



## **FROM EUROPE: the surge in litigation/compliance review, and outsourced legal work**

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6 May 2011 – I settled in Brussels about seven years ago (I hold several nationalities and am fluent in several languages) after a career in the U.S. in intellectual property law (with which I am still deeply involved) and a number of years in the e-discovery world, on the subjective review side of the [EDRM](#). My perspective has been that side of the process: providing corporations and law firms contract/temporary attorneys for review and other substantive tasks.

Project Counsel Europe was born a little over four years ago. Our initial work was subjective document review for U.S. law firms in Brussels, and then London, and then Paris, and then Luxembourg and then Frankfurt, and then ... well, we grew. We now have a document review center in London and one in Paris, and offices in five European countries. Having “boots on the ground” across Europe we have been able to service a multitude of clients for various projects (almost all of our work today is for corporations) and we have been able to follow European developments in e-discovery, search, semantic technologies and analytics and cover such events as the [IQPC Exchange on e-Discovery](#) in Munich, [LeWeb](#) in Paris, and [software developers’ conferences](#).

Over the last few years I have had an opportunity to see up close EU data privacy issues, the growth of in-country subjective document review, the growing “matrix” of regulation-compliance-litigation work, and the explosion of intellectual property litigation — either as Project Counsel providing attorney teams, or via my U.S. company The Posse List that assists U.S. corporations, law firms and staffing agencies in finding temporary legal review teams that often have a multi-national/multi-lingual component. I have been involved with: the air cargo transport cartel investigations by the DOJ and DGCOMP with data across 8+ EU countries and the US; the Merck and Monsanto litigations and regulatory investigations across the US and EU; the Federal-Mogul bankruptcy which lapped the US, UK, Germany, Italy; and the infamous Siemens case which lapped the US, UK, Germany and Africa.

Oh, and the granddaddy: the Parmalat investigations and litigations which seemed to take in everybody. That was my first exposure to EU data/privacy and in-country review (Italy). But that case has been usurped by the US/EU investigation(s) of Google which has already prompted in-country reviews in the UK, France and Germany.

But the most interesting case has been the Societe/Kerviel case in France which wrapped up last year (we staffed part of the discovery case and also followed it through the courts) which ran the gauntlet of legal and technical implications of collecting and processing data in the EU, audit and compliance. For our full analysis and coverage of the Societe/Kerviel case (in English, French and German) [click here](#).

*Side note: and for my views on those (infernal) differences between e-discovery and e-disclosure (with links for versions in French and German) [click here](#).*

So in the past 4+ years Project Counsel has completed numerous subjective document reviews in Brussels, Frankfurt, London, Luxembourg, and Paris. But the work has expanded to include numerous special assignments such as transfer pricing enforcement reviews (authorities are developing greater sophistication in their audit practice, while coming under pressure from embattled governments to increase overall tax revenues), real estate contract work, corporate housekeeping, research & writing projects for numerous legal authors, and RFP work for corporations responding to EU institution requests.

Standard document review work continues to surge across the whole continent. Epiq Systems, Huron Consulting, and UNIFIED have all opened document review centers in London, with at least two other large e-discovery companies slated to open centers before year-end. And why

not? Based on feedback from London-based members of my sister company [The Posse List](#) there are 12 significant (10+ reviewers) document reviews in London right now at law firms, vendor review sites, and corporate client locations with many more to come (see more on this below).

*Note: but despite all these state-of-the-art document centers, one interesting trend: the Las Vegas rule (“what happens in Vegas, stays in Vegas”). Or to put it another way: Elvis is NOT leaving the building. The data ain’t leaving the premises. More and more the client wants the work done on their site.*

What explains this surge in work? If I didn’t loath the cliché, I might call it a “paradigm shift” (truth be known, I use the phrase a lot). But there has been a shift, a change in both volume of work, and attitude, due to several factors.

