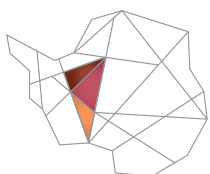




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# HOW LITIGATION FINANCING ALIGNS WITH A COMPREHENSIVE LEGAL OPERATIONS STRATEGY



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In their quest for efficiency, in-house attorneys have increasingly turned to legal operations professionals, whose duties include everything from administrative tasks to financial management.<sup>1,2</sup> Ultimately, their aim is to help the legal department operate more like a business, while giving attorneys more time to focus on legal matters.<sup>3</sup>

But even as in-house attorneys are utilizing legal operations teams to help them fire on all cylinders, they have yet to fully utilize one important tool: litigation finance. Under a litigation financing deal, a funder provides payment to a company or claimholder, in exchange for a portion of the proceeds from a legal case.

By monetizing their company's legal claims, law departments can challenge the notion that they're purely a "cost center." Instead, litigation financing can allow a legal department to generate funds, making it a strong addition to an overall legal operations strategy. For any law department eager to use every tool at its disposal to help it achieve its peak performance, litigation financing shouldn't be ignored.

In this white paper, we'll outline the basics of litigation finance, explore the benefits of having a legal operations strategy, and unpack how litigation finance can complement an organization's legal operations goals.

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1 [https://www.acc.com/sites/default/files/resources/vl/public/NoMaterialType/1433075\\_2.pdf](https://www.acc.com/sites/default/files/resources/vl/public/NoMaterialType/1433075_2.pdf)

2 <https://www.tcdi.com/legal-operations-staff-responsibilities/>

3 <https://acc.inreachce.com/Details/Information/6672ec5b-0c44-40e0-87fd-f39b170a85c6>



# HOW LITIGATION FINANCING ALIGNS WITH A COMPREHENSIVE LEGAL OPERATIONS STRATEGY

## What Is Litigation Financing?

Litigation financing involves a third-party giving funds to a company or law firm in exchange for a share of the proceeds from litigation or arbitration. Importantly, the litigation funder is typically only paid if the claimholder successfully wins or settles their case, as recourse is limited to the award or settlement.

The funds provided by a litigation finance firm can be used to pay for attorneys' fees and expenses associated with the legal case. Litigation financing, therefore, allows companies to pursue meritorious legal claims with less risk, as they can unburden themselves of the costs associated with the litigation.

Companies may also opt for litigation financing in order to keep the cost of the litigation off their balance sheets, as a way to raise capital, or so they're able to hire top outside counsel for a matter. Overall, litigation finance — which is also called litigation funding or third-party funding — can allow companies to both realize the value of a litigation asset and reduce risk.

Litigation finance can also be an important tool for law firms, as it allows them to take cases from underfunded claimholders, enlarge and diversify their portfolios of contingent representations, and raise capital needed to support the law firm or particular cases.

## The Rise of Litigation Financing

Although litigation finance is a relatively new phenomenon in the United States, the practice has

been around for decades, having begun in Australia in the mid-1990s.<sup>4</sup> Commercial litigation funding came to the U.S. in the mid-2000s, and is now a growing industry worth billions.<sup>5,6</sup>

“Every survey that we do shows, year after year, more people are using it, more people have heard of it, and fewer people have concerns,” said Marla Decker, a Managing Director at Lake Whillans. “I think that everyone, at this point, agrees that it's here to stay.”

Indeed, attorneys appear increasingly eager to utilize litigation financing. According to Lake Whillans' 2021 Litigation Finance Survey Report, 65.7% of respondents — which included solo practitioners, in-house counsel, and law firm attorneys — indicated they had firsthand experience working with a litigation finance firm.<sup>7</sup> And of those, 86.4% would use litigation finance again.

When it came to the strongest reason for seeking litigation financing, a lack of funds for legal fees and expenses was cited as the top motivation, followed by hedging the risk of litigation and as a way to fund operating expenses. The varying responses show that companies and law firms have a broad range of reasons for exploring litigation financing and are able to use it to fit their individual needs.

