



PROGRAM MATERIALS
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Litigation as An Investment— How Analytics Should Drive Litigation Decisions

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LITIGATION AS AN INVESTMENT: HOW ANALYTICS SHOULD DRIVE LITIGATION DECISIONS



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TODAY, WE WANT TO GIVE YOU TOOLS TO ASSESS LITIGATION AS AN INVESTMENT.



CONCEPT:

Litigation teams deliver value, but companies treat them as cost centers.



INSIGHT:

Define litigation success through setting reasonable expectations.



MEET SOPHIA

- **CEO of Drone On**, a designer and manufacturer of drones
- **Breach of contract claim** against her supplier, Bad Drone
- **Damages: \$50 million**

SOPHIA HAS A MODEL: A \$50M EVENT OR \$0 EVENT

- **A model is a simplified representation of the complexities of litigation.**
- But, the range of outcomes is not just \$0 or \$50M.
- Settlement could come in anywhere in between those two numbers, and there may even be some unlikely scenarios where you could get above \$50M or below \$0 (e.g. fee shifting).
- Sophia has a model. But we can help her do better.

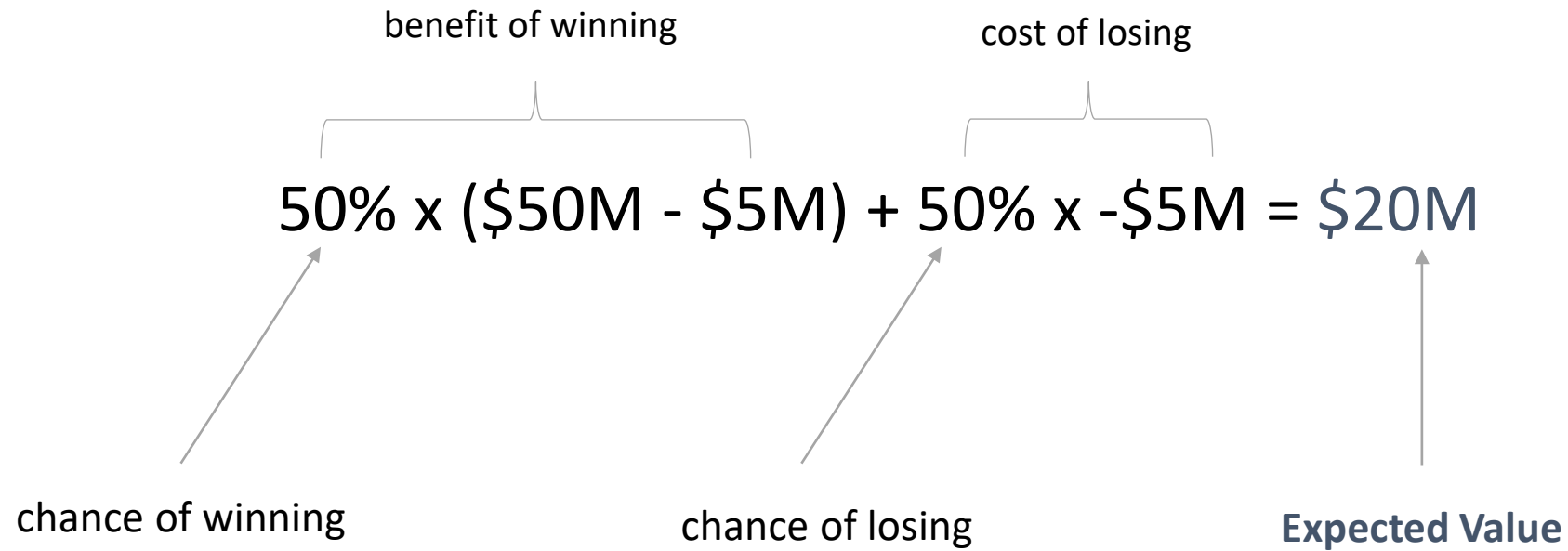
SOPHIA NEEDS AN EXPECTED VALUE MODEL

“Expected Value” is the anticipated value of an investment, calculated by multiplying each of the possible outcomes by the likelihood of that outcome and adding together the sum of those values.

We need some assumptions:

- Sophia’s favorite outside counsel suggests a budget (fees and costs) of \$5M.
- And (to keep it simple) a 50% chance of winning.

SOPHIA'S EXPECTED VALUE



WHAT ABOUT DENISE (OUR DEFENDANT)?

cost of losing

cost of winning

$$50\% \times (-\$50M - \$5M) + 50\% \times -\$5M = -\$30M$$

chance of losing

chance of winning

Expected Value

FIRST EXPECTED VALUE INSIGHTS

- **Sophia's and Denise's expected values are not the same.**
- Why? The transaction costs of litigation.
 - It will cost \$10M (\$5M each for Sophia and Denise) to work out who is right.
- NOTICE: If Sophia and Denies agree on the chances that each will prevail, there is a chance for efficient settlement!
 - A \$25M settlement would exceed the expected value for both the plaintiff and the defendant, AND would involve no risk from litigation.

