Can Litigation Management Close the Corporate Justice Gap?

Phil Griffis[†]

Introduction

The owner of a small chain of franchises knocks on the door of your litigation firm. Her business has grown from one to five franchises and her sales are growing rapidly. She projects that her annual revenue will increase over the next three years from $1 million dollars per year to $2 million. The franchise agreement gives her the option to purchase ten additional franchises, but the franchisor has just been purchased by a Fortune 100 company whose unannounced but well-known business plan calls for ending the franchise system, making all stores corporately owned. The franchisor expects nationwide fights and decides to make this a test case for franchise termination. The franchisor knows that the franchisee is underfunded and unlikely to contest the termination. The franchisor manufactures a pretextual ground for franchise termination and issues a termination notice.

Your firm quickly identifies multiple viable grounds for a lawsuit, including wrongful termination, violations of state or federal franchise laws, and discrimination. However, the franchise agreement contains an overreaching minefield of defenses, personal guarantees, damage limitations, waivers, arbitration clauses, and indemnity agreements. Without these provisions, the firm would gladly take the case on a contingency fee agreement, but with the contractual defenses, the fight against a $5 billion corporation cannot justify the financial risk to your firm. You offer to take the case on an hourly basis, but you budget at least $300,000 in attorneys' fees, a five-figure mediation fee, and a six-figure arbitration fee from large commercial dispute resolution services.

You present the budget to the client, but mutually determine that she cannot proceed without the income stream from the franchise, which the

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[†] B.B.A., Baylor University (1985); J.D. (1988), LL.M. (2022), Baylor Law School. Phil Griffis is the owner/shareholder of The Law Office of Phil Griffis in Houston, Texas.

franchisor has now terminated. The door to the courthouse effectively slams shut, and corporate wrongdoing goes unpunished, all because of the financial disparity between the two companies.

Scholars have written much about so-called "justice gaps," but typical studies of the topic justifiably focus on the civil legal needs of low-income citizens. For example, the 2017 Justice Gap Report, published by the Legal Services Corporation (LSC), found that "86% of the civil legal problems reported by low-income Americans received inadequate or no legal help."[1] The study also found that "[a]mong the low-income Americans receiving help from LSC-funded legal aid organizations, the top three types of civil legal problems relate to family, housing, and income maintenance."[2] More visible and spectacular examples of the justice gap include Chevron's decades-spanning litigation against the indigenous people of the Amazon.[3]

This Article in no way seeks to minimize the disparity between low-income citizens and their legal antagonists. Instead, it focuses on a smaller subset of the "justice gap" problem: small- to mid-sized businesses seeking to litigate against corporate giants.

I. The Hidden Justice Gap

It is not easy to quantify this subset. Earlier this year, Apple, with a market cap of approximately $2.457 trillion at the time of publication,[4] went to trial against the video game developer Epic Games (Epic), which had a market cap of approximately $28.7 billion.[5] By that crude measure, Apple is approximately eighty-six times larger than Epic. Although that

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[1] LEGAL SERVICES CORP., *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans* 6 (June 2017).

[2] *Id.* at 8.

[3] *See generally* Judith Kimerling, *Oil, Contact, and Conservation in the Amazon: Indigenous Huaorani, Chevron, and Yasuni*, 24 COLO. J. INT'L ENV'T. L. & POL'Y 43, 63-98 (2013) (summarizing twenty years of litigation between Chevron and Ecuador).

[4] *Market Capitalization of Apple*, COMPANIESMARKETCAP.COM, https://companiesmarketcap.com/apple/marketcap (last visited Sept. 26, 2022).

