CORPORATE COUNSEL

Commentary

Managing Litigation and Benchmarking Through Big Data

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It might not be the first thing people remember about the Great Recession, but the effects of the last big economic downturn changed the way companies view and measure their legal departments—probably, forever.

Gone are the days when an in-house counsel's success (or failure) was measured simply by reducing legal spend year over year. Legal departments are no longer considered pure cost centers—with the C-suite now focused on metrics that demonstrate its legal department's effectiveness in new ways, including an ever-increasing drive for data-driven intelligence and the ability to benchmark performance against the legal departments of other, similar, companies.

Garnering the data necessary to compare a legal department's efforts with others isn't easy, as most actionable information isn't public. But finding ways to leverage that kind of data is becoming more important if in-house counsel want to provide new metrics to company leaders and strategically manage potentially damaging litigation—before and after it starts.

One way for in-house counsel to do this is to tap their outside law firms, who should have data from similar companies to draw comparisons, as well as technology to more effectively and efficiently manage litigation.

Using Data to Guide the Strategy for Individual Matters

When it comes to guidance on individual litigation matters, in-house attorneys previously had to rely largely on the historical knowledge of outside counsel to get the lay of the land. Was the opposing attorney any good? Was she eager (or overly eager) to settle? Was the judge assigned to the case prone to decide in certain ways on dispositive motions?

To be sure, assessments from seasoned litigators remain important—but they are subjective and may be incomplete. My law firm, Littler Mendelson, has long focused on using technology to gather the collective knowledge and insights of our more than 1,200 attorneys worldwide. We've found that the ideal approach is to create a litigation strategy that combines attorney intuition with objective insights gleaned from aggregated data.

Leveraging Aggregated Data to Minimize Risk

Improved access to data can also help legal departments look inward and make changes that avoid triggering expensive litigation in the first place. This is a key function of Littler CaseSmart, a technology platform my firm developed several years ago to manage administrative agency charges and employment litigation.

The platform captures data on legal matters in an interactive dashboard, which helps companies identify factors that are triggering litigation and proactively manage risk. As an example, the legal department for a large hospitality company reviewing aggregate data provided by its law firm may find that a certain employment policy is more often involved in lawsuits than others. Consequently, they may decide to alter the policy or provide more training to employees to rectify this issue.

Benchmarking Data and Actionable Intelligence

While legal departments clearly understand the value of technology and advanced data analytics, they usually don't have the time or resources to develop the necessary tools in-house. For many companies, data analytics resources are primarily focused on departments such as logistics or sales where the return on investment is higher. As a result, in-house counsel often live in a world of spreadsheets where larger trends and insights do not jump off the page.

In this context, as in-house counsel look to report benchmarking data to the C-suite, law firms can provide these kinds of actionable insights if they can aggregate data from a host of clients facing similar issues. For instance, through aggregate, de-identified data from its law firm, a large retailer might find that it is spending less than the median for its industry to settle charges—but with more matters ending up in litigation. The company may decide to adjust its settlement strategy for charges as a result. But without access to that aggregate data to provide a big-picture, industry-wide view, the company might not have known that such a change could reduce litigation.

Predictive Modeling—the Next Frontier

All of the approaches above are important and possible based on technology and services currently available, but legal departments also need to be looking to what's next: Using data to make predictions about how a matter is going to progress and its eventual outcome.

Predictive modeling can provide significant benefits for assessing the likely length, costs and outcome of lawsuits filed against a company, as well as what to expect in the deposition and discovery process. By anticipating hard costs (such as legal fees and the settlement/award amount) and soft costs (such as the impact on personnel and brand reputation), corporate counsel are in a better position to make informed decisions on how best to proceed with a particular case at inception.

Conclusion

It's not a shocking statement to say that the legal industry is generally behind when it comes to technology. But the time has come to embrace a new world in which litigation is heavily influenced by datasets, analytics and statistical modeling. Smart companies are seeking out progressive law firms that are breaking from the historical reactive approach. They want legal representation that is continuously looking around the corner for what's next—particularly when it comes to managing litigation and using advanced metrics to show the legal department's value.

Scott Forman is a shareholder at Littler Mendelson and founder of Littler CaseSmart®, an award-winning platform that uses a combination of technology, alternative staffing and project management to more efficiently resolve employment charges and litigation, while providing data-driven insights on business risks. He can be reached at sforman@littler.com.