

Knowing What You Don't Know

Practical Considerations for Picking the Right Legal Spend Management Partner

By Taylor Smith, President, CLM Advisors

Tom Brokaw once asked a series of candidates in a town hall debate, "What don't you know and how will you learn it?" This funny question is actually a good way of thinking about how to tackle many issues around which we don't have complete knowledge. We know that we want to be expert enough to ask the right questions, but we may lack sufficient expertise to know what those questions are.

Donald Rumsfeld, during a Department of Defense news briefing, once famously broke down the world of "unknowns" in to three categories. There are "known knowns." These are the things we know that we know. However, there are also "known unknowns." These are things we know that we don't know. And lastly, there are "unknown unknowns." These are things we don't know we don't know.

The challenge for some claims executives who are looking for the right legal spend management business partner is that they may have a fair number of unknown unknowns. In other words, they may not be sure what to ask about, what to look for, and how to flush out the philosophies and practices of their potential new business partner.

This article will summarize a few known knowns about effective legal spend management. This will help you focus and direct your questioning – ensuring that you find a partner that will deliver truly effective solutions for your business.

An Industry Evolution

My first exposure to traditional legal spend management solutions in the insurance industry was as a buyer of legal services 1980s. I was an insurance claims litigation manager, which meant that I had lots of legal work to dole out. Picking the "best" firms was mostly a function of which attorneys I believed would keep the organization "out of trouble." That is, I wanted lots of reports and no surprises.

When it came to how much we paid our attorneys, there was a fair amount of eye rolling about the cost of legal work, but no real focus on guideline compliance or the amount of the bill. To be fair, we really didn't issue guidelines to comply with.

Frankly, our focus at that time was how to pay invoices more quickly, not to look at them more carefully. Our primary legal invoicing "metric" was to measure the number of inches the stacks of paper invoices comprised on our desks. Our goal was to keep the stack of invoices to be paid at no more than three to five inches. We were guided by the ruler.

In response to sky rocketing legal costs in the 1990s, we began issuing increasingly detailed and complex billing and process guidelines to outside firms. And logically we began to recognize the need to review each firms' compliance with these guidelines. This spawned an entire industry of legal auditors and the software required to support those auditors.

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As counsel pushed back hard against the legal auditing industry, the software originally designed to support the auditors was elevated to a new plane. E-billing software, and the formats and standards created to support that software, was promoted as able to do what auditors used to do. The industry no longer needed auditors, it was argued, because the software could do “all that.” Clients spent hours and hours writing business rules for their e-billing software. Law firms spent hours and hours figuring out how to submit invoices in certain formats and trying to figure out what the business rules were.

Today, we live in a different world. First, no one uses rulers to measure the efficiency of their invoice payment process. Second, law firms no longer push back against the use of human invoice reviewers. In fact, some would prefer it over a software-only review of their invoices. Thirdly, and most importantly, we have transcended from the world of business rules to a land of deep analytics, artificial intelligence, machine learning, and big data. We are a long way away from looking at whether copies were charged at 25 cents.

We know that legal invoices are rich with information and not just cost data. Invoices tell us how the firm practices, how it staffs cases, how it tries to create value, where the firm focuses its time, how quickly it moves cases to resolution, whether it churns time, reinvents the wheel, and much more. There is no better way to decode a firm's DNA than through its invoices. Why is this brief evolution of the industry important? Because the known knowns, the known unknowns, and the unknown unknowns are contextual to that evolution. We know more about what we want as buyers now than we did 10, 20, and 30 years ago. We know more about how to create value with our firms and with the invoices they send us. We have tools we couldn't have imagined that long ago.

Some Known Knowns

Effective, successful legal spend management in today's environment is, in my opinion, based on three core tenets. This three-pronged approach influences what litigation executives should look for in their legal spend management partner.

First, legal spend management is not just about cutting bills. The transition from rulers to auditors to software created an ugly tension in the industry. Historically, auditors (and some e-billing software companies) expressed their value by emphasizing much they could cut legal invoices.

We would be wrong to suggest that tension has gone away; but it is muted. Firms seem more resigned. They recognize that the payer side of the industry has invested billions in sophisticated invoice review software and that firms have not. Attorneys continue to see cuts as unfair and arbitrary but have few tools to push back.

For some buyers of legal spend management software, the idea of cutting legal bills has great short-term appeal. More sophisticated carriers balance that short-term attraction with a recognition of the importance their counsel play. Loss ratios are more important in the big picture than legal spend to ALAE ratios.

