

Big Data, Big Business: Leveraging Analytics to Strengthen Your Legal Department

Law Department Management

Technology, Privacy, and eCommerce


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CHEAT SHEET

- ***Outside relationships.*** Data can play an important part in your relationship with outside counsel by providing better decision-making tools to improve outcomes. When retaining outside counsel, consider using data to identify which firm is best suited to handle the task at hand.
- ***Internal risk.*** No matter how compelling your data is, it's useless unless it's echoed by a proper tone at the top. Leadership must convey the importance of capturing and leveraging internal metrics so that employees at all levels understand the importance of data analysis.
- ***Contract management***. In-house counsel should consider incorporating newer, more advanced contract management systems, which possess built-in analytic capabilities that allow the user to better harness contract data.
- ***Optimizing collection.*** No matter how advanced your law department is with regard to data analytics, it's important that you know what you already have before considering advancements. Once you're confident in your capabilities, you can better determine what you might need in addition.

Unlike other professions that leverage data analytics to support their day-to-day functions (e.g., engineers, architects, healthcare workers, etc.), only a little over half of legal professionals consider automating work processes a top management practice that will create department efficiencies.[1] The purpose of this article is to challenge in-house counsel to explore unconventional ways to capture and analyze data to improve their services to clients and enhance their day-to-day decision-making processes. In particular, in-house counsel should learn the potential benefits of collecting and analyzing data as it relates to the selection of outside counsel, the handling of internal risk and litigation matters, and the management of commercial agreements. And finally, a sample business case outlines the return on investment legal departments can anticipate if in-house counsel increase their data collection methods, as well as solutions for maximizing data on a tight budget.

1 Based on the ACC report Law Department Management: Establishing Value in an Evolving Business World, 65 percent of respondents considered automating work processes through technology as the primary management practice they would employ to improve efficiency in their department, as compared to 75 percent of respondents whose focus was deploying value-based staffing.

Soliciting data from outside counsel

Data can and should play a part in your relationship with outside counsel, providing opportunities for better decision-making and improved outcomes. As discussed below, areas in which the use of data can provide valuable insights include the following:

- Retention of outside counsel;
- Mitigating internal risk;
- Research and the use of artificial intelligence (AI);
- Matter closing and evaluations; and,

- Audit rights.

Retention of outside counsel

When retaining outside counsel, some of the most common goals are identifying outside counsel who can handle a particular matter in a cost-effective manner that achieves the optimal outcome. Identifying the right outside counsel involves determining the necessary selection criteria and then, either through an informal or formal request for proposal (RFP) process, identifying those firms that have the skills to handle the issues.

Add in the increasing complexity of company IT infrastructures, regulatory developments, and law firm vulnerabilities such as cyberattacks. Data security issues with law firms are now top of mind. In fact, the risk posed by retaining an outside law firm is no less than the risk posed by retaining an outside nonlaw firm vendor. Your data security is no stronger than the weakest link in the chain of custody.

Available data security resources for retaining outside counsel

ACC resources contain information and templates to assist in-house counsel in addressing the cybersecurity risks that exist when retaining an outside law firm. Among those resources are guidelines for outside counsel having access to sensitive company data as part of their engagements with corporate law departments. The guidelines, the Model Information Protection and Security Controls for Outside Counsel Possessing Company Confidential Information, serve as a benchmark for law firm cybersecurity practices. They are a welcomed tool to aid that conversation between in-house and outside counsel, as well as their respective IT departments, and provide a useful framework to address the specific needs raised by the attorney-client relationship.

ACC's guidelines cover such topics as information retention/return/destruction, data handling and encryption, data breach reporting, physical security, employee background screening, and cyber-liability insurance. The guidelines were in part informed by the 2016 Law Firm Cybersecurity Questionnaire and Guide developed by the ACC Litigation Committee's Cybersecurity Working Group. The ACC resource library also contains a template Cybersecurity Obligations attachment to a standard law firm retention developed by Jon Becker, general counsel, Vita Simplicity LLC, with the participation of the members of the ACC Litigation Committee.

The threat of a cybersecurity breach is a crucial issue, and should be addressed upfront in the retention process. [See the sidebar above.] A law firm that is unable or unwilling to engage in a conversation about the firm's data security can expect not to move forward in the retention process. Typical data elements you will want to request from outside counsel include:

- What information shows they understand your company's business, products and services, market, and competition?
- Do the lawyers have data around their experience with the type of matter being referred? What is their record of success? How do they differentiate themselves from other firms competing for the same business? What have they done that is innovative or creative? How do they think about these types of matters strategically?