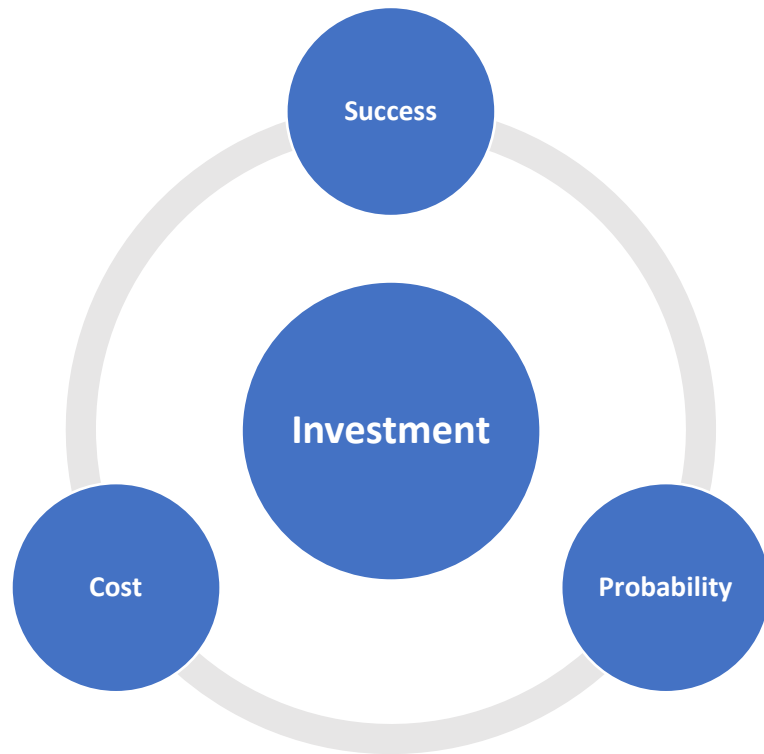
DEFINING SUCCESS

- Our first model, \$50M or \$0 defined success for Sophia as \$50M and for Denise as \$0.
- Both results were impossible because they ignored the transaction costs of litigation. Sophia's best result was \$45M and Denise's was -\$5M.
- Our second model, a simple expected value, defines success for Sophia as ~\$20M, and for Denise as ~-\$30M.

IMMEDIATE BENEFITS OF DEFINING SUCCESS

- Denise’s general counsel didn’t cause the potential \$50M liability to Sophia. Her job is to manage it.
- Every other department gets targets, stretch goals, and ways to demonstrate that they are adding value to the company.
- Sales targets are not set at “everyone in America buys one.” Litigation targets should not be “completely eliminate the problem at no cost.”
- Setting an achievable goal allows for planning and incentivizes value maximizing decisions.

TO ASSESS INVESTMENT, LOOK BEYOND COST



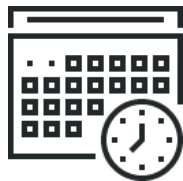
Litigation budgets have a practical element in describing litigation costs, but their utility extends far beyond a statement of costs to take a case through litigation proceedings.

BE SPECIFIC ABOUT SUCCESS. THEN SET YOUR BUDGET

- **Anchor your budget to a definition of success**, not a map of the litigation process
- Should be specific, “i.e. achieving \$50M damages result” is far more specific and measurable than “winning the case”



Resolution



Time



Managing Risks /
Outcomes



Cost



Savings/Damages

FRAMEWORK FOR EFFECTIVE BUDGETING

1

MAP PROSPECTIVE CASE

- Define Success & Resolution first
 - Scope
 - Resources Anticipated & Mix of Work
 - Cost-Driving Risks
 - Pathways to Resolution
 - Venue

Objective: Understand what success looks like *THEN* DEFINE the work.

2

ANALYZE HISTORICAL CASES

- Hours Invested
- Resources Required & Mix of Work
- Workflow by Phase/Task
- Resolution and Time to Resolution
- Risks Realized
- Venue

Objective: Understand EFFORT by identifying SIMILAR CASES to benchmark prospective case against

3

INFORM PROSPECTIVE CASE BUDGET W/ COMPARABLE DATA

- Hours, Team, Duration, Scope of Phases/Tasks, Anticipated Risks, Offramps
- Adjust effort based assumptions or variables between prospective and comparable cases

