Litigation management in the 21st century

Greg Wildisen

As every plaintiff lawyer knows, the greatest hurdle to pursuing a claim is the expected cost of legal action.

This may be due to the extended nature of a case, the absence of a homogeneous class, or the ambiguity of the law. These are all legal issues which are somewhat intransigent in nature, and there is no evidence that the fundamental costs of legal recourse will vary in the near future.

However, there is one area in which legal professionals can substantially reduce the cost of litigation – and broaden the client's window of opportunity – between settling and pursuing a matter in court.

This is the area of information management. One of the major cost factors in plaintiff law is of course the discovery and document management process.

While lawyers commonly think of information management as an intellectual pursuit – the core legal business of document analysis and strategic preparation – there is a more technical side which provides a significant drain to the litigation industry.

At the moment, for most legal professionals, the major event in a discovery process is the receipt of large boxes of documents, often with sparse and potentially confusing indexing.

Following such a process, plaintiff lawyers are faced with the time-wasting activity of cataloguing documents in such a way as to offer a workable foundation for their action.

In recent times, this issue has been addressed by the Supreme Courts of both NSW and Victoria, with Practice Notes 105 and 3 of 1999, respectively.

The thrust of these practice notes has been that in cases involving large numbers of documents (500 in NSW and 1000 in Victoria) opposing legal teams should conduct discovery and other document exchange via an electronic format.

Such Practice Notes recognise the inherent advantages offered by imaged documents, including portability, fast retrieval and ease of indexing. In fact, the simple task of document imaging can substantially lower the cost of discovery, by reducing the requirement for multiple hard copies.

However, imaging on its own is only a half-measure. Just like a semi-load of unmarked boxes, a disk stacked with inadequately referenced image files presents a major information management headache.

While the NSW and Victorian Supreme Courts' advice is a step in the right direction, it is a limited contribution to altering the litigation equation.

The next step for the legal industry must be to identify ways of harnessing the advantages of imaged documents, to make the law a more efficient tool, both for its practitioners, and its participants.

The first requirement is the development of data protocols. With even the best intentions, electronic documents are of little use if there is a mismatch between the data management formats of plaintiff and respondent forms.

This does not mean a wholesale revision of each firm's in-house document management or data storage formats. Rather, it is a matter of agreeing on standard transfer formats which can be commonly understood.

The Courts could extend their advice to play a guiding role in this. After all, it is no more prescriptive than issuing standard formats for appeal books, or insisting that documents in a foreign script be translated to English.

However, the legal profession may be better served by taking this opportunity to agree on its own standard formats, thereby providing a *de facto* protocol which the Courts may simply assume.

The establishment of basic transfer protocols is fairly straightforward. But the broader question of information quality lies with the information which accompanies discovery.

A recent industry survey carried out by my firm, shows that electronic document management by the legal sector may use up to twenty different database packages, ranging from simple indexing packages, through customised in-house software, to cutting-edge litigation support packages.

At the moment, without a protocol in place, there is little guarantee that information supplied as part of a discovery process will be useful.

This has provided an ongoing obstacle to electronic discovery and other document transfers. To date, the most common solution has been for parties to an action to agree on a single package, which is generally customised for that case and then discarded.

Such a process is obviously both inefficient, and through its need to consistently 'reinvent the wheel', costly to the client.

Again, the solution lies with the development of industry-standard software protocols. This need not require the entire legal sector to select a common software package, but it does require limitation of software solutions to those which allow efficient exchange of detailed document profiles.

Legal-specific software packages are available on the market, and offer a number of significant efficiency and cost-reduction opportunities, including the ability to identify and retrieve documents using refined searches based on multiple criteria.

However, there is one more step required to genuinely change the cost equation for litigation – placing your information management online.

There are many advantages to web-based document management. For one, multiple members of your legal team can ▶

examine and discuss a single document simultaneously, from multiple centres.

Secondly, the ability to link over the web to your secure intranet means you can examine and annotate documents at any time, anywhere – in your office, at your client's, at home or on the road.

Which brings us to the final opportunity offered by electronic document management. With a web-based system, you have immediate access to your full range of documents, including discovery, case notes and legal team communications, within the courtroom.

The reduction in court time offered by such an innovation is the final piece in the cost-minimisation jigsaw.

In the short term, many law firms and sole practitioners view the shift to state of the art on-line systems negatively, in terms of upgrade cost and training time.

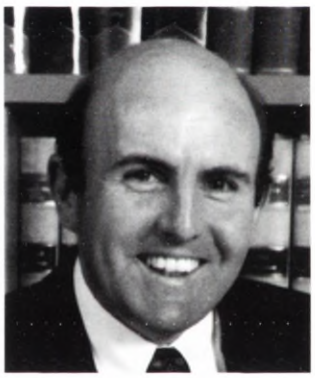
However, with the long-term reductions in case-management costs, a good on-line information solution can not only allow you to focus on the intellectual aspect of legal practice, but can significantly alter the decision to proceed with litigation.

Particularly for plaintiff firms, this enhances the credibility of the threat to litigate, which in turn improves your negotiating position. The advantages are obvious. ■

Greg Wildisen is a Director of Diskcovery – Australia's premier provider of information management solutions to the legal sector. Diskcovery is also the distributor of LanternTM Software, developed by Ringtail Solutions, as Australia's first fully web-based legal knowledge management package.

Recent developments in workers compensation in the A.C.T.

Richard Faulks, ACT



Richard Faulks

The ACT government have released a discussion paper relating to reforming Workers Compensation in the Australian Capital Territory. At the present time ACT workers enjoy the benefit of full common law rights if injured as a result of the negligence of their employer. Their Workers Compensation entitlements are contained in the **Workers Compensation Act 1951**. *There is no doubt that the incapacity payments available under that legislation are currently inadequate and falling well behind comparable benefits in other jurisdictions. Further there is no proper permanent impairment system under the legislation and no payments whatsoever for psychiatric injury or back injury. Notwithstanding that, the availability of common law rights means that most workers are better off in the long run.*

The discussion paper suggests that reform is necessary because of the cost of the current system. Interestingly evidence available suggests that premiums in the ACT are lower in real terms than those in New South Wales.

The strategies which are dealt with in the discussion paper include abolition of journey claims and the restriction of common law entitlements. The aspect of the paper dealing with common law entitlements is a little difficult to follow but suggests a capping of common law damages and a threshold based on a whole person impairment of 25%. Clearly this will severely restrict common law entitlements to most injured workers.

The discussion paper does suggest the possibility of introducing a more generous permanent impairment scheme similar to that under the *Safety Rehabilitation and Compensation Act* (Commonwealth).

Further, the discussion paper highlights the current inadequacy of incapacity payments particularly after the first 26 weeks following injury and suggests that after 26 weeks incapacity payments should be set at 65% of pre injury earnings. Clearly this is still inadequate and 10% lower than the Commonwealth counterpart.

ACT APLA members are currently gathering sufficient information to put forward a submission to the Government in relation to the discussion paper opposing, in particular, the abolition of common law rights and the other restriction of workers benefits. ■

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