Law firms have historically had more experience working with litigation financing than in-house counsel,<sup>8</sup> but the practice has also been making inroads with corporate legal departments. In fact, the 2021 Lake Whillans survey found that 27% of law firm partners named corporate legal departments

4 <https://abovethelaw.com/2017/01/the-history-and-evolution-of-litigation-finance/?rf=1>

5 <https://thepractice.law.harvard.edu/article/a-brief-history-of-litigation-finance/#:~:text=In%202006%20Credit%20Suisse%20opened.group%20in%20the%20United%20States.>

6 <https://www.businesswire.com/news/home/20210127005148/en/2.47-Billion-of-Capital-Deployed-Last-Year-Across-U.S.-Commercial-Litigation-Finance-Industry-As-Growing-Sector-Weathers-Pandemic-Storm>

7 <https://lakewhillans.com/research/2021-litigation-finance-survey-report/>

8 <https://lakewhillans.com/research/litigation-finance-in-house-perspective/>

as the main drivers of the decision to seek litigation financing—a 10 percentage point increase over 2020.<sup>9</sup> A separate survey of finance professionals has found that 65.1% of them believed their companies were very likely to consider using litigation finance in the next two years.<sup>10</sup>

Furthermore, as companies work to rebound from the COVID-19 pandemic, they may consider litigation financing as a way to help their bottomline. In an article examining the outlook for litigation finance in 2021, *Bloomberg Law* predicted that big companies might “more frequently make deals directly with funders, as they seek to monetize their assets and increase restricted cash flow.”<sup>11</sup>



## Types of Litigation Financing

Litigation financing can take a variety of forms, depending on the needs and situation of each claimholder or law firm. The shared feature of all

forms of litigation finance, however, is that the funder is paid only if the case or set of claims is successful. In the event of a win, the funder gets back its invested amount, plus part of the award or settlement from the litigation. However, if the case fails, the litigation funder isn’t paid anything.

In the most basic litigation financing structure, the funder agrees to pay the legal fees and expenses for a single case, footing the bill for things like attorneys’ fees or costs associated with experts.

Another common model for litigation funding is the portfolio structure. In a portfolio funding situation, the litigation financing firm invests in a set of claims held either by the same company, or handled by the same law firm. For companies, portfolios may consist of a few big claims or a variety of smaller claims. By grouping claims, a company can typically obtain funding at a lower cost — the funder is willing to accept a lower return, since investing in a portfolio is less risky than investing in a single case.

For law firms, a portfolio funding structure can allow them to take cases on contingency with less risk. The litigation funder will give capital to the firm based on the anticipated contingency fees from the portfolio, and the firm can use this capital to pay for its ongoing expenses or to expand while the cases are pending.

Finally, a litigation funding deal may include monetization of the underlying claims, which means the funder will pay a part of the anticipated recovery straight to the claimholder. Rather than just being used for litigation costs, this capital can be used for a range of purposes, such as operating expenses or addressing debt. Notably, for a large corporation, this structure can help self-fund the legal department, thereby counteracting the department’s status as a cost center.

<sup>9</sup> <https://lakewhillans.com/research/2021-litigation-finance-survey-report/>

<sup>10</sup> <https://www.burfordcapital.com/insights/insights-container/2019-managing-legal-risk-report/#:::text=The%202019%20Managing%20Legal%20Risk,business%20challenge%E2%80%94all%20the%20more>

<sup>11</sup> <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-for-litigation-finance-new-heights-are-within-reach>

## What Is Legal Operations?

As corporate law departments have become more sophisticated, in-house attorneys are increasingly turning to legal operations professionals.

Typically, legal operations teams reside within a company’s law department and help it run as efficiently as possible. Their responsibilities can include everything from managing the law department’s budget to coordinating e-discovery. Essentially, by taking on key administrative and operational tasks, legal operations professionals can help bring more business rigor to a corporate legal department, while also allowing attorneys to focus on legal work.

“I’d say that the main purpose of the legal operations department is to make legal run more like a business,” noted Justin Ergler, the Director of Alternative Fee Intelligence and Analytics at GlaxoSmithKline.