Objective: establish CORE ASSUMPTIONS about the EFFORT with client/law firm

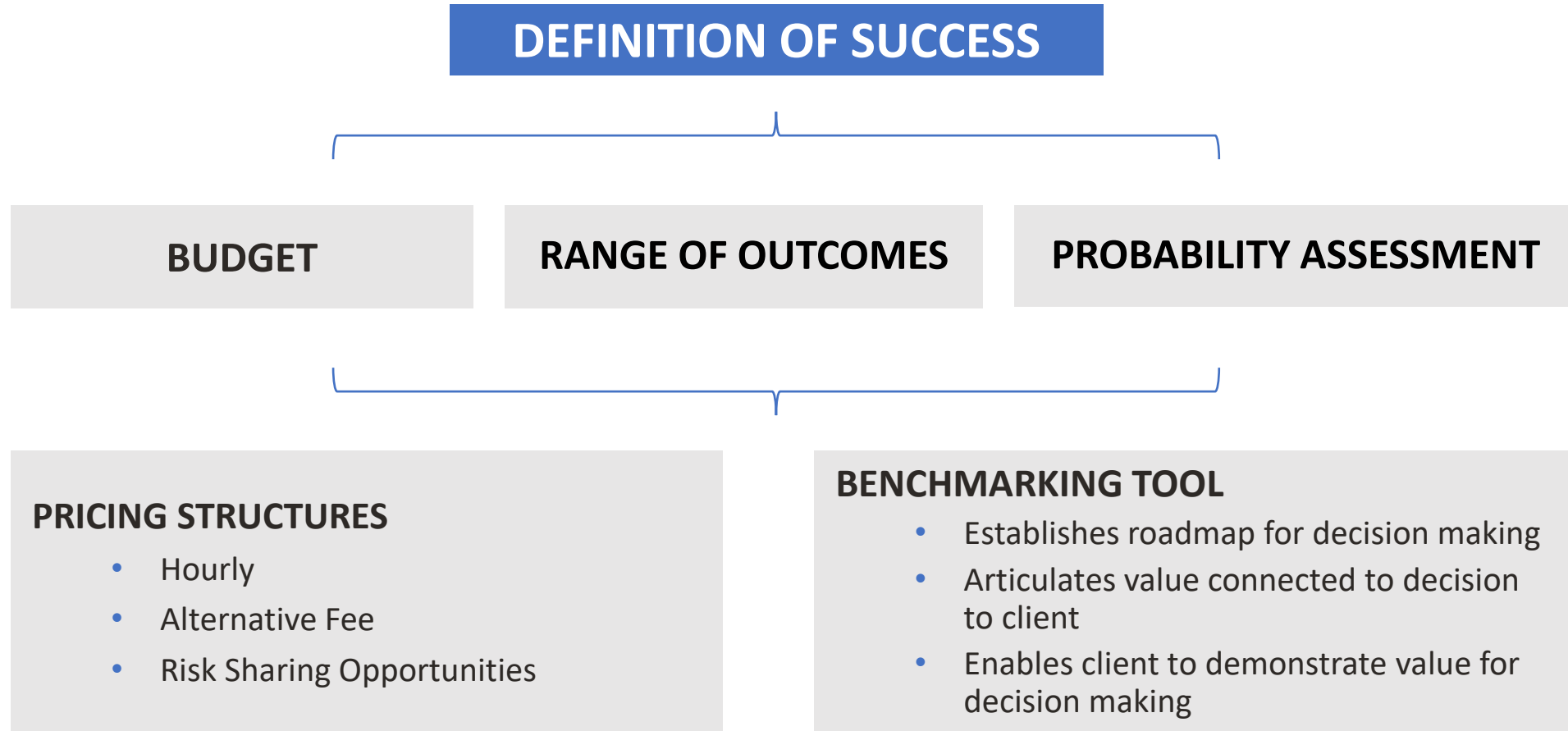
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INTRODUCE PRICE

- Billing Rates
- Price Per Task/Phase
- Expenses
- Client-Specific Arrangements

Objective: Set BASELINE cost to achieve RESOLUTION and becomes tool for pricing and measuring success

BUDGET IS A KEY ASSUMPTION TO MODELING EQUATION



THE CHANCE OF SUCCESS: A QUICK ILLUSTRATION

- If Sophia believes that Law Firm A will give her a 50% chance of success and Law Firm B will give her a 60% chance of success, then Law Firm B increases her expected value from \$20M to \$25M if the budget stays the same.
- If Law Firm B is more expensive, expected value calculations let you work out how much more expensive is reasonable (here, anything under \$5M is worth considering).

DEFINING THE CHANCE OF SUCCESS

There are two major dimensions to setting a reasonable chance of success.

1. The first is the judgment and track record of counsel.
2. The second is how many outcomes you want to consider.

JUDGMENT OF COUNSEL - BALLPARKING

Factors to consider in determining the chance of success:

- Case type (antitrust, contract, etc.)
- Procedural posture
- Forum
- Factors influencing settlement
- Legal precedent and the clarity of the legal theory
- The complexity and sympathy of the factual story
- The certainty of your damages calculation
- Collectability

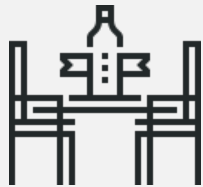
(REMEMBER: It is not just about being right.)

FROM FACTORS TO A PERCENTAGE

- There is no magical formula to determine probability.
- But there are better and worse ways of forming judgments.
- It is helpful to take a moment to consider every factor. You needn't write an essay on each. But be honest about how positive or negative they are and try to be consistent in your evaluations across cases.
- Overtime you will build up a series of judgments that refine your next evaluation. Even in a single case, the exercise is helpful for creating an honest ballpark.

CHOOSING OUTCOMES

Litigation is not bimodal—there are not only two outcomes. 50/50 chance of \$50M or \$0 is very simplified. Your definition of success will be better calibrated if you at least consider the full range of potential outcomes.



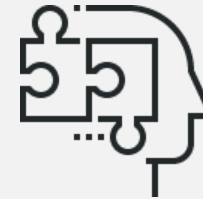
Settlement

Damages discount. Most likely outcome.



Homerun

Very rewarding. Unlikely.



Complications

Different legal theories or damages categories. May need a decision tree.

DEFINITIONS OF SUCCESS AFFECT INCENTIVES

- What you expect of people impacts how they perform.
- What many do not focus on, however, is how having an unachievable definition of success warps incentive structures for their in-house and outside litigation teams.
- At the most basic level: treating litigation as a cost center with no way of demonstrating value-add, fails to incentivize providing precisely that value-add.