[5] *'Fortnite' Maker Epic Games Gets $28.7 Billion Valuation in Latest Funding*, REUTERS (Apr. 13, 2021, 8:35 AM CDT), https://www.reuters.com/technology/epic-games-completes-1-bln-funding-round-2021-04-13.

is a significant difference, few would argue that Epic lacks the resources to fund its battle against the corporate giant.[6]

But what about our franchise scenario, where a franchisor with yearly sales of $5 billion decides to financially steamroll a franchisee with yearly sales of approximately $1 million, a delta of 5,000%? Is there a quantifiable or moral difference between this scenario and a tenant earning $30,000 a year "litigating" against his landlord who earns $200,000 a year? In the latter scenario, neither side can likely afford to engage in a typical hourly rate billing agreement, mediation and arbitration fees, and electronic discovery vendor costs involved in lengthy litigation. Although the landlord certainly has a distinct resource advantage, the discrepancy is significantly less than in our franchisor-franchisee scenario.

Moreover, in the landlord scenario, the tenant thankfully has access to potentially equalizing factors, such as Legal Aid, pro bono services, Justice Courts, Simplified Courts, dispute resolution centers, and even favorable legislation, such as recent COVID-related "eviction moratoriums."[7] Our franchisee has access to very few of these options.

II. Can Litigation Management Techniques Level the Playing Field?

Unless our client locates well-financed contingency fee counsel to take on the case, her prospects are bleak. Her options are to give up or, alternatively, somehow locate and finance skilled non-contingency fee-based counsel to navigate the minefield of contractual defenses, mandatory mediation, and arbitration clauses, and stand head-to-head against the franchisor's legal team. The question is whether a resourceful, non-contingency fee attorney could utilize cutting edge litigation management skills to assist the client, fight the fight, and receive adequate compensation for the work. This Article provides a brief introduction to several

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[6] *Epic Games, the Maker of Fortnite, Raises $1 Billion in a Funding Round*, NY TIMES (Apr. 13, 2021), https://www.nytimes.com/2021/04/13/business/epic-games-fortnite-fundraising.html.

[7] *National Moratorium*, NAT'L LOW INCOME HOUS. COAL., https://nlihc.org/coronavirus-and-housing-homelessness/national-eviction-moratorium (last visited Sept. 26, 2022).

techniques—specifically (1) Early Case Assessment, (2) third-party litigation funding, (3) alternative fee agreements, (4) alternative electronic discovery management, and (5) the outsourcing of certain types of legal work—followed by a discussion of their availability and feasibility and how each might help bridge the corporate justice gap. The sections below provide a brief introduction to litigation management techniques and explain how each might help bridge the corporate justice gap.

III. Early Case Assessment

A. Consideration of Strategy

Every dollar counts in the "David v. Goliath" legal battle. Unfortunately, new cases are monetized through such rote actions as filing standard pleadings, sending standard discovery, noticing depositions, and moving towards some undefined "resolution." Sometimes lawyers are guilty of "digging into" the nuances of a case late in the game, only to learn for the first time of some case dispositive issue or learning that the costs of developing the case are far greater than anything the client expected or is able to pay.

This is the equivalent of putting a football team on the field with no defined goal other than "to win" and without any plan or playbook to do so. Likewise, in litigation the client and attorney must determine, *early* in the matter (1) what is to be accomplished, (2) whether the desired outcome *can* be accomplished, (3) *how* can it be accomplished, and (4) at what cost can it be accomplished.

In a lawsuit against a larger and better-financed opponent, a lack of strategy, tactics, and appropriate allocation of resources virtually guarantees an unsatisfactory result. Even a technical "win" can be pyrrhic. Consider a case where a small business incurs $250,000 in fees to achieve a $250,000 verdict at trial. Would the board of directors consider this to be a "win," if the case could have been settled for $100,000 early in the litigation, with an expenditure of only $25,000 in fees? Thus, in any litigation, comprehensive and aggressive Early Case Assessment (ECA) is imperative. The need is magnified when a small company faces a corporate giant.