- How does the firm think about early case assessment? What is the firm’s past history with similar types of cases, including history within the given jurisdiction, with various judges, or with certain plaintiff ’s counsel?
- What is opposing counsel or the judge’s history with similar types of matters?
- Will outside counsel be able to comply with retention guidelines, including billing requirements?
- Do the technological capabilities of outside counsel meet your needs?
- Do outside counsel have experience with outsourcing low value work? How does the firm monitor vendor data security risks?
- What do outside counsel offer to make sure you are getting strategic advice and alerts on emerging risks?

Research and the use of AI

With the size of the external datasets available through court records and better tools, some innovative companies like Bloomberg BNA, ALM, Lex Machina, and others are mining these courthouse records with surprising results. The widespread availability and reliability of such data through services such as PACER court records and other services provide ample data. In particular, analytics are being applied to tease out trends and to predict how a particular judge might rule in a given employment, bankruptcy, or intellectual property case, or how long the case may take through various stages (good to know for budgeting purposes). And over time, the use of AI is expected to improve. Is it not fair to wonder whether, once there is a high degree of confidence in the technology, society could decide that the judge is no longer needed in this transaction?

Of course, we are not there yet. And while we may still need lawyers and judges today, AI is beginning to encroach on work traditionally reserved for legal professionals. Take legal research, for instance. Lawyers typically begin their legal careers as an associate researching legal precedent and statutory law and crafting legal memorandums and briefs — but maybe not for long. Private companies like ROSS Intelligence, which uses IBM’s Watson platform, are pioneering AI applications to research and draft briefs, while other companies are using technology to draft contracts. And large law firms, eager to trim costs and improve productivity, are signing up.

To bring this full circle, these technology vendors then have access to the law firm’s data, which is your data. You will need to discuss your expectations of the firm’s oversight of vendors, whether your data security team should be involved in assessing the risks and security protocols, and when and if such tools will be permitted in your engagement.

Matter closing and evaluations

There are a number of benefits to evaluating outside counsel both during and at the end of an assignment. Among them is the creation of a database that can aid in future retention decisions or address performance issues in an ongoing matter. This scorecard should contain fields such as expertise, responsiveness, and an ability to adhere to budget, efficiency, and objectives. Soft skills can also be measured, such as judgment, creativity, and communication skills.

You can also track your use of the scorecards in retaining counsel, tracking the department’s trend in assigning matters based on performance, rates, or some other measure.

As part of the process, the firm’s bills over the course of the matter can be audited, a task made easier with today’s electronic e-billing platforms and tools. Budget tracking and comparison to both

peer and historical matters can provide insight into the firm's practices. Invoice review shouldn't be used as a way to nickel-and-dime law firms. Instead, it should be used to ensure the right billing guidelines are in place and are being followed.

Both manual and AI-assisted invoice review generate actionable data. They can identify guidelines that need to be reviewed — if certain guidelines are regularly flagged in reviews, find out why. Are they no longer applicable, poorly worded, or unreasonable? Conduct a review and see if they warrant a change.

If certain law firms or lawyers are regularly being flagged, you or your invoice review team should have a conversation with them to ensure they understand the guideline. Oftentimes, simple confusion or miscommunication is the cause of the problem and it can be quickly resolved.

Audit rights

In addition to the upfront conversations, the retention agreement with the firm should include your right to audit the law firm's data security in order to ensure compliance with your expected level of protection. As an added benefit, this continues the dialogue and allows both parties to feel comfortable in the implementation of adopted measures and to make improvements to those measures as circumstances may warrant.

Managing internal risk

Internal metrics, derived from the data you create and capture, are foundational to any legal operations strategy. Not only do they give you a clear picture as to the current state of your department, but they tell you why you are where you are, where you are headed, and where you should be going.

However, no matter how compelling a picture the data paints, it's powerless unless prioritized with messaging and resources from the top. Leaders must consistently message the importance of capturing and leveraging internal metrics, and then they also have to put resources behind it.

Historic data for risk management and predictive analysis

In order to create meaningful internal metrics, the right data must be analyzed and measurement doesn't occur until data is captured. Define the data points that matter to you (e.g., attorney/firm rate, judge, injury type, etc.) and make sure they are consistently gathered. Many matter/spend management systems allow you to add and remove data fields, as well as select the criteria that require completion in order to continue through the workflow. A little discipline in data gathering will go a long way to bolster confidence in the results.