A THOUGHT PROBLEM

- **Scenario 1.** Denise did not establish an expected value—did not define success—and now she needs to convince her superiors to approve a settlement of \$20M.
- **Scenario 2.** Denise established an expected value of -\$30M. She has already spent \$2M on litigation, and now has the chance to settle for \$20M, bringing her total costs to \$22M.
- In scenario 2, Denise came in under budget and delivered \$8M in value through her management of the litigation.

IN-HOUSE INCENTIVES

Fees v. Resolution

Do you treat legal fees and case resolutions differently?

Does your in-house team need to justify a \$10M settlement, but not \$10M in legal fees?

Judgments v. Settlements

Who owns a judgment or a settlement?

Is a judgment a strike of lightning (or outside counsel's fault), but a settlement the responsibility of your in-house team?

OUTSIDE COUNSEL CONSIDERATIONS

OUTSIDE COUNSEL CONSIDERATIONS

How do you frame the discussion with your client around fees vs. settlement/damages?

Do you know how your client justifies legal fees?

Fees v. Resolution

Do you treat legal fees and case resolutions differently?

Does your in-house team need to justify a \$10M settlement, but not \$10M in legal fees?

Judgments v. Settlements

Who owns a judgment or a settlement?

Is a judgment a strike of lightning (or outside counsel's fault), but a settlement the responsibility of your in-house team?

OUTSIDE COUNSEL CONSIDERATIONS

How does your client approach settlements versus judgments?

What is the client's past litigation history?

Do they have a litigation strategy?

TRACK RECORD OF COUNSEL



Track record is one of the many considerations for clients when making outside counsel selection

- Outside counsel need to consider how they are framing their track record and telling the value story
- Leverage internal and external data sources to research current/potential clients to view problem through their lens
 - Litigation profile
 - Risk tolerance
 - Who a client hires
- Avoid speaking in platitudes about your track record
 - Be specific about how your experience solves the problem the client is facing
 - Back statements with data supporting your results

WHAT HAPPENS WHEN CIRCUMSTANCES CHANGE?

3 Main Sources of Change

- Nature of litigation
- Client
- Outside influences

ADAPTING TO CHANGED CIRCUMSTANCES

The Assumption

You thought there was a 50-50 shot of winning your contract dispute. To win, you needed to get the judge to accept an interpretation of a certain clause, and you needed to prove a disputed fact.

Changed Circumstance

At the motion to dismiss, the judge adopts your interpretation of the clause based on the plain language of the contract—or the judge heavily hints that she will at summary judgment. Your chance of success just shot up to 75%. Your expected value just shot up to \$32.5M. Suddenly, that \$25M settlement offer doesn't look so hot.

Adjusting Expectations

This is a simple illustration of the fact that circumstances changing should also change your expectations without being an indictment of your prior analysis.

ADAPTING TO CHANGED CIRCUMSTANCES

Reaction to a Ruling

All too often, after a ruling like that you will hear statements like, “it’s only the motion to dismiss, it’s not binding yet” or “we can fix this at summary judgement or on appeal.”

Changed Circumstance

I’m not saying anything about that is wrong. I am saying that you need to accept, and to inform your client, that the reasonable analysis has changed. Maybe you will prevail on appeal or at summary judgment. But the chances of success dropped.

Framing Expected Value

Expected value is a good way of capturing that. You can say, “I still think we should win,” but also, “our chances have dropped from 50% to 25% because that decision went against us.” The expected value is now -\$42.5M, and you should take that into account when thinking about settlement.

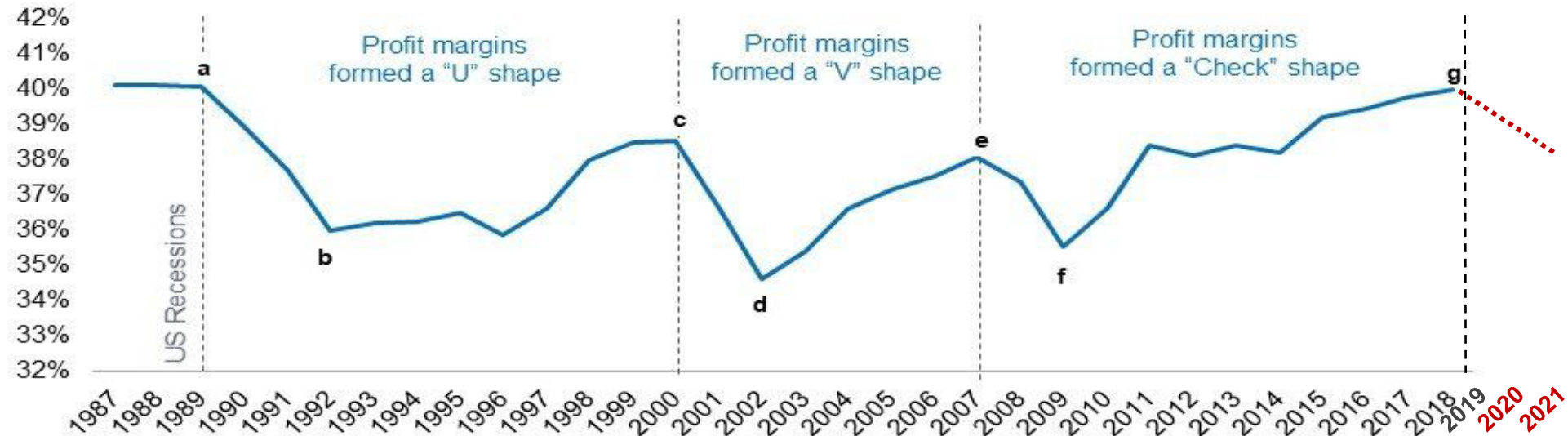
COVID AND EXPECTED VALUE



- The pandemic's effect on the legal system highlights an element of financial modelling we have not discussed: timing.
- Full financial models, including for litigation, include timing assumptions. If you need to know about timing, there are (paywalled) databases that can provide you duration statistics by court or even by judge.
- We have not noticed any effect from COVID on outcomes in litigation, but it has caused delay and affected filings.
- COVID has also caused increased activity around ways to de-risk and monetize litigation outside of the court system.