Effective case assessment begins by working backward from the client's goal. To do this, counsel should approach litigation and other legal proceedings as occasions that present potential outcomes and then use qualitative and quantitative assessments to "(a) determine risk, (b) reduce expenses, (c) terminate cases as soon as practicable, and (d) otherwise reduce or eliminate further exposure to litigation."[8] The goal of ECA is to learn the great majority of what your company will ever know about a case shortly after an attorney is retained. For instance, if research performed during an aggressive ECA reveals a history of a larger opponent typically settling cases soon after filing, your client can focus its efforts and resources on making an early, focused, and good faith effort to settle quickly. Without the knowledge gained via the ECA, an uninformed client might dive into aggressive discovery and motion practice, thus diminishing the value of a later settlement.

Without question, Early Case Assessment is critical[9] and has few drawbacks. But serious, comprehensive, and systematic ECA is a rarity, especially among the counsel expected to represent the franchisee. Thus, if our firm goes into pre-suit negotiations with the franchisor, a realistic, meticulous, and aggressive ECA, presented fearlessly to the franchisor, would likely be factored into the opponent's analysis, and serve as motivation for it to resolve the matter quickly.

Another primary aspect of an effective ECA is in-depth research into whether our franchisee can potentially shift attorneys' fees and costs to the larger company. This requires a deep dive into, among other things, potentially available causes of action and defenses. For example, in cases involving alleged conversion, Texas plaintiffs will often add ill-considered claims under the Texas Theft Liability Act[10] and the Texas Uniform Trade Secrets Act,[11] not knowing that these statutes contain fee shifting provisions against the losing party.

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[8] Marcellus A. McRae & Kahn A. Scolnick, *Case Assessment and Evaluation*, PRACTICAL LAW CO. (Apr. 1, 2013), https://www.gibsondunn.com/wp-content/uploads/documents/publications/McRaeScolnick-CaseAssessmentandEvaluation.pdf.

[9] *See generally Early Case Assessment Guidelines*, INT'L INST. CONFLICT PREVENTION & RESOL., https://www.cpradr.org/resource-center/toolkits/early-case-assessment-guidelines (last visited Sept. 26, 2022) (discussing the benefits of early case assessment).

[10] TEX. CIV. PRAC. & REM. CODE ANN. § 134.005(b).

[11] *Id.*

But if this example is reversed, a potential small business plaintiff considering a conversion action against a larger corporate defendant would learn via ECA that a Theft Liability Act claim is also viable and, if successful, would potentially shift the burden of attorneys' fees to the defendant.

Successful ECA necessitates meticulous budgeting, allocation of resource analysis, *and communication* with the client about each. For instance, ECA might reveal that the larger corporate client has previously "blinked" and settled quickly in cases where its opponents won early injunction hearings. Based on that research, the attorney and client might mutually decide to allocate significant resources to an early request for injunction, in hopes that an aggressive early strategy might preempt a longer and costlier battle.

ECA is an incredibly complex subject, and this Article barely scratches its surface. In *any* lawsuit, much less a case against a better-financed opponent, the lawyer and client must resist the urge to simply file suit and hope something good happens. Rather, the attorney should put in the time and do the work, with the goal of learning most of what she will ever know about the case within ninety days of assignment, and then using the ECA to help the client determine what constitutes a "win" and whether and how that goal can be economically achieved.

B. Choosing the Court Wisely

Early Case Assessment should include an analysis of the forum, whether that be a court or arbitration provider.[12] This should include an evaluation of applicable rules of procedure, local rules, and the judge's individual procedures. The seemingly obvious task of researching the court in which your client finds itself, and meticulously considering its rules, can help level the playing field when litigating against a much larger opponent.

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[12] *See generally* 5 LEON RODAY ET AL., SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 59 (2021); *see* INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, CORPORATE EARLY CASE ASSESSMENT TOOLKIT (2009), https://www.cpradr.org/resource-center/toolkits/early-case-assessment-guidelines/_res/id=Attachments/index=0/CPRECAToolkit2010.pdf (discussing steps of early case assessment).

