

FT Innovative Lawyers Report

The next big thing in litigation

By Kirsty-Anne Jasper, RSG Consulting, founder and research partner to the FT Innovative Lawyers Report and Awards

In the latest research for the FT Innovative Lawyers Europe report, the most commonly reported barrier to change was lawyers' inherent risk-aversion.

However, when we asked why clients instruct particular law firms, they increasingly seek out individual lawyers who are prepared to assume an element of risk. The top-ranked FT matters often involve lawyers taking on cases where others have said that they have little or no chance of success.

Innovative solutions can involve forum shopping to have a case held in an amenable jurisdiction, moving away from the billable hour to a fee structure where the law firm assumes some of the risk, or in third-party funding.

The idea, so valued by clients, of litigators sharing risk, is still rare to be found in practice. Examples such as RB Group plc, the British multinational consumer goods company, whose ex-GC, Bill Mordan insisted that his outside lawyers have skin in the litigation game, are rare. (Mr Mordan won an FT award for his approach in 2012).

Instead, lawyers tend to inappropriately assess litigation risk. They either over-stress the dangers or fight cases that they should have realised have no chance of winning.

The appetite for litigation funding

The FT reports first featured litigation funding in 2007. Initiatives from Norton Rose were some of the first in the UK market, and at the time were considered ground-breaking. Despite the growth of litigation funding companies such as Harbour Litigation or Burford Capital in the past decade, it is only in the last couple of years that we have seen an uptick in clients' readiness to use these methods to fund their cases.

Interestingly, there is an appetite for litigation funding in geographies such as the Ukraine. This fledgling democracy is innovating to protect foreign investors and its economic growth, and embracing alternative routes to dispute resolution. One law firm recently secured a fully-funded asset tracing package at an early stage for a Ukrainian client, showing an increased willingness to third-party funding in jurisdictions that have traditionally been considered high-risk.

Improving litigation

Despite lawyers' risk aversion, they are, in actual fact, getting better at litigating. A greater and smarter use of technology means that lawyers are able to better assess litigation outcomes and advise their clients accordingly.

Clients and firms are turning to new types of artificial intelligence and data capture to ensure more efficient mining of information; from in-house technologies which have been developed to keep track of litigation currently in court, to automated document analysis tools implemented to search for patterns in written texts.

These technologies are invaluable to lawyers as they can process materials at a speed and quality that far exceeds that of a manual search. Algorithms and data mining enable better diagnosis of the strengths and weakness of a case. When compared to a manual exercise, the algorithm is invariably faster and more accurate.

The next big thing(s)

The increasing use of these software tools has implications for resourcing. Younger, less experienced lawyers can get up to speed faster with litigation strategies. The judgement of the senior partner garnered after years of litigating is beginning to be condensed. For example, Kirkland & Ellis, the US law firm submitted to the FT their data capture exercises, where they break down all their litigation matters into 50 data points, which they can then analyse.

The more data recorded, the more scope there is to reduce risk. Algorithms are increasingly being used to make predictions that traditional commentators get wrong. For example, LexPredict, the knowledge management and **legal analytics** company, has had remarkable success in predicting political outcomes in the United States, including a win for Donald Trump and Gorsuch's selection to the US Supreme Court. Their recent announcement that they are making their core platform ContraxSuite, which lies behind its contract and document analytics platform, available under an open-source licensing model opens up exciting new possibilities for law firms. It allows them to freely tailor and implement their own contract and document analytics.

Better capture of legal data with these types of predictive algorithms could change the face of litigation. Some commentators predict that litigation will soon become an asset class – a trend that will no doubt speed up the adoption of third-party funding as investment returns become more attractive.

Certainly, the research for the FT reports show that third-party funders themselves can be drivers of innovation.

The open access to algorithms and data is a cause for celebration but as yet we still have to see whether it will create greater opportunities to access justice for resource-constrained clients to bring cases to court.

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