THE IN CROWD™ EUROPEAN GC

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EDITORIAL

ANOTHER WINTER OF DISCONTENT LOOMS

Welcome back to *European GC*, the intelligence report dedicated to legal spending management. After a long summer break, vacations included, it's now back to business in a climate not too far different from the previous 12 months. With sovereign debt problems across the Eurozone adding to the general malaise of company cost constraints and reduced trading figures, General Counsel look to be in for another winter of discontent. The switch from the billable hour to alternative fee arrangements (AFA) will clearly remain high on the agenda, while risk management – another of the stress points for corporate legal departments in the recession – seems unlikely to diminish in day to day work.

For me the summer months were productive. Along with my colleague in Prague, Jeffrey Forbes, of the **Forbes Institute**, we completed our first in-depth report to help general counsel, explaining over some 40 pages how to make a legal department turn a profit. By concentrating on a formal recoveries programme they would find that there are huge sums of money to had by punishing wrongdoings against their single client, the company. The report, which will be published world-wide by Lexis Nexis, in conjunction with EGC and the Forbes Institute, will of course be

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It's about time: Legal department cuts are not just a US phenomenon

IN FOCUS™

Pamela H. Woldow and Douglas B. Richardson, of Edge International count the costs of the squeeze on budgets and time billing as one new survey suggests that outsourced fees, as seen in the past decade have entered terminal decline, and general counsel should now be thinking, not of routine instruction, but Legal Project Management.

General counsel and chief legal officers around the world are sharing a bond of pain and a world of hurt from recession-driven pressures to reduce total legal spend. Following a decade where legal costs had increased by 75% while general corporate operating expenses had increased by only 20%, the message from management is clear: your legal department is not immune from the consequences of the global economic slump, so deliver on cost-containment or your job is at risk.

In a new Eversheds survey report, The Clients' Revolution, 90% of general counsel reported intense internal pressure from their financial managers to provide better value, efficiency and cost reductions. Arguments to senior management about the unpredictability of legal costs, particularly litigation expense, fall on deaf ears. No more fluid legal department budgets, no more automatic 15% legal budget increases every fiscal year. US legal budgets took a major hit in 2009, declining an average of almost 12% when surveyed at the end of Q1 and dropping further thereafter. Our conversations with European and Latin American general counsel tell us that this sobering reduction is not just a US phenomenon.

To complicate matters, the great cost squeeze has come at a time when legal departments are stretched thin by new regulatory requirements, larger and more sophisticated corporate structures, and the struggle to keep up with work formerly sent to firms and now pulled back in-house (over half of the legal departments Eversheds surveyed have reduced the amount of work they send to firms). The result is that departments that are expected to "do more with less" find themselves barely able to "do the same with less." The termination of many seasoned staff lawyers further negatively erodes department efficiency.

Internal Cost Management Tactics

Like cash-strapped law firms, many senior in-house counsel started by trimming internal expenses. They reduced legal staff size, froze salaries, skipped bonuses, cut non-lawyer staff support, deferred technology purchases, red-lined professional conferences, and in the case of one legal department, even banned those "costly" post-it notes. In addition to outsourcing superfluous non-legal parts of their cost base, an increasing number of legal departments are diving into legal process outsourcing (LPO), either by sending legal work directly to overseas vendors or insisting that their outside counsel do so. These moves have produced significant savings…but not enough.

Accordingly, the focus has moved beyond cost-cutting to greater attention on the fundamental issue of how efficiently work is performed – on analyzing who does the work, how work is assigned, delegated and managed, and how time is

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About the editor: **Patrick Wilkins**

Patrick Wilkins is the founder, editor and publisher of the award-winning the European Lawyer magazine from its launch in 2000 until 2009 when the publication passed into new hands. A former British national newspaper journalist, he began to specialise in the reporting of law and legal issues in 1994, becoming in 1999 executive editor of Commercial Lawyer. The European Lawyer won the prestigious Queen's Award for Export in Great Britain in 2006. **patrickwilkins@europeangc.com**

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actually spent. This can be uncomfortable for legal departments accustomed to operating as cost centers historically immune from scrutiny. Some departments have attempted to measure efficiency by mimicking law firms and tracking staff lawyer time. However, this creates the same issue that time-based billing creates in law firms: the fact that a certain amount of time was spent on a matter does not mean that it was spent appropriately or effectively. In other words, time spent is not a measure of valued added.