Multiple databases can provide critical data on such factors as the available venues' (1) procedures, (2) earlier outcomes in similar matters, (3) past rulings on issues similar to those likely to be encountered in your case, and (4) average time from filing to ultimate resolution.[13] The latter metric can be critical since, generally, a shorter "time to trial" will generate less in fees than a longer one. By assessing these factors, educated guesses can be made about the relative benefits and costs of filing in each available venue.

Give *immediate* consideration to whether the matter can, and should, be filed in or removed to federal court.[14] Litigation in federal court brings into play multiple Federal Rules of Civil Procedure which the out-gunned client can use to help level the playing field.[15] The first, and arguably most important, Federal Rule states:

> Rule 1. Scope and Purpose
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> These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the *just, speedy, and inexpensive determination of every action and proceeding*.[16]

The underlined "proportionality" language should be a "guiding standard" in discovery and the pre-trial process.[17] This is especially true for the counsel of the underfunded litigant, especially when facing an opponent who has chosen to utilize a financially depleting "scorched earth" strategy. Counsel should liberally cite Rule 1 and highlight to the court instances where the other rules applicable to the case should be construed in light of Rule 1's goals of just, speedy, and inexpensive determination.

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[13] Kristen Baginski, *Legal Analytics and Artificial Intelligence for Research & Law Practice: Tools, Features & Functionality*, LEXISNEXIS (2019), https://www.duq.edu/assets/Documents/law/legal-research/_pdf/Baginski,%20Lexis.pdf

[14] McRae & Scolnick, *supra* note 8.

[15] Giyoung Song, *The Advantages of Early Data Assessment*, THOMSON REUTERS: PRAC. L. LITIG. (2015).

[16] FED. R. CIV. P. 1 (emphasis added).

[17] CIV. JUST. IMPROVEMENTS COMM., CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL 24 (2016), https://www.ncsc.org/__data/assets/pdf_file/0029/19289/call-to-action_-achieving-civil-justice-for-all.pdf.

As noted by the National Center for State Court's 2016 Report, *Call to Action: Achieving Civil Justice for All*,

> A court's consistent and clear application of proportionality principles early in cases can have a leavening effect on discovery decisions made in law offices. Parties and attorneys typically make their decisions about what discovery to do next without court involvement. A steady court policy with respect to proportionality provides deliberating parties and attorneys with guidance.[18]

Many states have comparable expense considerations in their respective rules of procedure. For example, Texas Rule of Civil Procedure 1 states:

> Rule 1. Objective of Rules
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> The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch *and at the least expense both to the litigants and to the state as may be practicable*, these rules shall be given a liberal construction.[19]

Litigating in federal court also brings into play the federal system's focus on "proportionality" in discovery. Rule 26(b)(1) defines the scope of discovery:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery* outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.[20]

This rule contains potential lifelines for the underfunded federal litigant. A larger opponent's scorched earth discovery tactics can be countered

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[18] *Id.* at 26.

[19] TEX. R. CIV. P. 1.

[20] FED. R. CIV. P. 26(b) (emphasis added).

with arguments that the burdensome and unnecessary discovery sought is not proportional to the needs of the case, when taking into consideration your client's limited resources and the relative burden of the requests. Many, if not most, state courts have analogous rules, or at least informally recognize the "proportionality" factor.[21]

The underfunded litigant facing a potential "justice gap" should also painstakingly analyze local court rules and judge's procedures to find similar provisions and other potential avenues for cost saving. More and more federal courts are limiting full-blown motion practice in favor of short, preliminary position statements and telephone conferences to reduce time and expense. For instance, one court rule imposed by U.S. District Court Judge Jeffrey V. Brown in the Southern District of Texas states:

> Discovery Disputes. The court expects that the parties will make a serious attempt to resolve all discovery issues without court intervention. When those earnest and valiant attempts prove unsuccessful, the parties should file a joint letter not to exceed two pages outlining the dispute, each side's position, and the efforts made to resolve the dispute. Typically, the court will then convene a telephone conference to resolve the issue as quickly as possible. Parties should not file a motion to compel without first exhausting this procedure.[22]