MEASURING THE COVID-19 EFFECT ON THE LEGAL INDUSTRY

Figure 1: Am Law 100 Profit Margins
Average Profit Margin For Am Law 100 Firms



Industry is navigating the headwinds of COVID-19

Full impacts and subsequent trends yet to be realized and measured

- Duration
- Workforce
- Impact on courts
- Demand for legal services
- Legal spending

WHAT WE KNOW | COVID-19 EFFECT ON THE LEGAL INDUSTRY

89%

Legal departments identifying controlling outside counsel costs as a high priority

79%

Legal departments reported an increase of workload due to pandemic, but noted that crisis management work handled in house caused a slowdown in outsourcing of work

43%

Legal departments noting change in typical mix of legal matter types because of COVID

Source: Thomson Reuters Institute 2021 Report on the State of the Legal Market

THE COVID-19 EFFECT ON LITIGATION

**SCHEDULING
DELAYS**

**CHANGED
STRATEGIES INC.
DISPUTE
MINIMIZATION**

**INTEREST IN
SETTLEMENTS**

**NEW CLAIMS
ARISING OUT OF
COVID**

THE KNOWN IMPACTS

**LITIGATION
SPENDING
REMAINS FLAT**

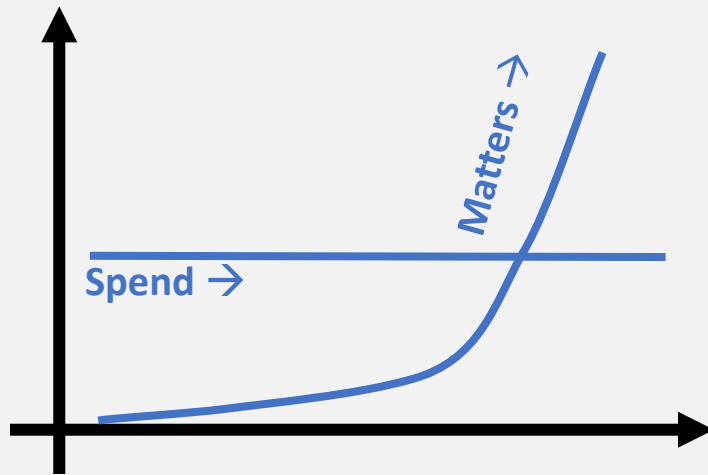
BTI Consulting Group: Litigation Outlook 2021

**LITIGATION
MATTERS
INCREASE**

BTI Consulting Group: Litigation Outlook 2021

**LOGISTICS &
EMPHASIS ON
TECHNOLOGY**

NAVIGATING CHANGED CIRCUMSTANCES



OUTSIDE COUNSEL CONSIDERATIONS

- New needs/clients in the marketplace
- New strategies around settlement and litigation strategy
- Emphasis on risk assessment
- Inside counsel insourcing work to reduce cost
- Seeking alternative pricing structures

TOOLS TO STRUCTURE & MANAGE LITIGATION INVESTMENTS



Business Professionals

Leverage in-house or outside counsel operations professionals. Introduce Pricing into the conversation to budget and provide options. Deploy Legal Project Managers (“LPM”) to support efficient, cost effective, and clearly communicated legal services.



Analytics

Put your own historical data to work to inform cost, timelines, offramps, and results. Tap into (paid) 3rd party resources for competitive intelligence, company litigation histories, and benchmarks on court venue timing and resolution.



Effective Budgets

Don’t wait to budget until cost becomes a problem. Budget early, based upon a concrete definition of success. Use historical case benchmarks to support the budget. Make your budget a strategy tool by demonstrating pathways to success and associated costs.



Fee Arrangements

Instead of presenting a budget with a general invitation to discuss alternative fees, follow the budget conversation with fee arrangement options that align with the work. Consider which matters may be best suited to sharing risk, and when to tap into resources like litigation financing to expand client options.



Model & Monitor

Don’t stop modeling at cost. Use models as active tools in case initiation and downstream decision making. Monitor to your budget, using LPM resources and available budget monitoring tools to streamline budget management and communicate progress with the legal team and inside counsel.

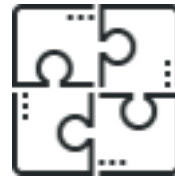
LITIGATION AS A LITERAL INVESTMENT

- Investing in litigation is not new.
- Every client who pays a lawyer to litigate, is making an investment.
- Every law firm that takes a case on contingency, or accepts a flat fee or success fee, is investing their time and expertise for an expected return.
- And, of course, litigation finance is the business of making an investment in a litigation claim.

HOW DO FUNDERS INVEST IN LITIGATION?