Some legal departments report improved efficiency when they work to engineer greater collaboration between the legal department and other business or functional units. Rather than operating as a silo, these legal departments are implementing systematic approaches for leveraging their collective knowledge and experience, often with the assistance of a newly-evolved corporate role, the Head of Knowledge Management. This approach acknowledges that the aggregation and retrievability of information and experience relating to prior legal work is essential if lawyers are to avoid redundant effort, constantly reinventing the wheel, or repeating past mistakes.

Focusing on the Firms

The most obvious cost-management solution, of course, is to reduce outside legal spend, which typically consumes about 50% of the annual legal budget. And here, general counsel get some good news: an unintended consequence of cost-management pressures from their own management is their increased leverage in their relationships with outside counsel. Indeed, the Eversheds report highlights three characteristics of the current legal market:

- Clients take centre stage;
- Delivery of legal services is geared up to efficiency and value; and
- The law firm market in flux.

This survey reports that 75% of partners sampled say that the balance of power in the client-lawyer relationship has shifted to the client, and 90% of general counsel believe that fee levels are entering a long-term decline.

Many general counsel are implementing approaches for cutting low-hanging fruit: convergence programs to lower the number of firms providing service and RFPs that create competitive bidding contests. In one notable example, the legal world was astonished by the news that Levi Strauss had reduced its complement of hundreds of outside law firms to two, Orrick for most of the legal work and Townsend for IP work.

Other cost-management tactics are becoming common: law firm rate increases are being rejected, legal invoices are subjected to intense audit, and firms are told that the client will not pay for work done by first or second year trainees or associates. Such one-time tactics, however, don't address the fundamental issue, which is inefficiencies in how firms perform legal work, inefficiencies that historically get passed through to the client.

When pressed by clients to "share the pain" and come up with innovative cost-cutting solutions, law firms have been quick to offer hourly-rate discounts or blended rates that may appear quite significant. These accommodations appear to produce victories for general counsel, who can brag to their management that they have successfully beaten the outside firms down on costs. Except that they really haven't – they have only hammered them on rates. Such rate reductions are almost invariably accompanied by compensatory increases in the number of hours billed. One large firm partner told us, "I love discounted rates! We end up making far more money on them, both because the client sends us more work and because we spend more time doing it." At the end of the day, the outside legal spend remains largely the same, or even greater.

There certainly have been attempts at innovation in time-based billing. London-based Berwin Leighton Paisner, for example, has introduced a "Lawyers on Demand" program, a pool of contract lawyers who can be engaged to handle certain matters at rates below the firm's own billing rate floor. This novel approach, however, remains time-based. While the rates may be attractive, this approach does not really address the fundamental issue of how efficiently work is performed.

It's All About Value

The need to stop playing around the edges with pricing gimmicks and get to the heart of how law firms provide service value explains the burgeoning popularity of value-based, rather than time-based, billing approaches. Clients are telling their law firms that they will welcome proposals for such alternative fee arrangements (AFAs) as fixed and flat fees, phased fees, contingency fees, success fees, retrospective fees based on value conferred, or retainers. The global legal marketplace has witnessed the sweeping shift to AFAs by such corporate giants as Cisco, Pfizer, United Technologies and Bombardier.

Tyco has used nothing but value-based billing since 2004, and FMC's general counsel, Jeff Carr, makes his position clear: "I'm not interested in hours. Hours tell me nothing. I'm interested in what it costs to get the work done, and done well." Continuing recessionary forces have done much to accelerate the trend toward value-based billing in every legal market worldwide. It is noteworthy that 88% of law firm partners in the Eversheds survey report that they often or sometimes use value-based billing. Bombadier's general counsel, Daniel Desjardins says, "The EU is much further along in the use of value-based fees than the U.S."

Whether an engagement operates pursuant to time-based or value-based billing, general counsel must become more comfortable holding outside counsels' feet to the fire. Today, the client must be increasingly vigilant: scope creep is unacceptable. Passing the costs of doing business through to the client is forbidden. Excuses for overruns are unacceptable. At a recent colloquium attended by both managing partners and general counsel, one general counsel stressed the absolute need to perform on time and on budget. He cited the example of a prepared food enterprise that cooks, packages and delivers prepared foods to shops all over London. "Day after day, this company has to deliver," he said. "They have to anticipate hundreds of variables – broken-down trucks, suppliers that go out of business, employees who get sick – and still deliver their products as agreed, on time and at specific price points. No matter what. I expect our vendors, including law firms, to do the same."