First, the key volume drivers:

1. *The EU Commission just LOVES to launch investigations.* As we have chronicled in previous posts, Brussels has opened two major credit default swap probes (for one such post [click here](#)), set targeted investigations of the energy, tech, and drug markets and recently launched an EU-wide probe into telecoms companies’ data traffic management practices. In addition there are the dawn raids and one-on-one investigations of specific corporations. This has sent EDDs scurrying across Europe picking up boatloads of data collection/data processing work which has generated (and will generate) significantly more subjective review.

*Side note:* and the Commission is getting serious about technology. We met with DGCOMP officials last month to discuss the Commission’s adoption of e-discovery/document management technology. The Commission is near the end of its beta tests of Nuix, Recommind, Relativity and ZyLAB software and will issue an RFP by the summer.

2. *The amount of intellectual property litigation has skyrocketed.* As we discussed in a companion piece on The Posse List ([click here](#)) the globalization of smartphone patent disputes has simply pointed out that the most aggressive corporate asset these days is IP. This litigation crosses multiple countries and languages. It is all about the convergence of technology markets — most clearly, the clash of mobile communications and personal computing in the smartphone — which has greatly added to the complexity as well as the potential for conflict as the prime battle for market share (I follow and report on the myriad issues affecting the digital media/IP world through my other company [EAM Capital Partners](#). Project Counsel has a special IP team that works on numerous projects in Europe).

Examples: Huawei, China’s largest telecom equipment vendor, has sued it’s largest Chinese competitor ZTE over patents and trademarks in three European countries: Germany, France and Hungary. Not to be outdone, Ericsson, the world’s largest network equipment vendor, sued ZTE in the UK, Germany and Italy. This is all part of the second-and-third-generation wireless technology that is a major battleground across the globe.

***Some advice:*** to cover all of this IP litigation and the whys and wherefores of these global disputes we always turn to our colleague Florian Mueller and his brilliant blog Foss Patents, as well as his Twitter account. You can find his blog by [clicking here](#) follow him on Twitter by [clicking here](#).

Also, China's internal IP litigation has risen 40% (our Asia office tracks litigation, M&A activity and IP work in Asia in conjunction with our Asia partner, [e.law](#)). The latest figures from China's Supreme People's Court show a dramatic rise in IP litigation, with domestic companies driving the increase. Of cases concluded in 2010 by courts of first instance, 41,718 involved businesses from mainland China (up 37%), while only 1,369 cases involved one or more foreign parties (up 0.6%). More and more companies in China have some knowledge of IP and so they are paying more attention to protecting that IP.

3. *Mergers and acquisitions are back on the rise in a big way.* There has been a surge of large strategic deal-making by U.S., European and Asian companies which has boosted e-discovery work. While the U.S. now accounts for almost half of global M&A activity, up from about a third last year, nine of the 10 biggest deals this year have been cross-border US/Europe or Europe/Asia. These deals have involved companies from Brazil, China, Germany, India, Italy, Portugal, Turkey, and Russia — to name just a few.

Much is due to the financial crisis. At a recent *Financial Times* program on M&A activity in Europe the discussion focused on the “good” results from the financial crisis. Many companies had hunkered down and are now wielding stronger balance sheets and look to deploy cash they had been hoarding. Cost savings and caution towards M&A in the past couple of years meant companies amassed cash and are now emerging to go on the offensive.

And on the “bad” side, discussion focused on companies now waiting to for a return to “the promised land”: do we wait and see what the future holds or will lack of immediate growth become a problem and therefore lead to a cutting of losses by seeking a buyer? Or perhaps eat before being eaten?

4. *A growth in Europe of governance, compliance and regulatory work.* In civil jurisdictions you see less litigation but much more compliance/regulation/governance reviews. And this gets us to the “matrix” I mentioned earlier. Many of these projects are global in nature. We recently completed a long and complex compliance/regulatory review (25 reviewers, 3 months) that started in Europe but then took us to Dubai and Singapore. The recent financial crisis surely made us all aware of the financial nexus between all regions so handling a coordinated review in Europe, the Persian Gulf and Singapore is now standard operating procedure. The Persian Gulf, long a source of work for forensic accounting review teams, is slowly becoming a source on its own of discovery/compliance review.