FEE AND COST
FUNDING



PORTFOLIO FUNDING



WORKING CAPITAL



DEFENSE FUNDING



CLAIM MONETIZATION



BESPOKE PROGRAMS

PUTTING IT ALL TOGETHER

A funder can provide you with a model that helps explain the risk and cashflow effects of financing litigation.

litig Case Model
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 FOR ILLUSTRATIVE PURPOSES ONLY

Ending Assumptions	Funding	Month	to Month	Monthly Avg
Fees	1,500,000	1	36	41,667
Costs	500,000	1	36	13,889
Total funding	2,000,000			

	Settlement	Trial
Reasonable	10,000,000	20,000,000
High	30,000,000	60,000,000
Low	5,000,000	10,000,000
Timing	18	36

RS1 - Case 1				RS1 - Case 2				RS1 - Case 3			
Case result:		Case proceeds	Month	Case result:		Case proceeds	Month	Case result:		Case proceeds	Month
Case result:		10,000,000	18	Case result:		30,000,000	18	Case result:		5,000,000	18
Allocation of Proceeds:				Allocation of Proceeds:				Allocation of Proceeds:			
Funder	2,250,000	23%		Validity	4,500,000	15%		Validity	2,250,000	45%	
Counsel	1,500,000	15%		Counsel	4,500,000	15%		Counsel	750,000	15%	
Claimants	6,250,000	63%		Claimants	21,000,000	70%		Claimants	2,000,000	40%	
	10,000,000	100%			30,000,000	100%			5,000,000	100%	
Total Cash				Total Cash				Total Cash			
Funder	1,250,000	13%		Validity	3,500,000	12%		Validity	1,250,000	26%	
Counsel	2,250,000	23%		Counsel	5,250,000	18%		Counsel	1,500,000	32%	
Claimants	6,250,000	64%		Claimants	21,000,000	71%		Claimants	2,000,000	42%	
	9,750,000	100%			29,750,000	100%			4,750,000	100%	

RS2 - Case 1				RS2 - Case 2				RS2 - Case 3			
Case result:		Case proceeds	Month	Case result:		Case proceeds	Month	Case result:		Case proceeds	Month
Case result:		20,000,000	36	Case result:		60,000,000	36	Case result:		10,000,000	36
Allocation of Proceeds:				Allocation of Proceeds:				Allocation of Proceeds:			
Validity	6,500,000	33%		Validity	12,000,000	20%		Validity	6,500,000	65%	
Counsel	3,000,000	15%		Counsel	9,000,000	15%		Counsel	1,500,000	15%	
Claimants	10,500,000	53%		Claimants	39,000,000	65%		Claimants	2,000,000	20%	
	20,000,000	100%			60,000,000	100%			10,000,000	100%	
Total Cash				Total Cash				Total Cash			
Validity	4,500,000	23%		Validity	10,000,000	17%		Validity	4,500,000	47%	
Counsel	4,500,000	23%		Counsel	10,500,000	18%		Counsel	3,000,000	32%	
Claimants	10,500,000	54%		Claimants	39,000,000	66%		Claimants	2,000,000	21%	
	19,500,000	98%			59,500,000	99%			7,500,000	75%	

CONCLUSIONS

- Your litigation team is in the business of adding value—not costing you money.
- By defining success in litigation, you can improve outcomes and better incentivize your litigation team.
- Success in litigation needs to be measured against reasonable expectations.

Reimagining Litigation as an Investment: How In-House Counsel Can Maximize Value and Align Incentives in Legal Costs

You want to keep litigation costs down and to maximize recoveries and minimize losses. You want to win your cases. But are such general incentives enough to ensure efficient outcomes in the actual decision-making process?

By Joshua Libling

You are the general counsel, CFO, or even CEO of a business engaged in litigation, or with potential litigation you could bring. Budgets are tight, and your capital needs to be conserved. You have probably read enough articles about the “death of the billable hour” and the rise of alternative fee arrangements to fill a book. You have probably been pitched to by law firms that say they can be more efficient or offer fee discounts for repeat business. Those developments in the legal market are good, but they are not enough. The lawyer-client relationship has two parties, and your legal costs will never be managed efficiently unless the client side—your side—is properly incentivized. Achieving this will require a paradigm shift from thinking about litigation as a cost and a burden, to thinking about it as an investment and an opportunity.

You might think that you are already properly incentivized. You want to keep litigation costs down and to maximize recoveries and minimize losses. You want to win your cases. But are such general incentives enough to ensure efficient outcomes in the actual decision-making process? Winning isn't a goal until you define what winning means, and your in-house departments are also

focused on other, more concrete, goals. After a decade of litigating cases for and against large corporations, I believe that far too often incentives are pushing companies in the wrong direction.

To see if I am right, I'd like you to think about how you approach three choices. Are you approaching them in a way that incentivizes efficiency in your legal costs, or not? The three choices are: fees vs. resolutions, judgments vs. settlements, and people vs. costs.

Fees vs. Resolutions. Think about how you account for fees and resolutions (whether judgments or settlements) in your accounting and in your management decisions. Many companies treat legal expenses as a regular cost for which they budget. Resolutions, however, are treated as one-off events. You can see this most clearly in the litigation budgets you get from your outside law firms, which often do even contain anticipated or goal resolution amounts or dates. When a future resolution is accounted for, it's usually to manage the risk of loss—perhaps as a disclosure in an SEC filing or in the form of a fund that has been set aside to protect against a large potential judgment. No other business unit would operate this way. No production



Joshua Libling

budget fails to include anticipated sales. No investment budget fails to include anticipated returns.