In the same court, Judge Charles Eskridge's court procedures contain a wealth of potential avenues to achieve proportionality and decrease certain unnecessary burdens of litigation. These include:

1. Form Discovery Protocols.
2. Requirements that all interrogatories, document requests, and requests for admissions be framed to meet the relevance and proportionality requirements of Rule 26(b)(1).
3. Directives to confer on reasonable limitations to the number of depositions, based on considerations of relevance and proportionality.

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[21] Mark A. Behrens & Christopher E. Appel, *States Are Embracing Proportional Discovery, Moving into Alignment with Federal Rules*, 29 WASH. LEGAL FOUND 5 (July 17, 2020), https://www.wlf.org/2020/07/16/publishing/states-are-embracing-proportional-discovery-moving-into-alignment-with-federal-rules.

[22] GALVESTON DIST. S.D. TEX. CT. R. PRAC. 7 (Apr. 8, 2020), https://www.txs.uscourts.gov/sites/txs/files/GalvestonDistrictCourtRulesofPractice.pdf.

4. A Standard Electronic Discovery Order and early streamlined E-discovery provisions (subject to modification following conference and request made for good cause).
5. Prohibition against the filing of motions on discovery and scheduling disputes prior to submission of party letters (no more than two pages in length) outlining the dispute.[23]

Taking advantage of these streamlining tools can save tens of thousands of dollars in fees. In their absence, a larger opponent could serve overly burdensome discovery and file lengthy motions, requiring the smaller litigant to burn resources in responding. These judges' procedures do not eliminate such tactics but ensure that the court is a gatekeeper allowing them. As a result, discovery and motion practice, typically costing tens of thousands of dollars, can be replaced by completing two-page letters describing the dispute. Utilizing the ECA process, such advantageous local procedures should be identified at the outset of litigation.

Litigants should consider an early conversation with the court regarding the resource gap present in the client's litigation. Recall that Federal Rule of Civil Procedure 1 requires the court to consider the parties' resources in its proportionality. It may not hurt to describe the disparity and ask for any assistance the court can provide within the applicable rules.[24] Further, legitimately drawing the court's attention to the opponent's scorched earth tactics can set the stage for later sanctions if the conduct persists.[25]

Note, however, that "resources" are *only one* of the proportionality factors. The court must also consider other factors, including "the amount in controversy."[26] Indeed, this factor may outweigh the "re-

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[23] S.D. TEX CT. P. 9, 13 (Oct. 28, 2021), https://www.txs.uscourts.gov/sites/txs/files/CRE%20Court%20Procedures%202020.06.22.pdf.

[24] *A Practical Guide to Discovery Conference Preparation*, LAW360 (June 29, 2011, 4:47 PM), https://www.law360.com/articles/252729/a-practical-guide-to-discovery-conference-preparation.

[25] Martha Woodall, *Judge: Philly District's 'Scorched Earth' Legal Tactics Cost It Millions*, PHILA. INQUIRER (Dec. 21, 2016), https://www.inquirer.com/philly/news/20161222_Judge__Philly_Schools__quot_scorched_earth_quot__legal_tactics_cost_it_millions.html.

[26] Suzanne H. Segal, *Proportionality and Necessity Under Federal Rule of Civil Procedure 26(B)*, ADVOCATE (July 2017), https://www.advocatemagazine.com/article/2017-july/proportionality-and-necessity-under-federal-rule-of-civil-procedure-26-b.

source" factor. Paraphrasing United States District Judge Charles Eskridge, a small company suing a much larger opponent for billions of dollars may find its "relative resource" argument met with skepticism, while also taking into account "amount in controversy" concerns.[27] In other words, a small company's desire for a resolution within its budget cannot trump when justice for all is concerned. But if the underfunded litigant indeed has legitimate grounds for proportionality relief based on relative resources grounds, then additional doors may be opened. For instance, Federal Rule of Civil Procedure 26(c)(1)(B) allows a party facing burdensome and disproportionate discovery to move for protection and request that the court shift the cost of responding to discovery onto the requesting party.[28] Although such cost-shifting orders are comparatively rare, even making the request could at least partially deter the much larger opponent's tactics.