When advising in-house counsel on how to ride herd on their outside counsel, we suggest that they demand hard answers to four key questions:

- What steps have you taken to increase your efficiency in delivering legal service?
- What is your firm's or practice group's process for budgeting legal matters?
- What is you process for monitoring legal work and holding legal fees to budget?
- What actions do you take when legal services exceed budget?

Enter LPM

To support the drive for efficiency on both the client and law firm side, we're seeing rapidly-increasing interest in Legal Project Management (LPM). LPM is relevant to legal departments both as a tool to monitor how efficiently outside counsel are keeping their cost-management promises and as a way to better manage their own in-house lawyers' efficiency.

Properly implemented, LPM is a uniform and disciplined approach to efficiently planning and performing legal work that permits more accurate costing and budgeting. All LPM approaches contain six basic components: 1) defining outcomes and scope; 2) identifying resources and constraints (including budget); 3) developing a thorough project plan with critical paths and clear performance metrics; 4) executing that plan; 5) monitoring progress and trouble-shooting deviations from the plan; and 6) after-project review to identify opportunities for process improvement. Ultimately, what LPM does is provide a consistent approach to behaviors that now tend to be individualistic, thereby aligning the interests and actions of interdependent stakeholders. Yes, because it uses a common vocabulary and uniform approach to tasks, LPM takes time and training to introduce and implement. But even when used crudely in its formative stages, LPM produces immediate and significant gains, both on the law firm side and the client side.

To date legal departments have generally been slower than firms to implement internal LPM initiatives (although pioneers like DuPont adapted industrial project management techniques to its legal operations as early as 1999). Theoretically, LPM should

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be easier to introduce and institutionalize in-house, if only because legal departments are smaller than large law firms and less geographically-dispersed. We strongly support internal LPM programs for two reasons: first, LPM should not be viewed simply as a way for law firms to manage work. It is a powerful tool for lawyers in all settings. Second, it is far easier to monitor the efficiency of firms' performance if one is well-grounded in LPM disciplines, tools and metrics.

Pulling Together

We are encouraged that so many firms and legal departments are undertaking LPM initiatives. That said, we urge them to look beyond their own internal initiatives to LPM's powerful potential to diminish the adversarial dimensions of law firm-client relationships. One of LPM's greatest benefits is that it greatly improves the quality of communication – in both mode and content. When all stakeholders know what's going on, where things stand and what things cost, it becomes easier to act collaboratively to address challenges and solve problems. LPM can be a tool for building rapport, trust and common purpose – particularly with respect to the costs of doing business and the overall quality of legal service – if the players use it as a collaborative bridge, a legal lingua franca, so to speak.

We think LPM will work still better when clients and firms learn to meld their LPM efforts. We currently have the pleasure of working on two LPM implementation initiatives where a firm and a valued client are collaborating on jointly developing their LPM capabilities. These joint efforts use real-life projects and legal matters as their "case materials" for mastering LPM planning, implementation, communication and metrics. In such undertakings, the parties' drive for efficiency is mutually respected, openly communicated and jointly supported. The parties do not expect perfection, only commitment and continuous improvement. We hope such innovation will become a much-imitated model for improving client-lawyer relationships, as well as providing a lot of applause for first-movers willing to showcase some fresh thinking.

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made available to all subscribers as a download. It makes for interesting reading, whether law firm or law department. This is because installing such a programme is a great reason for law firms to approach their clients and show them how to become profitable. Contracts can be scoured for discrepancies, IP agreements can be re-read to make sure of compliance, and events such as factory breakdowns, power outages and the like can be investigated to find out who is to blame.

You will remember it was European GC that revealed the concept of this radical new departure earlier this year. Go back to Issues 5 and 6 if you missed them and there is much to learn, even from the short report. After all, why run as a cost to the company when you could pay for your own department many times over, simply by being proactive and a little more aggressive with

As for this new edition of EGC, readers will find that there are plenty more problems coming to the surface: stricter rules on e-discovery in English Courts procedure where precise demands on retention and disclosure of all electronic documents are now imposed, and new guidelines on contract management by one of the leaders in the field. Both need to enter the mindset and ultimately can save corporations large amounts of money. As indeed can the content of Pam Woldow's excellent article on the move to Legal Project Management as a way of softening the effect of the billable hour every time a GC picks up the phone to its outside legal advisers.