The reason no other business unit operates that way is obvious: Businesses are supposed to pay attention to the bottom line. Somehow, litigation has become exempt from that mantra, with the process budgeted for and the outcome not. That makes no sense. If you can pay more legal fees for an appropriately increased chance of a better resolution, you should. If you can avoid sufficient future fees through the right resolution now, you should. Your incentive structure should account for that and not treat resolutions as special.

You might think that litigation resolutions are too uncertain to include in budgets and to be subject to incentive structures, but that is dead wrong. A decade of litigation funding in the United States, and an even longer track record in Australia and

the United Kingdom, demonstrates that litigations are just another kind of investment with another kind of pay-off structure and risk profile. Those of us in the litigation funding industry make these judgments every day, and back them up with millions of dollars in capital on which we expect a return. There is no reason your business needs to be left out of the increasing focus on efficient litigation investments.

Judgments vs. Settlements. Think about who owns the responsibility for judgments and settlements. Many companies internalize the process of settlement approval. It might be a committee, or it might be an individual, but a settlement decision often requires an in-house judgment call. Internal accountability and responsibility for such judgment calls can be avoided when a company opts to proceed to trial. In those cases, the credit or blame can be placed on outside counsel or the courts, or even just to the vagaries of fate. Many legal departments' incentive structures thus create a preference for judgments.

That may sound counter-intuitive when so many cases ultimately do settle. There are, of course, many incentives that push towards settlement, and the case resolution statistics back that up. But taking a closer look at when settlements happen suggests skewed incentives. Settlement typically happens late—often on the eve of trial. In many cases, this is because companies require a significant, imminent risk of loss before someone assumes responsibility for a settlement decision. The months leading up to trial are often extremely expensive because law firms legitimately need to perform a lot of work in the lead up to trial. At the same time, your risk profile as you get closer to trial often isn't significantly changing. You are spending



money on trial preparation, therefore, for not benefit. Sometimes the risk profile does change and you do need to wait for a critical summary judgment, discovery, or similar ruling before settlement makes sense. But when that is not the case, or when the case proceeds intensively for months after that critical decision, you are wasting money. Again, thinking of litigation as an investment helps to shift focus to the value of time and the costs of delay. Correcting for irrational incentives to delay rational settlements would help you get your resolutions faster, reduce your run costs, and measurably increase your litigation returns.

People vs. Costs. Finally, think about how your team makes the decision about whether to agree to search an executive's documents or offer them for a deposition. The legal fees that have been used to defend executives from depositions that everyone (except, perhaps, the executive herself) knows they will ultimately have to sit for could fund a whole new business line. It is natural for your team to want to protect the executives in your company, but sometimes bitter pills need to be swallowed. If your in-house team believes that its job is to defend executives, you will keep wasting money on doomed motions and delaying resolution of

your litigation. If your in-house team believes their job is to protect one of your companies' assets—a litigation asset—the calculus may be different.

I don't pretend to be neutral in this discussion. Even while I was still litigating, it was funders who opened my eyes to some of the ways in which clients were losing out on their best results. Now that I work for a litigation funder, I am even less neutral because we want to fund your plaintiff- and defense-side litigations. If you view litigation as a manageable asset, it will be easier for us to demonstrate how funding can unlock value. After all, we believe that we are experts in structuring litigation to align everyone's incentives to efficient resolution, and in identifying the value of a case and helping companies and law firms maximize it both at initiation and throughout the life of the litigation as we monitor the case. But my hope is that these insights are helpful for any company looking to manage litigation costs regardless of whether you come to us for funding.

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Litigation

WWW.NYLJ.COM

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Your Choice: Model Your Litigation, or Overpay

BY JOSHUA LIBLING

It's time for some math. Modeling math! No, don't stop reading! Most law firm pitches are heavy on the lawyers' records but leave out a crucial part of the litigation: its resolution. This article is about using analytics to pick the right counsel and demonstrate a legal department's value as a profit-generator, not a cost center. Math is a big part of that.

Every case, plaintiff or defendant, should start with a model that includes expected costs and a target resolution. There is no way to measure success, by which I mean delivering incremental value, if you haven't defined your expectations. You will also lack the tools needed to decide how much to spend, and when or if to settle.

JOSHUA LIBLING is portfolio counsel at Validity Finance in New York.



How Does a Model Help?

As a defendant, a model tells you the cost of a full defense, and helps you better understand your settlement incentives. Success as a defendant does not mean \$0. For one thing, you have litigation costs.

For another, outside counsel saying “We can win” doesn’t mean “100% guaranteed.” It normally means, “we have a 60%-70% chance.” That means a 30%-40% chance of paying damages.

Hence, math. A 40% chance of losing \$50M is an expected cost of

\$20M, plus the \$5M it will cost you to litigate through trial. That means your baseline assessment is that this litigation will cost you \$25M. A company's litigation department didn't cause the \$25M cost, but it is their job to mitigate it. And when they do, they deliver value and profit.

Delivering value on an expected \$25M cost means that a settlement on Day 1 for \$10M is saving your company \$15M. If a settlement of \$20M is on the table after you have spent \$2M in fees, that option is coming in under budget. It makes a big difference when presenting options to be able to say, "we're \$3M under budget" rather than only being able to say, "please authorize spending \$20M." This is why buy-in from the C-suite on modeling litigation helps align incentives internally and improve your financial results.

