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In a declining market  
Litigation Support Vendors  
must reinvent themselves  
to remain relevant



**A WHITE PAPER FOR LITIGATION SUPPORT VENDORS**

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**While experts have predicted that the market for electronic discovery software and services could exceed \$4.8 billion by 2011, cost concerns are threatening that growth**

Reinvention has always been the key to success in the litigation support industry. During the nascent days of electronic discovery, companies known for photocopying and scanning documents transformed themselves into e-discovery providers. Entities with a narrow technology focus rebranded themselves as full-service consultancies with diverse in-house capabilities. As the tide of electronic discovery rose throughout the United States and across the world, it lifted the entire industry. The legal landscape has however, shifted dramatically in the past year and those vendors that fail to reinvent themselves again are sure to suffer in the all but certain market contraction.

The diversity of data, exploding volumes of information and enhanced client oversight are helping to motivate members of the litigation support community to refocus their efforts, but cost concerns are driving an historic shift toward more comprehensive, faster and less expensive alternatives to the tools and practices that are currently accepted.

While experts have predicted that the market for electronic discovery software and services could exceed \$4.8 billion by 2011, cost concerns are threatening that growth.<sup>i</sup> In November 2008, 115 general counsel revealed in a survey that outside counsel costs and lack of predictability in legal spending were their top budgetary concerns for 2009.<sup>ii</sup> As a result, 65 percent of them expected to bring more legal work in-house.<sup>iii</sup>

That move will have a cascading effect on legal services in general, but particularly on those vendors using outdated technology designed for an era of unchecked litigation spending. The emergence of exponentially faster software that can operate in a multi-lingual environment, on small hardware foot prints and unconstrained by file types is the engine that will fuel the economic recovery and usher in the next era of electronic discovery. Those who harness the power of this technology will flourish, while others who do not will be outpaced and outmatched.

This white paper addresses the challenges prompting reinvention and the ample opportunity available to those who meet them.

Litigants are analyzing and monitoring their matters in a more sophisticated fashion both to manage costs and to maintain control

## Challenges

### COST COMPETITION

The Fulbright & Jaworski 2008 Litigation Trends Survey of 251 senior corporate counsel in the U.S. and 100 in the U.K. found that cost management is the area of greatest concern followed by electronic discovery.<sup>iv</sup> Litigation support vendors can only face the dual challenge of cost containment and renewing confidence in e-discovery processing by redefining how they approach pricing.

### Confusing Cost Quotes Raise Questions

As vendors have struggled to find ways to distinguish themselves in a disparate market, they have defined their business models in different ways. Some set a fixed price on a project basis while others bill in a familiar hourly fashion. Enterprising vendors also price based on the number of gigabytes (GB) of data clients ask them to process.

To enhance their ability to compare prices, outside and in-house counsel have started requesting bids from multiple parties. As a result of this increased competition with lower-tier vendors that clients did not traditionally consider, there has been a steady downward trend in total cost from up to \$2,500/gigabyte processed to under \$500/gigabyte.

That decline is also due to dramatic improvements in data processing software and the availability of project managers capable of dealing with these matters. The challenge for litigation support vendors in a faltering economy is to convince organizations that their services are neither fungible nor a commodity. That said, however, the only persuasive support for that argument is to demonstrate the speed and accuracy of the end to end litigation support process using technology that showcases efficiency.

### Vendors Must Contend With Competition From In-House Counsel

Despite the prediction by 31% of the respondents in the Fulbright survey that their litigation will increase in 2009, many organizations are delaying action.<sup>v</sup> Litigants are analyzing and monitoring their matters in a more sophisticated fashion both to manage costs and to maintain control. Some in-house legal teams are even acquiring technology themselves in an effort to bypass the litigation support component and provide a load file directly to their outside counsel.

Ultimately, it is the technology that will dictate the extent to which a vendor must reinvent itself. Many organizations lack sufficient critical mass or a proprietary technology platform with which to compete adequately against their former clients and existing rivals. Since these vendors have typically adopted off-the-shelf software for which they pay licensing fees, they cannot offer loss-leading services as a way to encourage adoption of that software. Those who own both the processing and hosting technology are far more interested in growing the hosting income. They are, therefore, inclined to price the processing service at a point that will attract interest in their other options.