It is a more holistic approach to GRC (governance, risk, compliance) — a “buzz phrase” sometimes more annoying than “the cloud” and “early case assessment”. But those elements ... governance, risk and compliance ... rely on the role played by in-house counsel and compliance professionals and their knowledge of the interplay of those related disciplines. As the roles of the GC and CCO broaden and impact the strategic direction of the business, the importance of

integrating GRC technologies has increased along with the value added of high-quality (but lower cost) attorneys to improve ROI.

But in addition to this surge in litigation/compliance review, there is a companion surge in outsourced legal work and that is due to several factors I attribute to an attitude change:

1. Companies (including their in-house law departments) have adopted very advanced technology to improve global information lifecycle management and information governance. And it is not all the “usual suspects”. We have worked with Xerox, IBM and SAP on several projects, all of whom have proprietary review/analytics software (which one expects given these companies are already in corporations on so many different levels of knowledge management). At the recent [IQPC Corporate Counsel/Corporate Compliance Exchange program](#) we met with scores of in-house counsel who detailed their progress and plans that included e-discovery/e-disclosure management technology. And we have seen it up close (as mentioned, most of our projects are at the corporate client).

2. This process has led to the expansion of the use of temporary, highly-qualified review teams in matters such as transfer pricing enforcement reviews (mentioned above), real estate contract work, IP prosecution work, etc. What has caused more and more companies to bring these matters in-house and outsource directly to vendors, to “untether” from their outside counsel? Make no mistake. Outside counsel still plays a key role and we often work hand-in-hand with them. And in litigation/regulatory reviews we often work (especially on EU privacy matters) with local specialized counsel to assist on tasks such as working with local workers’ councils on employee consents, interviewing employees on-site to assure privacy protection for personal materials on company computers, etc.

But the big change is what I call “Susskind writ large” – what [Richard Susskind](#), and [Jordon Furlong](#) have been writing about these last few years: the deep and rapid technological advances (of the disruptive kind) that has led to relentless connectivity, the burgeoning electronic legal marketplace and the “decomposition of legal tasks” into component parts that can be delegated to various sources: in-sourcing, relocating, offshoring, outsourcing, subcontracting. It has led to reducing costs for repetitive processes such as regulatory filings, document review, etc.

In-house counsel are increasingly internalizing first-pass document and e-mail review because the advanced technology allows them to do so and in-house counsel have become more hands on. And they are realizing they can use outsourced review teams to handle more complex discovery because there is an enormous pool of contract/temporary attorneys who have substantial substantive experience.

This is the major difference between the U.S. and the European contract/temporary attorneys pools. Speaking for Project Counsel, our attorney pool is made up of scores of attorneys with substantive backgrounds in myriad legal areas. Many are sole practitioners or specialists – anathema in a U.S. document review. We have multi-national, multi-barred attorneys — some with a CIPP (Certified Information Privacy Professional) certificate. Almost all are tri-lingual

and many have worked in the U.S. and Europe with an understanding of both the American and the European legal systems and cultures.

3. A change in role, or at least a more developed role. What has happened in Europe is that all of this new, grand technology has led to a demand for lawyers who are skilled in using the new technology more effectively. What folks like [Ralph Losey](#), [Steven Berrent](#) of WilmerHale and [Joe Kanka](#) of eTERA have posited is in fact coming true: our teams are tasked with the very critical tasks of fact investigation and storytelling. We have become the “first team” and are developing the efficient document analysis — much more than a review — and the technology/software allows this via smaller teams of lawyers who can synthesize the story of a case, an issue, a dispute with highly insightful results. Recently we were able to show a corporate client (and his outside counsel) what could be done by a small, dedicated, highly trained crew.

It’s over for the armies of contract reviewers? Not quite yet. They still have a good run ahead of them. Just ask the 300+ working on the AT&T/Verizon deal. But we have found that the European climate is much more conducive to this new paradigm. So in Europe at least there does seem to be a fundamental “rethink” of corporate legal/business strategy.

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