And as Chris Coats, the vice president of legal operations at Oracle, told the *ABA Journal*, the “role of the legal operations leader is to be the right hand to the GC.”<sup>12</sup>

Although there isn’t one set rubric for what “legal operations” entails, tasks that legal operations professionals may handle include: managing the law department’s budget, keeping track of spending on outside counsel, finding ways to reduce costs for the law department, helping to hire and on-board new staff, improving efficiencies, strategic planning, handling e-billing, managing technology, coordinating e-discovery, tracking the law department’s metrics and key performance indicators (KPIs), and managing vendors, knowledge, contracts, and client and firm relationships.

Notably, the legal operations field has seen serious growth in recent years. According to the 2021

Chief Legal Officers Survey from the Association of Corporate Counsel (ACC), 61% of legal departments now have at least one legal operations person, which is a 6.7 percentage point jump from 2020 and a 39.4 point increase from 2015.<sup>13</sup>

### BY THE NUMBERS

27%

OF LAW FIRM PARTNERS NAMED  
**CORPORATE LEGAL  
DEPARTMENTS**  
AS THE MAIN DRIVERS OF THE  
DECISION TO SEEK LITIGATION  
FINANCING, MARKING A  
10 PERCENTAGE POINT  
INCREASE OVER 2020.

*2021 Litigation Finance Survey Report, Lake Whillans*

And while legal operations teams used to exist primarily within large legal departments, the discipline is spreading to smaller companies, as well.<sup>14</sup> The 2021 State of the Industry Survey from the Corporate Legal Operations Consortium (CLOC) found that small companies have an average of one legal operations professional, while medium companies had seven (as compared with just two in 2020).<sup>15</sup>

Larger companies still led the pack, however, with an average of 13 legal operations professionals. And, impressively, the average legal operations full-time employee supports 23 legal team members, according to the survey.<sup>16</sup>

Overall, the state of the field is a far cry from where it was in the early 1990s, when General Electric, Prudential and Bank of America were part of a

<sup>12</sup> [https://www.abajournal.com/news/article/reinventing\\_professionals\\_CLOC\\_corporate\\_legal\\_operations\\_consortium](https://www.abajournal.com/news/article/reinventing_professionals_CLOC_corporate_legal_operations_consortium)

<sup>13</sup> <https://www.acc.com/clo2021>

<sup>14</sup> <https://www.simplelegal.com/blog/what-is-legal-operations>

<sup>15</sup> <https://cloc.org/2021-state-of-industry-survey/>

<sup>16</sup> <https://cloc.org/2021-state-of-industry-survey/>

“handful of companies that employed dedicated legal operations specialists” to help manage legal spending and boost efficiencies, according to the legal management software company SimpleLegal.<sup>17</sup>

With the legal operations field advancing, both CLOC and ACC have developed maturity guides for legal operations professionals. Both include financial management, and indeed, the top responsibilities for legal operations personnel do often pertain to handling financial issues.

“They usually are trying to make things more efficient and cost effective. And so, that will manifest in a few ways,” said Catherine Jackson Moynihan, the executive director of ACC Legal Operations. “Sometimes, they’re really trying to cut costs — there’s a mandate and they’re going to find savings. And in other cases, they may be just trying to make the spending more predictable.”

Indeed, among CLOC’s 12 core competencies that legal operations teams should aim for, financial management is listed as a foundational goal. This includes being able to manage the department budget, track forecasting, and collaborate with the finance department to determine spending patterns, ways to save costs, and areas to boost efficiency, according to the organization.<sup>18</sup>

## How Can Litigation Financing Fit Into a Legal Operations Strategy?

Cost control and financial management are clearly on the minds of legal operations professionals today. In the 13th Annual Law Department Operations Survey from the Blickstein Group, law department operations professionals ranked cost issues as a key concern, with 60.3% listing “cost containment and savings/managing the budget” as top challenge they face<sup>19</sup>

As legal operations professionals look to create cost savings and manage budgets, they may want to consider turning their law departments into revenue-generators, as opposed to solely cost centers. Perhaps the most well-known example of a company using its law department to generate revenue is DuPont. The chemical giant started a legal recovery program in 2004, and it reportedly raised nearly \$3 billion for DuPont over a span of 10 years.<sup>20</sup>

Under its program, DuPont attorneys have obtained recoveries involving international trade, intellectual property, insurance coverage and contract disputes, among others, according to a paper co-authored by one of the company’s now-former attorneys.<sup>21</sup> Indeed, the paper notes that, “in some years, DuPont Legal has brought in affirmative recoveries exceeding its annual budget.”