When speed is no longer an issue, vendors can refocus their clients on the value they bring as talented advisors

Many products can process 100 gigabytes per day, but the industry is moving toward a terabyte per day standard

Litigation support professionals who recognize this predicament will be able to adjust their strategy by adopting technology that will enable them to lower their processing costs while dramatically increasing the speed. When speed is no longer an issue, vendors can refocus their clients on the value they bring as talented advisors.

#### TECHNOLOGY

Many of the tools that litigation support vendors are currently using were architected before 2000 and are uniquely tailored to the U.S. market. The most common programs cannot scale because they were designed to manipulate elements of electronic information as if they were paper documents. These programs also process lower volumes and fewer types of data. Most of the newer technologies that have attempted to address this flaw use engines fueled by an extensive hardware footprint, which increases the cost significantly.

#### The Inherent Flaws Of Building Vs. Buying Software

For these reasons, declining processing fees and advancements in technology have made the development of internal software cost prohibitive over the past few years. An exponential increase in the volume of data is also pressuring litigation support vendors to increase their capabilities ten fold. Many products can process 100 gigabytes/day, but the industry is moving toward a terabyte/day standard.

The challenge for vendors with proprietary platforms is in restructuring or modifying the entire architecture of an in-house product. Those who acquired third party software are at a tremendous disadvantage to independent manufacturers that have organically developed their proprietary code. Regardless, while entities that own their technology have the flexibility to change it to meet demands, they must invest the time and tremendous development expertise to do so.

Most off-the-shelf software operates and is licensed on a single or dual-core machine, which is not capable of vertical multi-threaded processing. Those that use a program, which can scale horizontally by connecting hundreds of servers, will incur extensive hardware costs, data center expenses and fees for additional operating system licenses. This is in addition to overhead for labor, hardware and maintenance.

Newer, more advanced technology companies can adapt to changing data types and release a patch in hours or days, rather than weeks or months. These focused technologies operate in a single server, which makes updates simple and often automatic. Installation typically takes minutes.

Reinvention begins with an acknowledgement that there is an imperative to change and then identification of prioritized areas for improvement.

Ultimately, the challenges for the litigation support community are primarily cost and technology

From fees to speed, there are a number of ways that litigation support professionals can benefit from the reinvention process

### Technology Is Critical To Workflow And Data Management

It is common for a client to have no information with respect to his/her data (e.g. number of custodians, availability of back-up tapes and paper documents, location and types of files, types of systems being used) at the outset of a project. It is in this scenario that a litigation support vendor can offer tremendous value and insight on planning. Add a global component to a matter with privacy or language restrictions and the complexities mount. Litigants in these matters require a high degree of skill and familiarity with technology.

The challenge for today's technology is to process a complete data set that addresses metadata, content and attachments in the shortest time possible with as little human intervention as possible and with zero margin for error. Those who maintain in-house technology must modify it on a frequent basis because of the evolving nature of information.

As well as these updating capabilities, the most critical aspect of modern software is workflow flexibility. Most programs hard code workflow into the software, making processing tremendously inflexible.

Successful litigation support vendors who are in the process of redefining themselves should use specialized technologies that allow them to create unique workflows for each project. This flexibility will allow an organization to alter its staff composition as needed, particularly in the search for talented human capital.

Ultimately, the challenges for the litigation support community are primarily cost and technology. Those who manage costs by utilizing more advanced software from an outside partner will ultimately increase their efficiency and their value to clients.

### Opportunities

The commoditization of e-discovery technology has arrived. Those litigation support vendors who do not own their own technology have a valuable opportunity. They can now offer high-quality cost-effective services that will generate a consistent stream of smaller projects and allow a nimble organization to demonstrate its added value. From fees to speed, there are a number of ways that litigation support professionals can benefit from the reinvention process.

#### FEE FLEXIBILITY OFFERS A PROMISING REACTION

The legal industry has been discussing alternative fee arrangements for many years, but those litigation support vendors who can operate successfully while offering caps, success fees, tapered pricing on increases and others, will distinguish themselves positively. There is a particular demand from both law firms and corporations to eliminate per-gigabyte fees on material that needs to be processed in favor of a per-gigabyte fee on material that software produces after processing.