For more savvy buyers, legal spend management is about guideline compliance and not bill cutting. There is a big difference in philosophies between these two approaches. Too deep a cut in legal spend might risk loss costs and potentially drive up ULAE as well. More chief claims and litigation officers than I can count have said to me, “I'd happily have zero invoice adjustments if I can be assured that the billing is compliant.”

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Second, human expertise is a critical component to the legal spend management process. To a significant degree, the industry has backed away from the original excitement of the 2000s, when everyone said, “We don’t need auditors if we have good software.”

Roughly 70-80 percent of all adjustments made to legal invoices are what can be called “discretionary.” That is, they require some element of human discretion to judge whether the billable item is appropriate. Is the description adequate? Is the time reasonable? Was the activity approved? Was it necessary?

These are all questions only a human can answer. Software does a great job today of flagging a specific line item on a bill, but it can’t answer those questions adequately. It can try to answer them, but the level of big data it needs to conclude definitively that a billable item is unreasonable, previously approved, or necessary is just too much.

For those reasons, the combination of advanced software and human experts is hands-down the best approach. This means either that your legal spend management partner must provide those experts, or be able to support your own internal team of invoice review experts

Third, it is all about the analytics. Generally, most buyers of legal services want the “best attorneys for the job”, not the “least paid attorneys for the job.” The definition of “best” in this context is paramount.

The good news for legal services buyers is that they get to define what “best” means to them. It is their definition that matters after all. And best can absolutely be defined to include cost effectiveness.

However, more sophisticated buyers look at many things beyond cost. They might look at speed of resolution, accuracy in predicting exposure, a continual lack of surprises, subject matter expertise, legal activity effectiveness, and much much more. This data exists within the invoices being processed, and analytics is the path to those evaluations.

In a word, analytics is where a legal spend management provider’s true value lies – it is the ability to influence and improve the value of the legal services being provided.

What To Look For In Spend Management Providers

If the three tenets described above resonate with you when looking for effective legal spend management solution, what are some indicators of a good potential business partner in this arena?

Here are three important factors to consider:

First, insist on the best technology – Pick a provider with the industry’s most advanced artificial intelligence and machine learning capabilities. These technologies dive much deeper into invoice data, spotting patterns, building algorithms, learning from each invoice over and over. This drives better invoice compliance while also decoding the firms’ DNA in new and interesting ways.

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Ensure that the provider specializes in integrating its software into your existing claims system, into Microsoft office, and other existing platforms your teams use every day. Legal spend management should fit within your business structure, not the other way around. Focus on customer-centric workflows that help your teams work smarter.

Second, insist on superior analytics – The entire point of machine learning, artificial intelligence and advanced analytics is to gain new insights, improve counsel performance, and optimize case outcomes. Insist that the data and information can be presented to your litigation management teams in ways that make sense, are easy to digest, and are insightful.

The ability to compare different firms against one another is key, as is the ability to find and use benchmarking data during case assignment, case management, invoice review, and panel selection. Perhaps most importantly, ask about the size of the data set being used for benchmarking. It is not big data if it is a small data set and in the area of benchmarking more data is better.

Lastly, select a consultative provider – In a world where your provider may know more about your unknown unknowns than you do, don't pick a provider that sells you software and says good luck.

Instead, focus on selecting a provider that promotes transparency with your law firms, that believes stronger relationships with counsel are the goal. Be fearful of any provider that suggests a focus that sounds like it is all about cutting an invoice. You do not want an invoice cutting frenzy that jeopardizes your relationships with counsel and undermines your longer-term objectives.

Pick a provider that can teach your organization how to use effectively the wealth of data points being produced in your legal spend management program. Look specifically for an organization that shares knowledge about best practices, new ideas, and innovative approaches.

The industry has moved beyond rulers and auditors and software to something more exciting, with artificial intelligence and machine learning and truly consultative approaches. It's a wonderful time to be looking at new opportunities in legal spend management.

With the three-pronged foundation and the three provider attributes described above in mind, litigation executives will minimize their unknown unknowns and address their known unknowns much more effectively.

About the Author

Taylor Smith is the president of CLM Advisors and also Claims Pages. He has more than 35 years of experience in insurance defense litigation management, legal spend management, litigation analytics, and legal vendor selection and management. He is also a Chancellor and instructor at the CLM's Litigation Management Institute (LMI), the industry's first certification program focused on the business of litigation management. He can be reached at taylor.smith@clmadvisors.org