TIP: For data gathering in your matter/spend management system, limit the use of free text boxes. Instead, use drop downs in order to drive consistency of response. Your analysis will be much easier using defined categories.

Ensuring you'll have the right data moving forward is only part of the data equation — you also want to leverage the data that already exists. High-volume practice areas provide large data sets and, even if the data elements don't exactly match what you'll capture moving forward, they can provide actionable insights. Historic data can show you the most common types of claims and, more

importantly, can help you find the root causes that drive your risk [See chart below]. You may be able to improve analytic output by supplementing your own company data with industry data when available.

Perceived benefits of AI-powered solutions by corporate legal departments

	Total (N = 207)	Dept. < 6 Attys (N = 105)	Dept. 6-10 Attys (N = 30)	Dept. 11+ Attys (N = 72)
Efficiency/saves time	17%	10%	23%	24%
Reducing costs	13%	12%	13%	14%
Predicting outcome/risk	7%	6%	10%	8%
Document management/review	6%	4%	10%	7%

SOURCE: 2017, THOMSON REUTERS. "READY OR NOT: ARTIFICIAL INTELLIGENCE AND CORPORATE LEGAL DEPARTMENTS."

As shown in the chart above, when asked, the majority of legal professionals did not believe their legal departments were effective at using data from contracts in order to develop business strategy and mitigate risks.

Algorithms can be constructed to sift through your past data in order to tease out type, frequency, and severity of claims. The greater transparency will allow you to take a more risk-based approach by employing mitigation or avoidance strategies, and tell you how a current matter will likely resolve and how you should handle it:

- Should you settle?
- If so, for how much?
- And at what stage in the litigation cycle?

Your past behavior and outcomes are used to inform today's decisions. The larger your data set, the more accurate the prediction is likely to be. And with better decisions, claim costs and the cost of insurance may go down.

Information security

As information security threats become more pervasive, organizations will be expected to not only remain compliant with privacy laws, but also to be able to analyze trends and identify areas of potential risk in order to mitigate security concerns and provide better remediation. In-house counsel, together with their information security and privacy counterparts, should consider implementing a system for categorizing or tagging different data types they control to manage the use and security of such data within the organization. Although few organizations currently leverage big data for purposes of identifying patterns that could be indicative of future security risks (the majority of data analytics solutions within the current security space are focused on fraud prevention and early detection, closely associated with the financial services industry) — this is an area that organizations should explore. Data analytics would allow the application of algorithms and other machine-learning techniques to the multitude of data points that are generated by organizations every day, enabling companies to be less reactive and more proactive in terms of identifying areas of repeat security risks. **The greatest challenge in deploying analytics within the information security space will be successfully gathering the data needed (as the data includes both structured and unstructured data types, in a variety of languages) and obtaining human resources with the**

right skillset in order to perform the level of statistical analysis required to extrapolate trends.

Leveraging data to improve contract management systems

Until recently, contract management systems possessed limited functionality. Such systems mostly served as data repositories or a system for automating contract templates for purposes of new contract creation. These systems have since evolved, and counsel should consider new solutions that possess built-in analytic capabilities that allow users to better harness contract data. By leveraging natural language processing and other machine learning capabilities, users can now view similar contractual clauses as negotiated across multiple clients. When this data is combined with financial data, such as revenue associated with each contract, in-house counsel can establish more consistent positions for highly negotiated clauses (limits of liability, indemnification, etc.) and enable a more efficient negotiation process. Removing the requirement to manually search contracts also reduces the risk of lost revenue because opportunities to charge for products and services are easily captured across the entire client base. In addition, the risk of failing to meet a contractual obligation is lessened as those requirements are no longer buried in an agreement, but easily summarized. Finally, these contract management systems also have automated reporting functionality, which summarizes the data in a dashboard setting, rather than requiring data to be manually tracked and displayed within Excel.

Making the business case for investing in data management solutions

The failure of in-house counsel to capture and analyze data to the fullest degree is often linked to the inability to afford the software tools it takes to capture and perform such analysis. Although the purchase and implementation of any new software program is an investment in both time and money, the return on that investment may arguably be significant enough to justify the initial cost. Consider some of the factors below when making your business case for further support of data management solutions within your legal department.