Higher processing speeds will allow vendors to gain competitive advantage without participating in a long drawn out contest with their peers

Alternative fees are easier to offer when using software that is designed with a scalable architecture. Such programs do not have capacity processing constraints for data types or data set sizes, are capable of modifying the system for new data types overnight, and are operable on a minimal automated hardware platform. Vendors using these tools can replace 20-40 dual-core computers with one multi-core machine that processes data 10-40 times faster than anything available in the marketplace.

Advanced technology that is scalable will help eliminate the risks of ballooning costs that accumulate due to increases in the specifications of a particular project. Those that weigh features vs. timescales vs. cost will realize the power of technology in transforming their operations.

#### SPEED AND ACCURACY WILL ENHANCE THE PERCEPTION OF A VENDOR'S CAPABILITIES

In the new e-discovery paradigm, speed relates directly to cost. Higher processing speeds will allow vendors to gain competitive advantage without participating in a long drawn out contest with their peers.

Regardless of the speed at which an organization can process data, there should still be a focus on addressing: (1) data types; (2) Unicode compliance; (3) deduplication; (4) de-nesting; (5) auto-tagging and, (6) character set analysis.

Enhancements to the pace of data analysis will also allow litigation support vendors to participate more thoroughly in the early case assessment that is essential for legal strategy and long-term success. As such, the ability to provide a preliminary summary of a case, particularly one with a larger dataset, is essential. There are very few vendors who can search and analyze large quantities of data in hours, and reduce those extensive data sets into much smaller relevant items in an open and transparent manner. Those who can do so earn the trust of their clients and an assurance of longevity in the marketplace.

## Conclusion

The litigation support industry is entering a new era that values advanced technology and talent above all else. The irony is, however, that vendors using older and restricting technology are incapable of demonstrating their true value to others because they are viewed as purveyors of commodity services.

Newer, more advanced and exponentially faster software, enabling flexible workflow tools that can help to aggressively lower costs, is the key to success for litigation support professionals who are actively reinventing themselves. It will also help them confront existing industry leaders for dominance over the next few years.

Despite the challenges associated with cost and competition, litigation support professionals who redefine their commitment to client service and technical advancement will realize opportunities to grow their businesses. Those who do not will eventually suffer the fate of the antiquated technology to which they unnecessarily adhere: early retirement. Instead, recommit to enhanced client satisfaction, a deeper understanding of the requirements for technology maintenance and broader collaboration. These attributes are the hallmarks of innovation and will give litigation support vendors the chance to distinguish themselves in the downturn.

## Nuix

Nuix's eDiscovery solutions power litigation support firms to achieve more with less. Whether you want to rapidly index 100 PST files, an entire corporate email server or one terabyte of Encase images, Nuix can process your data over 20 times faster than competitive products, producing output in all major litigation load file formats. Nuix's engines effortlessly process increasingly diverse datasets and meet the ever more stringent requirements of both the courts and litigation support clients.

It doesn't matter if you are following a traditional linear production workflow or processing for native review, Nuix can streamline your workflow and accelerate your end product.

By providing a single tool, with an intuitive interface, Nuix enables litigation support vendors to offer a complete scope of litigation support services which is backed by a powerful automation engine. The result is that you can process more data, faster and with less labor, less cost and less overhead.

Nuix's processing system is the fastest and most comprehensive available inside one integrated platform. It enables litigation support firms to push data at rates of multiple terabytes per day – from processing through to review and production, radically driving down costs. With three Nuix servers you can process (with complete full text extraction) 500 gigabytes of mixed data and export it back out with full text, natives and load file (expanding to 1.5 terabytes of natives) in 24 hours.

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- i Barry Murphy, Believe It — eDiscovery Technology Spending To Top \$4.8 Billion By 2011, Forrester Research (December 11, 2006).
- ii Altman Weil, Inc., Law Department Cost Control (November 2008). See, Sheri Qualters, Majority of Corporate Legal Departments Facing Budget Cuts, The National Law Journal (December 11, 2008).
- iii Altman Weil, Inc., Law Department Cost Control (November 2008).
- iv Fulbright & Jaworski, 2008 Litigation Trends Survey. See also, Fulbright & Jaworski, 2008 Litigation Trends Survey Complete Data Findings.
- v Fulbright & Jaworski, 2008 Litigation Trends Survey Complete Data Findings.

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