Welcome back to the real world.

LETTER TO THE EDITOR

Dear Sirs,

Reading your article on DuPont's profitable legal department (Issue 6), makes me feel guilty of being regressive, yet I am someone who embraces innovation and especially creative use of the law and legal perspective to add value to the commercial ventures I represent. I would therefore like to raise the following caveats:

Whilst I agree a good in-house lawyer will take a very proactive approach to think offensively as well as defensively, and turn any situation to advantage, my 16 years of working life, most of which has been pure litigation experience, show me there are rarely any winners in litigation, and more often than not both sides are net losers from the exercise. I would never at the outset of a claim raise a litigant's expectation above a scenario that the best one can achieve is to mitigate losses.

I appreciate a recovery program will likely take a pyramid shape, ideally a very ground-based sharp one with few claims to actually fight, but my years of litigation also tell me that, as Churchill famously said, "If you want peace, prepare for war", so you must be able to show convincingly that you are ready to go through with the claim in order to succeed in settling it.

I am also coloured by my 5 years in house, whereby in a small to medium sized business, the time and resource to litigate makes it a major distraction from the core business, though I can see that for larger companies it could make sense. I tend to think that a critical mass would be needed not only to invest and carry the strategy over at least a 3 to 6 year term, but the legal department head count probably needs to be into double figures to have an effective and dedicated in house litigation team. Also, the potential drawbacks of upsetting relationships, this could be considered less relevant for companies who operate in a series of one-off transactions and do not depend on repeat business or ongoing supplier relationships.

It is difficult to put a value on good supplier/customer relationships. While a truely objective and open minded business person might see it as purely professional behaviour and take no hard feelings, in reality when one moves into the realm of claiming compensatory damages backed up by threat of adversarial proceedings, you will find few people ever take it that way. When claims impact their bottom line, or even a threat to survival, they are unlikely to take it objectively. Again, it may be easier for the larger companies to project this as "business policy" if they can make it appear "faceless", but it is not just smaller companies, whose business largely depends on individual relationships, word of mouth recommendation and industry reputation, that will find themselves losing friends, and ultimately contracts, much sooner than the outcome of even the first disputed claim.

That said, however, the global economic downturn has – as predicted - led to more recovery exercises in my company. I could easily demonstrate that over the last 6, 12, 18 or 24 months our legal department actions have directly improved bottom line 'profitability' - many times in excessive of the overhead.

Yours faithfully,

Dominic Buckwell General Counsel GE SeaCo Services London

HOW MONEY CAN BE SAVED ON EFFICIENT CONTRACT MANAGEMENT

Based on the new BearingPoint Survey Contract Management 2010 three of Bearing Point's experts explain how General Counsel can support cost savings with Contract Management.

Sabine Brumme
Legal Counsel, BearingPoint

Steffen Tampe
Director, BearingPoint

Claudia Georgi
Manager, BearingPoint

Contracts are the foundations for all business activities in all departments. It is not only the General Counsel's business to take care of contracts. Contrariwise, tasks such as creating, negotiating, filing and monitoring contracts are often delegated to individuals company-wide. They are left alone with undefined contract processes, do not have access to existing contracts and may cause non-compliance with laws based on lack of knowledge. General Counsels often do not have the chance to reduce contract risks as they are not involved in negotiations and contract processes.

And although, in the end the companies have to pay for it, they often do little to improve the situation.

The key word is Contract Management. With enterprises becoming more and more global, Contract Management is instrumental in allowing enterprises to do the right things at the right time and to fulfil their objectives. And it can save money.

BearingPoint's recent European survey "Contract Management 2010", which was conducted across all industries and departments, reveals advantages and cost reduction opportunities by implementing efficient Contract Management procedures and supporting IT systems throughout the enterprise.

More than 50% of the participants believe that companies work under high to very high risks without an efficient Contract Management and that they even cannot tap the full potential for their business due to the lack of a professional Contract Management (see *Figure 1*).

The most important criteria related to Contract Management have a direct or indirect influence on potential cost savings (see *Figure 2*).

According to the study results the main cost saving opportunities of Contract Management are based on:

- Contract process optimisation
- Transparency over all existing contracts
- Compliance with laws

The data in *Figure 3* (overleaf) shows the main cost savings.

