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Risky Business



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Simplifying Risk and Compliance Challenges

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As we enter a new decade, the legal industry is faced with a wide range of risk, governance and compliance challenges. Some of these challenges are opportunities in disguise. A rapidly changing regulatory and legal landscape can often mean new avenues of legal work for the practitioners who have successfully adapted. The top cost, risk and regulatory issues facing the legal industry include:

- **Regulatory Pressures:**

It's no surprise that the Obama administration, both as a reaction to the financial abuses and as an attempt to curb the perceived *laissez-faire* attitude of past administrations, has stepped up its regulatory pressure. As part of the President's call for a "more vigorous regulatory regime," we can certainly expect the epicenter to be the financial services sector, but there will be ripples affecting other segments as well. Increased regulatory oversight will span a wide spectrum, including new environmental laws, the Patriot Act, climate change regulations and even laws with a more global reach such as the Foreign Corrupt Practices Act (FCPA).

- **Corporate Crackdowns:**

The increased, or simply amended, regulatory initiatives will mean that more regulators will be stepping up enforcement activities, all to the chagrin of corporate America. On the other side of the coin, litigators representing investigated enterprises will benefit as they make sense of the new landscape.

- **Global Repercussions:**

Not to be outdone by their U.S. counterparts, we can also expect to see a further increase in E.U. based regulatory initiatives, exemplified by the scrutiny surrounding the recent Oracle/Sun deal. This scenario is becoming increasingly typical as the growing number of international regulators, such as the Financial Services Authority (FSA), the E.U. commission and the U.K. competition commission, become more active.

- **Rise in Cross-Border Litigation:**

The transfer of electronically stored information (ESI) across international borders has increased in both frequency and risk due to the hodge-podge of disparate privacy laws and blocking statutes. In response, many litigants are forced to collect, process and review electronic data "in-country" to minimize complications, but this method isn't always convenient or practical.

- **Litigation's Upward Trend:**

Despite the fact that the economy appears to be stabilizing, approximately 53 percent of respondents to a recent legal industry survey conducted by Clearwell Systems and Enterprise Strategy Group said they expect the number of lawsuits and regulatory inquiries to increase by at least 20 percent in 2010. These statistics are mirrored by results from Fulbright & Jaworski's 6th Annual Litigation Trends Survey, in which 40 percent of respondents indicated their belief that litigation demands would increase in the upcoming year.

- **Out-of-Control Costs:**

The Fulbright survey also indicated that cost containment is a high priority, with many listing e-discovery as one of the budget items spiraling most out of control. Even as price compression continues to accelerate, data proliferation has offset any perceived discounting, with the net being higher electronic evidence processing and review costs.



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Facing these challenges may prove to be a daunting task for some, but a few promising strategies are expected to ease the burden:

- **In-House Control:**

Reducing e-discovery costs ranked at the top of the list as a major initiative for most respondents in the Fulbright survey. The leading method listed (at 47 percent) was the initiative of taking e-discovery in-house. While other methods were listed, most didn't appear to have critical mass, including: using "clawback" agreements more often, enforcing document retention policies and negotiating with the opposition over the scope of discovery. Nevertheless, there isn't a single silver bullet, and attempts should be made across all phases of the Electronic Discovery Reference Model (EDRM).

- **Early Case Assessment (ECA):**

From a process standpoint, many litigants are becoming convinced that an ECA methodology is the preferred way to counterbalance some risks by preparing earlier for litigation in terms of budgeting, risk assessment, and "meet and confer" preparation. Fulbright survey respondents also described the benefits of ECA:

- Attorneys responded that, on average, performing ECA results in a favorable outcome in 76 percent of cases.
- According to 87% of respondents, early case assessment is beneficial for strategic planning and determining the best way to proceed with a case.
- Respondents indicated that ECA enables attorneys to reduce the litigation expenses in 50 percent of their cases on average.

- **Alternative Fee Agreements:**

The economic downturn has also accelerated the use of alternative fee agreements, with over a third of the Fulbright survey respondents indicating such arrangements were gaining ground. While there didn't appear to be a clear winner out of the alternative fee models (e.g., blended rate, capped, contingent, fixed, and performance/reward base) it is clear that the time and material model is under siege as companies try to control costs in difficult economic times. **ILTA**