DuPont, then, stands as an important example of how taking a more proactive stance on a company’s potential legal claims can yield rewards. And for legal departments looking to generate revenue by pursuing claims more actively, litigation finance can be an important tool.

“Traditionally, the legal center is purely a cost center, and with budgets under strain, the question is: How do you do more with less?” said Lake Whillans’ Decker. “Well, you do more with less by taking the assets that you have and making them work for you in a smarter way. And that’s what turning to a litigation funder can help you do.”

With litigation funding, companies are able to mitigate the risk from litigation, while still pursuing cases that have the potential to help the bottom line. By working with a litigation funder, companies don’t have to worry about a case draining their budget as they anxiously wait for a potential settlement or award. Instead, the financier will foot the bill for the litigation expenses—such as attorneys’ fees or expert

<sup>17</sup> <https://info.simplelegal.com/legal-operations-101>

<sup>18</sup> [https://cloc.org/wp-content/uploads/2019/10/What-is-Legal-Ops\\_Oct2019-FINAL.pdf](https://cloc.org/wp-content/uploads/2019/10/What-is-Legal-Ops_Oct2019-FINAL.pdf) <sup>19</sup> <https://info.abovethelaw.com/13th-annual-law-department-operations-survey-report>

<sup>19</sup> <https://info.abovethelaw.com/13th-annual-law-department-operations-survey-report>

<sup>20</sup> <https://www.law360.com/texas/articles/862967/beyond-bean-counting-how-legal-can-add-true-value>

<sup>21</sup> [https://uk.practicallaw.thomsonreuters.com/6-525-5941?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/6-525-5941?transitionType=Default&contextData=(sc.Default)&firstPage=true)



## BY THE NUMBERS



*2019 Managing Legal Risk Report, Burford Capital*

costs—in exchange for being able to share in the proceeds of the case with the company.

If the case isn't successful, of course, the company owes nothing back to the litigation funder.

A related benefit of funding is that it can take the volatility of litigation costs out of a budget.

Decker explained: "The peaks and valleys of litigation spend are unpredictable, often at the whim of the court that sets the schedule or sits on a decision, or due to the unexpected antics of an adversary. The peaks can exceed a quarterly or yearly budget, while the valleys can leave unspent funds in the budget, which can be fodder for an argument that the budget should be cut going forward. Litigation funding can smooth it out by taking litigation costs out of a budget."

Further, in some instances, funders may pay (or monetize) part of the potential recovery directly to the company, providing cash flow, which means the company and legal department don't have to wait for the claim to be resolved to see a budget boost. In these instances, the capital provided by the funder doesn't need to be used for litigation costs, but can be put toward a host of other corporate needs, like operating expenses or paying down debt.

Importantly, litigation financing also allows a company to exclude the litigation cost from its

balance sheet.

When a company is publicly traded, litigation costs are reported on its profits and losses statement. However, by using litigation financing, an in-house law department can pay for its legal costs using capital from the funder, and thus keep the litigation costs off its balance sheet completely.

Corporate law departments that use litigation funding, therefore, don't have to worry about litigation costs hampering the company's profitability.

Finally, as an added benefit, litigation finance can enable a company to choose the best attorneys for its case, instead of the ones that fit within a restricted budget. And if the case should unexpectedly end in a loss, the legal department won't have lost money in the process, since the legal fees were already paid with outside funding.

Litigation funding, therefore, relieves legal operations professionals from having to worry about arranging optimal contingent or alternative fee agreements with outside counsel, as the litigation funder is the one covering the case's legal fees.

For all of these reasons, litigation funding is a powerful way for companies to boost their legal operations strategies and enhance the overall effectiveness of their in-house legal departments.