With contract process optimisation, transparency over all existing contracts and compliance with laws savings up to 10%of contract administration efforts are possible. Process optimization includes the use of standard templates, faster retrieval of existing contracts and related information, monitoring of contract deliverables and terms. The standardisation leads to more efficiency in processes and thus reduces the working time on contracts. Transparency of contract information concerning all existing contracts facilitates the risk reduction as a constant monitoring of all contracts is possible and thus the company can react quickly to all emerging contract risks during the contract lifecycle. Also with an efficient Contract Management compliance with laws is addressed in all defined contract processes. Thus, legal consequences can be reduced.

FIGURE 1

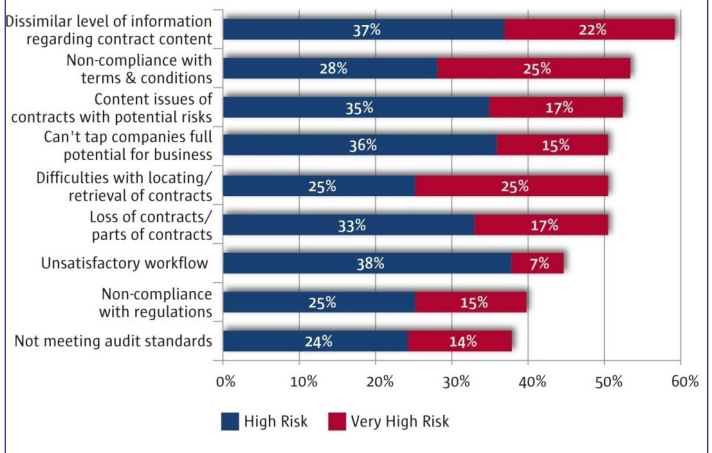
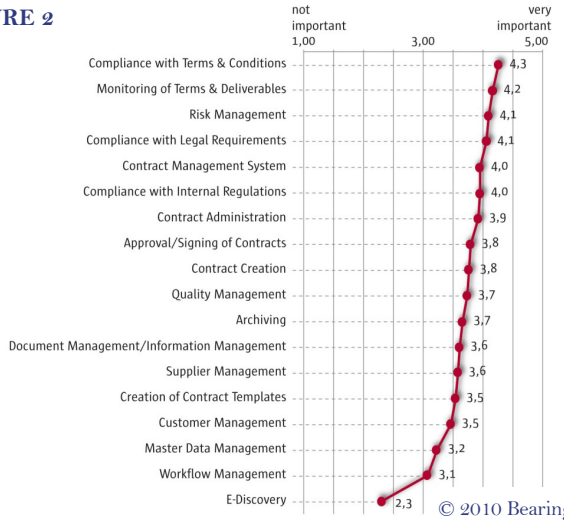


FIGURE 2



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The potential savings with Contract Management vary for every single contract and situation. The following examples might help you find enormous saving potential in your company, as well:

• **Contract Templates and Checklists help to save money**
An IT department negotiates a contract with a software vendor. The contract automatically terminates after three years. The IT department forgot to request a clause for early termination. As the company decided to switch to another software vendor after one year, the IT department realizes that the contract does not include a termination clause. The company has to pay the whole amount negotiated for the contract period of three years. Templates and checklists provided in a contract management system could help to consider such clause in advance.

• **Consistent and correct information helps to save money**
A sales department frequently offers services to the public authorities. Recently the company has acquired other firms to offer additional services. Proposals and contracts are not filed centrally but every sales unit is responsible for their own service. This leads to unequal information in different proposals and contracts to the same customer. The government gets inconsistent proposals from different sales units and realises that the enclosed forms and certifications necessary for the proposals are completely different. The government refuses both proposals.

• **Access to the available information helps to save money**
The procurement department of a world-wide operating company negotiates master agreements with the main suppliers, which are filed in the procurement department. Other departments do not know about these master agreements but negotiate standard purchasing contracts for their group every day. Not using the existing master agreements costs the company some 100,000 EUR per year.

• **Contract Management helps to enforce and monitor compliance with internal guidelines and templates while reducing costs**
The legal department of a company provides templates to be used for client contracts. Every change has to be approved by the legal department. If templates are provided as a document they can be easily amended without involving the legal department. A Contract Management system allows to provide the templates in the system, track any changes and automatically forward the changed document to the legal department for prior approval before it will be distributed to the client. This helps to increase the efficiency of the legal department and to reduce costs.