Models also help you evaluate the time value of money. There is a temptation to postpone the payment of an inevitable settlement because having money on hand is valuable. A model helps you calculate how valuable. But it also changes your attitude. It is easier to postpone making a payment when you are hoping you will never need to. But if you think about your chance of paying damages not in a binary way (win or lose) but in a probabilistic way (40% chance), you are

thinking about the risk-reward profile of delay more accurately.

Math also helps with choosing counsel. Does law firm A convince you that it can improve your chance of winning by 10% versus law firm B? Great! 10% of your \$50M liability is \$5M. If law firm A is charging \$3M more in fees than B, they are projected to save you money. But if they're only increasing your chance of winning by 5%, then you should go with the cheaper firm. This is value investing. (You're probably wondering how you can generate these percentages—I'll get there.)

As a plaintiff, the same math applies but with an added emphasis. Bringing litigation is a choice to allocate scarce capital to a chance of generating a return. That's investing. If you plan to invest \$5M to seek \$50M, you cannot make an informed decision without knowing if the chance of success is 10% (expected value of $\$50M \times 0.1 - \$5M = \$0$) or 90% (expected value of $\$50M \times 0.9 - \$5M = \$40M$).

Regardless of whether you are a plaintiff or defendant, there are more modeling benefits. You need to set up legal reserves. You need to manage disclosure obligations and measure materiality. You need to project your legal costs and cash flows into the future as a basic of corporate monitoring and financial management. All of that will be done better and more

efficiently if you have consistent treatment of your litigations and target resolutions.

How To Generate a Model

The standard rejoinder is that litigation is too uncertain to sustain sensible models. This is nonsense. Litigation funding companies raise \$100s of millions modeling litigation and projecting returns. The success of that industry is proof that through diligence and experience, modeling litigation is a winning strategy. Moreover, every capped fee, hybrid contingency, and success fee you've ever had pitched to you is implicitly based on estimates of the resolution value and risk of a litigation. The fact that those assumptions don't get written down in Excel doesn't mean they don't exist or that large bets aren't being made on them.

So how do you do it? First, you're not on your own. Most litigation funders would be delighted to help you work through your choices. Second, though, you're not flying blind. Maybe you have a history of litigation at your company that you can use to work out your historical costs, and how your cases resolved relative to the initial damages demands or projections. Litigation funders' models are more accurate in aggregate than they are on individual cases—which makes sense because investing in

one litigation might be a 70%-30% win-loss proposition, but investing in 20 with sufficient returns on the 70% wins to make up for the 30% losses is a business. You may be better off modeling your litigation portfolio in the aggregate than case-by-case.

You also have other sources of data. Your outside counsel that claims they can improve your resolution outcome has a track record. Ask them how their resolutions compare to their pre-litigation estimates in past cases. If they don't know, then ask them to compare their demands in their complaints (on the plaintiff side) or the first damages demands or complaint numbers (on the defense side) to their final resolutions. Look at their budgets—there are tools out there to help you understand what a reasonable budget looks like. But also, are they confident enough in their budget that they are willing to stick to it? And look at case resolution schedules. Law firms chronically underestimate the time to resolution, but objective information is available through subscription databases.

If most of your litigation is defense, you might think the lessons from the funding industry are harder to apply, but that isn't really true. Once you define success on the defense side, your ability to model, plan for, and finance that

success open up. Again, let's check the math. If you are facing \$5M in fees and costs and a 40% chance of \$50M in liability, you are looking at a 60% chance of spending \$5M and a 40% chance of spending \$55M for a weighted average ($40\% * \$55M + 60\% * \$5M$) liability of \$25M.

But if you finance the litigation costs to get better counsel and give yourself a 70% chance of winning, reducing your out of pocket litigation costs to zero, and pay a success fee of \$14M if you win, your weighted average liability has decreased to \$24.8M and you are protected on the downside by not bearing the risk of litigation budget cost overruns. Modeling is agnostic about whether something is a cost (defense liability) or revenue (plaintiff claims). You are not! But the math works either way.

Bottom Lines

Sometimes the math doesn't capture everything. Maybe you prefer law firm A because they know your business well and will be less disruptive. Maybe you like working with them. Maybe you want to avoid settling not because of this litigation but because of the next one or the twenty after that. Maybe you were truly wronged or you are offended by the claims brought against you and a resolution that doesn't reflect that is just not

acceptable. That's all fine. Modeling tells you how much you are paying for those positions. (Roughly speaking, rejecting a settlement at \$20M in a litigation projected to cost \$25M costs at least \$5M, and probably exposes you to the risk of trial.) If you are comfortable with the cost, you go for it, it's your business. But before you decide, do the math so that you know what the cost is.

Litigation is going to be on an upswing in the coming months as the courts re-open and COVID litigation continues. Take the time to model your litigation—individually or as a portfolio—and make the right, cost-effective decisions for your business. Picking counsel, deciding whether to bring a claim or when and for how much to settle, and deciding how to finance your litigation are all decisions that need to be informed by a full picture of the costs and benefits. Bring in a funder as a consultant or to help manage costs. And give credit for good litigation management where it is due! Every other department has graphs and models showing that they beat expectations and generated value and the legal department should too, because that is what they do every day.