- Risk mitigation:
    - Avoid missing contract obligations;
    - Respond quickly to new regulatory requirements and changes;
    - Avoid filing patents that may be at heightened risk for litigation;
    - Reduce claims and develop better litigation strategies; and,
    - Better predict, mitigate, and remediate security incidents.
- Cost savings/revenue generation:
    - Avoid missed opportunities to charge for services or products;
    - Reduce contract negotiation timeframes, thereby minimizing cost associated with in-house or outside counsel labor;
    - Reduce full-time employees needed to conduct research prior to filing patents;
    - Reduce outside legal spend in the event of litigation by ensuring the correct billing guidelines are followed;
    - Identify areas in which your company’s competitors have filed patents and areas for commercial opportunity; and,
    - Streamline legal workflow so that administrative tasks reside with the proper personnel.

Making the most of data collection

In situations where your department budget simply doesn't allow for investments in new software solutions, you can still improve your ability to collect and analyze data by taking the following steps:

1. Reevaluate basic data collection policies to ensure stakeholders understand the importance of collecting data. As an example, all executed contracts should be forwarded to a central repository for storage, and a tracking system for monitoring security incidents should also exist.
2. Maximize existing enterprise-wide licensed software. Often, we underutilize software tools already licensed by our organizations by not exploring their full range of functionality. As a prime example, Microsoft's SharePoint provides a platform by which departments can track incoming workflow, share knowledge, manage document approvals, and maintain version control when negotiating agreements. SharePoint can assist with identifying the nature of the legal work received by the department and whether such work is being assigned to the proper personnel for completion.
3. Make smaller investments. If you are limited to using Excel for data collection purposes, there are more affordable "add-on" tools that will work with Excel for purposes of exporting data into dashboards that then allow for better data visualization.
4. Explore the option of building a solution leveraging existing human resources rather than buying. As with many technological solutions, the decision to purchase an existing tool versus building one in-house can be influenced by many factors — budget, timeline, talent availability, enterprise strategy, etc.

Intellectual property portfolio management

Counsel should also consider using analytics-based software to manage intellectual property portfolios and the protection of intellectual property assets. Software applications within this space offer a variety of helpful functionality, including automation of the patent filing process and online work spaces, which allow in-house counsel, inventors, and outside counsel to share information during the patent filing or litigation process. Most importantly, these applications allow in-house counsel to analyze large data sets, (including databases of filed patents) efficiently and in a cost-effective manner due to less reliance on full-time employees. The text-mining algorithms within these applications allow counsel to draw important insights from the data sets, such as quickly identifying related or prior art, as well as other potential issues that may cause a patent to be identified as weak during prosecution or litigation. During patent litigation, analytics-based software supports the development of legal case strategy by informing counsel of a patent's prosecution history, along with summaries of when prior art have been cited in other cases.

ACC provides several resources that address the benefits and limitations of data analytics within this space, including "Duty of Disclosure for Patent Applicants: Trends, Technologies, and Best Practices" ACC Docket, September 2017 issue, by Thomas Melling, Kenneth Younge, and Jeffrey Kuhn, and as part of the "Breaking Down Big Data" e-series, "Legal Analytics for Intellectual Property Litigation and Portfolio Management" by Jon Holt.

No matter where you are on the data analytics maturity spectrum, be sure you know what you already have. Your matter/spend management solution may provide you with some level of analytics or an analytics tool may be part of a package provided by another type of legal vendor. Once you're

confident you know what's already in your stable, and what it can do, then determine what you might need in addition.

There are several companies that provide all-in-one analytics support to legal departments. They run the gamut in terms of functionality and cost. Be sure you review several before making a decision. And keep in mind that you'll want something that integrates well with your data sources. And since your largest and likely your most important data source is your matter/spend management system, pay close attention to what they can offer you. While it may come with an existing tool, there may be additional features offered at additional cost.

In evaluating if building your own solution is the best route to take, be sure you understand the human resources available to you. While there is lots of technology available, including a fair amount that's open source, you probably don't want a hobbyist building your legal department's analytics tools. These tools require complex and numerous connections; detailed notes on architecture; timely data refresh; and regular monitoring, maintenance, and troubleshooting. If the right talent doesn't exist in your legal department, be sure to check with internal technology groups to see if they can support your needs.

The opinions expressed in this article are those of the authors and do not necessarily reflect the views of their employers.

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