"I would say that if I'm an in-house legal department and I have a big piece of litigation that I can have a litigation funder come in and help fund, that's a great place to be," said Sterling Miller, the CEO of Hilgers Graben PLLC, and former General Counsel at Marketo, Inc., Sabre Corporation, and Travelocity.com. "Because not only does it allow you to prosecute the litigation, it's going to be very budget-friendly, because you're not going to front probably any of the cost. And all you're going to do is share part of the return with the funder."

For corporate law departments interested in litigation funding, there are several kinds of claims that are frequently funded by third-party financiers, such as trade secret, contract, insurance, antitrust, and business tort claims.<sup>22</sup>

Companies interested in litigation funding should reach out to a third-party funder to begin initial discussions, which serve as the first step in the funding process.

## How Does Litigation Financing Help Law Firm Operations?

Of course, law firms often have their own operations professionals too, with newer operations roles typically focusing on issues like pricing, innovation and project management.

“Law firms are obviously large businesses now. And they need strong administrative and operational staff to make sure everything is running smoothly,” said Eddie Raychaudhuri, Practice Group Director with DLA Piper. “So, from a high-level view, operations is really ensuring that lawyers are able to provide legal work to clients without disruption.”

As firms seek to keep their operations running smoothly, using litigation financing can help them smooth cashflow or grow their roster of cases.

“Litigation finance is a really powerful tool, I think, that law firms can use to A) expand their business, B) service their clients better, and C) potentially derisk some of their investments,” noted Raychaudhuri.

For instance, litigation finance can allow law firms to take cases on a contingency basis. Without funding, the firms would have to take on a significant amount of risk in such cases, as there’s a chance they could be resolved unfavorably and without a payout. Firms

would also need to have enough capital on-hand to pay for these cases’ expenses while they wait for them to be resolved, and the longer a case drags on, the more of a budget drain it can become.

Litigation financing solves these issues by providing an influx of capital, allowing firms to take cases from underfunded claimholders and grow their book of business. In the most common scenario, litigation funders will provide law firms with capital for a portfolio of cases, rather than just one.<sup>23</sup>

“A law firm might have 10 cases on 100% contingency, but they have real dollars that have to go out the door,” said Lake Whillans’ Decker. “They may have expenses — if they’ve taken the case on a true full contingency basis — where they’re bearing the expert cost, the travel cost, the deposition costs, etc. We can provide those dollars to support that portfolio.”

Additionally, in some cases, litigation funders may also seek to essentially purchase a law firm’s accounts receivable — that is, its clients’ unpaid bills — thereby allowing the firms to increase their current budgets.

“They don’t make the same kind of money on that that they would on a contingency case, but they’re coming in saying, ‘Hey, we want to be a financial partner of law firms in a variety of ways,’” said Toby Brown, Chief Practice Management Officer at Perkins Coie LLP, of litigation funders.

With litigation financing, law firms — much like companies — are able to pursue meritorious cases without taking a hit to their bottom lines. By assembling a diverse portfolio of funded claims, firm attorneys can grow their practices while maintaining a healthy cash flow. And with fresh business and a balanced budget, firms can rest assured that they’ll be able to operate at their peak level.

<sup>22</sup> <https://lakewhillans.com/articles/turning-the-law-department-into-a-profit-center/>

<sup>23</sup> <https://lakewhillans.com/articles/law-firm-portfolio-financing-a-primer-on-the-current-state-of-ethical-considerations/>



## Conclusion

For operations professionals at both law firms and corporate legal departments, litigation financing can be an important tool for keeping costs down and balancing budgets.

In the in-house context, litigation financing can allow companies to reap the benefits of meritorious legal claims without having to worry about the cost of outside counsel. It can also provide a direct budget boost to the company, and allow the law department to shed its reputation as a pure cost center.

When it comes to law firms, litigation finance can help firms take on contingency cases without worrying about draining their budgets. This allows the firms to both increase the number and variety of cases they can take on, and ensure that their cash flow — and thus, operations — isn't negatively impacted.

As both litigation finance and legal operations continue to grow, the possibilities for how these two fields can work together is truly exciting. With litigation funding in their roster of tools, operations professionals will be well-equipped to help their companies and law firms operate at the top of their game.