• **Clear Conditions, clear procedures help to save money**
Companies lose money through late payments. To avoid late payments a pre-condition is to define late payment interests in the contracts and to fulfil them.

What can General Counsel do for cost savings and efficient Contract Management?

General Counsel can do a lot! The legal department is key for Contract Management. It has insight into contracts of all departments and gives legal advise to reduce risks and ensure quality in contracts. Although the legal department does not have an overview of all existing contracts in a company it should act as a partner of the management concerning Contract Management. Why? Because the legal department can positively influence the contract processes and help all departments during the whole contract lifecycle, from planning to termination (see *Figure 4*).

One of the most important results of the BearingPoint survey is that companies demand a stronger centralisation of most of the Contract Management tasks as a basis for better contract processes, risk reduction and compliance (see *Figure 5*).

The legal department can play an active role in this centralisation. It is responsible for many of the contract tasks for the whole company and thus helps to start saving money right away. It is your turn now to define the role of the General Counsel/legal department in your company's Contract Management.

FIGURE 3 Savings based on …

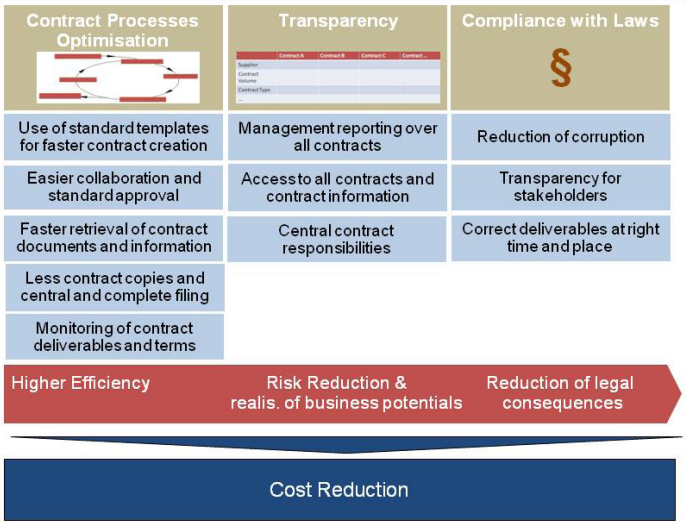


FIGURE 4

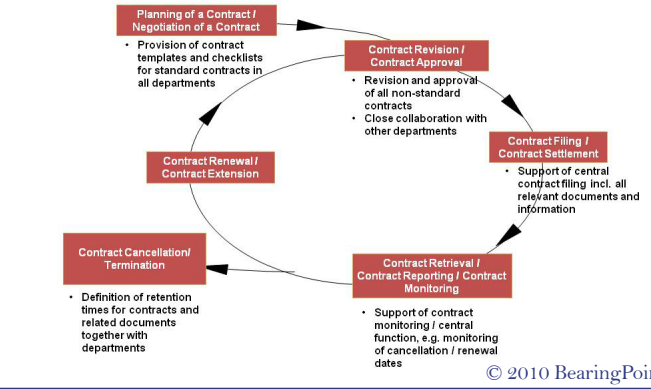
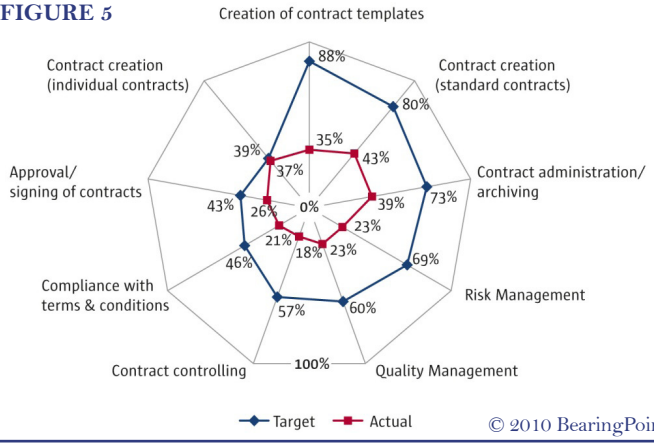


FIGURE 5



DISCLOSURE: THE NEW GET-TOUGH DIRECTION FOR ENGLISH LITIGATION

IN SIGHT™

Litigating in England takes a giant leap forward into the technology age this October, with new procedural rules governing electronic documents. Parties will no longer have an excuse to plead that it was 'impossible' to retrieve documents and other evidence needed. It will require GC in England, and those in other countries disputing, or defending claims under English law, to rethink their internal electronic organisational policies, write *Daniel Kavan* and *Tracey Stretton*.

