 75 percent said they continued to be cut or frozen for this year, and budgets are not expected to see dramatic improvements next year.

This scenario has forced general counsel to seek out creative methods to manage this paradox, including engaging contract attorneys/paralegals to be virtual members of their legal departments, pulling associates in-house from their outside law firm (secondment) on a contract basis, and partnering directly with e-discovery and managed review partners to leverage efficiencies and pricing across their litigation caseloads.

Editor: What were the outcomes in the questions surrounding alternative fee arrangements?

Habbinga: Many Texas law firms, particularly the large firms, told us that they are locked into their business models, which affect potential flexibility in fee structures. In the past two years, more than 80 percent of counsel respondents noted that they have asked for fee adjustments. One responding general counsel representative told us, “Extreme pressure from management to control spend related to outside counsel is the biggest distraction to performing my job.”

Additionally, 90 percent of outside counsel asked for caps as part of an alternative fee agreement. Noted a general counsel from a manufacturing company, “At a bare minimum, always ask for a cap, multiple caps if you can get them.”

Other options being utilized in the Texas market include flat rates for repeatable case types, annual spend flat rates, and various “hybrid models” such as reduced hourly and contingency-based hybrids, bonus-based hybrids, and tiered or blended hourly rates based on litigation phases (pre-filing, discovery, pre-trial, trial, and appeal).

Editor: What further analysis points to localized trends based on your survey results?

Habbinga: It seems that both general counsel and law firms need clearer guidance from the outset on the entire litigation process aligned to established performance metrics. Budgeting and billing needs more planning, including litigation phase budgets and the implementation of stronger metrics through a trial. Billing must also be better monitored, using more technology and focusing on total case cost throughout a project.

A few law firm partners are successfully presenting multiple options to their corporate clients – not only focusing on legal strategies themselves, but also on various solutions that allow the corporate client to better manage the litigation spend and describing how various options can reduce the cost of the litigation. These options include the use of e-discovery technology solutions to reduce the number of man hours required in the discovery phase of the case.

Editor: What specific advice do you offer law firms, based on what you learned from corporate counsel?

Habbinga: Generally, a firm needs to examine its relationships as corporate counsel add more firms to their short lists of go-to law firms. Boutiques and smaller firms are securing business that typically went to larger firms, and we don’t see this trend lessening in the coming year.

Editor: Conversely, what survey outcomes could help guide general counsel?

Habbinga: As the Associate General Counsel of litigation for a major retail company responded, “If you can’t track it, you cannot manage it.” Case benchmarks and goals, budgets versus actual totals, and average hours required for repeatable caseloads are key to track. Many corporations have implemented the use of legal budgeting software to more easily determine actual spend versus budgeted spend. This implementation not only helps to manage the spend on ongoing cases, but also helps with negotiating alternative billing arrangements on new cases.

General counsel are also creating relationships directly with legal vendors to ensure consistency across their caseloads, to assist in the management of outside counsel spend, and to leverage volume discounts based on overall litigation spend. These legal vendors include collections and forensics experts, e-discovery vendors, managed review providers, and staffing agencies. Identifying partners that can provide most of these services and create consistent and trackable savings is critical.

Many corporate counsel stated in the survey that they lacked a network of other general counsel to act as sounding boards on the unique issues that they face in the corporate environment. We suggest that they participate in corporate counsel-targeted activities held by such groups as the Association of Corporate Counsel, the Texas General Counsel Forum, the Texas Bar Association, and the local bar association’s corporate counsel sections to develop a strong network of contacts.

Editor: As a technology and services company, what do the issues in this survey mean to you and to your firm?

Habbinga: As a professional services firm that focuses on legal technology solutions, it is important for us to anticipate where law firms and corporate counsel may be experiencing problems. A very large part of their litigation budgets includes the technology, document review and other services that Epiq offers, and it is key for us to be responsive to their budget constraints and changing needs. We are often the pivotal project managers in many types of engagements, and understanding our clients and the market in which they operate is part of our mandate in creating strong relationships and a smooth services outcome.

Please email the interviewee at mhabbinga@epiqsystems.com with questions about this interview.