Rules of English civil procedure have long required parties in legal disputes to disclose all documents potentially relevant to the case being tried. As the volumes of electronically stored information generated in the ordinary course of business increase at an alarming rate, lawyers are starting to find their clients' electronic documents and communications increasingly difficult – and costly – to manage. Cases have reached the courts where problems with the disclosure of electronic evidence has required judicial intervention and the Jackson Report on Civil Litigation Costs highlighted the significant impact on the costs of litigation caused by the proliferation of electronic data.

On 1 October 2010, a new Practice Direction 31B on the disclosure of electronic documents came into effect. It applies to English proceedings allocated to the multi-track and aims to "encourage and assist the parties to reach agreement in relation to the disclosure of electronic documents in a proportionate and cost effective manner."[1] It deals with various aspects related to the disclosure of electronic documents, including:

- preservation
- completion of an Electronic Documents Questionnaire
- scope of the "reasonable search"
- use of technology and various searching strategies,
- discussions between the parties before the first Case Management Conference (CMC) and preparing for the conference itself

WHAT DOES THIS MEAN FOR IN-HOUSE COUNSEL?

The biggest impact will be that external lawyers will require in-house counsel to provide a very detailed breakdown of the electronic documents being retained and how they are stored.

Lawyers are required by the Practice Direction to discuss with the other side, in some detail, the information that is accessible and how they plan on dealing with it.

The obligation for parties to confer on these matters isn't a new requirement, but the new Practice Direction confirms that it is compulsory, rather than a mere suggestion, that parties should communicate and that these aspects can no longer be ignored. Historically, parties have been reticent to discuss electronic disclosure. However the lessons of *Digicel* [2] make it clear that it is essential to communicate with the other side.

THE ELECTRONIC DOCUMENTS QUESTIONNAIRE

The previous Practice Direction set out in general terms the need to discuss preservation and searches, and to provide information about documents, storage systems and retention policies. It wasn't clear what detail was required and many parties simply ignored these requirements. In Digicel, the parties gave disclosure without discussing the approaches that they would take in relation to electronic documents. Despite considerable effort and expense, the court ordered further searches to be conducted and further sources of documents to be considered. The case highlighted the need for key word search terms, and for the scope of the data that they will be applied to be agreed in advance. But what else needs to be agreed and in how much detail?

The new Practice Direction introduces the Electronic Documents Questionnaire, which although not compulsory in all cases, will act as a guide to the kinds of information to be exchanged by both parties. The Practice Direction suggests that parties may find it helpful to exchange the Questionnaire but also says that the Court has a discretion to order its completion if agreement on electronic disclosure cannot be reached.

The Questionnaire is a detailed form that asks probing questions about what kind of data is held by the party to the litigation, what formats it exists in, the storage media it can be found on, how easy it is to access, whether it has been preserved, and what steps will be taken to search and review the data to decide what will be disclosed.

Even before its official publication, we saw the Questionnaire, then in its draft form, used when the High Court's Senior

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[1] PD 31B.2. [2] [2008] All ER (D) 226 (Oct).

Master Whitaker ordered the defendant in *Gavin Goodale v The Ministry of Justice* [3] to fill it in.

If in-house counsel prepare to answer these kinds of questions before litigation kicks off by liaising with their IT departments and others in the business, answering these questions will be a smoother and faster process when the case gets underway. If the time spent by external lawyers finding answers to these questions can be reduced, there is the potential for real cost savings. As a matter of good practice, parties that consider the issues raised in it at an early stage are going to be better placed to reduce the costs and risks associated with disclosing electronic documents.

PRESERVATION

The Practice Direction enforces the common law requirement to preserve documents once litigation is contemplated, says the procedure. "The parties' legal representatives must notify their clients of the need to preserve disclosable documents... [including] electronic documents which would otherwise be deleted in accordance with a document retention policy or otherwise deleted in the ordinary course of business." [4] The Questionnaire goes on to ask what the document retention policy actually is, and asks for details on when the party was told to put a hold on deleting documents.

DISCUSSIONS AHEAD OF THE CASE MANAGEMENT CONFERENCE

The Practice Direction states that prior to the first CMC, lawyers must discuss:

- how they plan to present information to each other and at trial
- preservation
- the categories of electronic documents that they seek to disclose
- the scope of the reasonable search to find electronic documents
- the tools and techniques to be used to reduce the scope and burden of e-disclosure

A number of examples are provided including keyword searches, as well as methods which have become good working practice such as data sampling, de-duplication and using a staged approach to disclosure.

Parties must provide to the court, ahead of the first CMC, a list of issues which have and have not been agreed in relation to e-disclosure. This will allow the court to decide on any outstanding matters at the CMC and is the ultimate objective of the Practice Direction and Questionnaire.

THE REASONABLE SEARCH

The Practice Direction and the Questionnaire regularly make reference to a "reasonable search" for electronic documents as required by CPR 31.7. Paragraph 21 offers a list of factors to consider in determining what might be a reasonable search. These include the number of documents involved, the nature and complexity of proceedings, the ease and expense of retrieval of any particular document (which will depend on how "accessible" it is), the availability of the same material from other sources, and the significance of any documents likely to be found.

This may raise arguments as to what is reasonable and what might be outside that scope. Determining what is a "reasonable search" for each individual case can be difficult, and open to challenge. It essentially involves working out what evidence is needed to advance or defend a case and where it might be found. The cost of obtaining data from less accessible locations should be balanced against the likelihood of finding anything relevant. E-disclosure experts should be used to estimate the difficulty of accessing such data and the cost, as any argument at the CMC would best be supported by expert advice or at least a cost estimate.

THE REQUIRED KNOWLEDGE

A collaborative process is the best way to ensure that all of the elements of the Practice Direction are complied with, and if necessary, that the Electronic Documents Questionnaire is completed accurately and strategically. A roundtable discussion between in-house counsel, management, external lawyers and technology consultants will most effectively ensure understanding on all parties involved and help plan the way forward.

A prior understanding of the issues that arise in e-disclosure and the technology and techniques available to carry out successful exercises has become essential. As Lord Jackson pointed out in his report, e-disclosure should be a substantial part of legal education. The better prepared lawyers are to deal with the procedures and technical processes raised in the Direction, the less confusion that will occur and the smoother the disclosure process will be.

CONCLUSION

The new Practice Direction codifies good working practices developed over recent years to save costs in managing documents for disclosure. The Questionnaire acts as a useful checklist for the information that needs to be gathered and the issues that need to be discussed and agreed upon to conduct the process efficiently. If counsel embrace the advice provided, they will be better prepared to control the way disclosure is managed in litigation matters and the increasing costs associated with it.

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[3] [2010] EWHC B41 (QB)

[4] PD 31B.7.

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CORPORATE COUNSEL EXCHANGE IN THE HAGUE THE BIGGEST SO FAR

As last year, European GC will be attending the 3rd European Corporate Counsel Exchange, 24th – 26th October 2010, The Hague, Netherlands. The Exchange brings together leading General Counsel from throughout Europe to benchmark, discuss challenges and debate on issues facing legal departments. It is growing as every year goes by with GC finding the formula more beneficial than traditional conferences.

The Exchange is so successful at facilitating networking, that it was recently awarded 'Best Networking Event' at the Conference Awards 2010; an accolade presented to IQPC Exchange by industry peers. The 3rd Corporate Counsel Exchange features speakers including Liz Kelly, General Counsel, Nationwide Building Society and Iain Larkins, Group General Counsel, Mercedes Benz who will be discussing the evolving role of the General Counsel. Heads of Legal are now expected to go over and above the traditional role of legal and risk management, with an increasing shift towards a business advisory role. The panel session will explore competing priorities, to what extent a GC should be involved with business decisions, and how to meet the needs of the board.

The competition law panel, led by Anna Emanuelson, Policy Analyst, Antitrust and Mergers - Policy and Scrutiny , DG Competition, European Commission; Gabriel McGann, Senior International Competition Counsel, Coca-Cola and Nicola Northway, Director, Group Competition Law, Barclays Bank - will look at the latest case law and legislative developments, including the ECJ's ruling denying privilege for in-house lawyers and the new horizontal co-operation agreements regime. Panelists will also discuss how to balance the competing needs of the business with the need to meet competition requirements.

The Exchange is fast becoming the premier event for General Counsel, and is a truly unique, enjoyable networking opportunity.

To request your invitation, please contact Lindsay Lovell on:
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or e-mail:
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Look forward to seeing you there.

Patrick Wilkins, editor.