IV. Third Party Litigation Funding

The quickest way for an underfunded litigant to level the playing field is to raise additional funds. Of course, that is easier said than done. The funding problem applies regardless of which side of the docket the client finds itself on. Whether bringing a case against a corporate giant or defending one, litigation requires an outlay of funds that could otherwise be used to pay employees, service debt, and reinvest in the business.

Enter third-party litigation funding, which is simply an umbrella term for an arrangement in which an otherwise disinterested person or entity provides funding for litigation in return for a potential return on its investment.[29] Although litigation funding has existed for decades, the practice gained media attention in 2016 after Terry Bollea, better known as Hulk Hogan, won a $140 million invasion of privacy verdict against Gawker Media.[30] Bollea's legal war of attrition against Gawker was, in

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[27] *See generally* S.D. TEX CT. P. 9, *supra* note 23.

[28] FED. R. CIV. P. 26(c)(1)(B).

[29] Jacqueline Sheridan, *Champerty and Maintenance in the Modern Era*, DINSMORE (Jan. 22, 2016), https://www.dinsmore.com/publications/champerty-and-maintenance-in-the-modern-era.

[30] *Hulk Hogan v. Gawker: Invasion of Privacy & Free Speech in a Digital World*, FIRST AMENDMENT WATCH (Mar. 17, 2016), https://firstamendmentwatch.org/deep-dive/hulk-hogan-v-gawker-invasion-of-privacy-free-speech-in-a-digital-world.

large part, financed by Peter Thiel, a billionaire and co-founder of PayPal.[31]

Having now moved well past its infancy, the third-party litigation finance industry has matured into a serious, viable, and sophisticated option for financing courtroom fights. At the pinnacle of the industry is Burford Capital, a publicly traded company on the New York and London stock exchanges, which held a worldwide litigation portfolio of $4.8 billion as of June 31, 2021.[32]

Third-party litigation funding companies supply capital to litigants in exchange for a portion of the settlement or other remedy.[33] As one commentator, Jarrett Lewis, explains, "Third-party litigation funding is non-recourse, meaning that if the lawsuit fails, the funded party is not required to pay their source of funding after the case."[34] Lewis continues:

> There are currently two forms of third-party litigation funding: commercial and consumer litigation funding. Consumer litigation funding covers torts and personal injury cases in which unsophisticated parties seek financial assistance to pursue their legal claims. In exchange, the litigants agree to provide the funding company with a portion of their remedy. Commercial litigation funding usually covers sophisticated business entities in legal disputes against other sophisticated parties.[35]

Funders market themselves as the ultimate levelers of the playing field in battles between parties of disparate resources.[36] However, the question

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[31] Matt Drange, *Peter Thiel's Lawyers Now Say He Was Financially Motivated in Funding Hulk Hogan's Gawker Lawsuit*, FORBES (Apr. 18, 2017, 7:09 PM), https://www.forbes.com/sites/ryanmac/2017/04/18/peter-thiels-lawyers-now-say-he-was-financially-motivated-in-funding-hulk-hogans-gawker-lawsuit/?sh=1141cee971ff.

[32] *Burford Capital Reports Record New Business in First Half 2021 Results*, BURFORD CAP., LLC (Sep. 9, 2021), https://www.burfordcapital.com/media-room/media-room-container/burford-capital-reports-record-new-business-in-first-half-2021-results.

[33] Lyndon F. Bittle & Richard A. Blunk, *Market Watch: Shifting Tides in Commercial Alternative Litigation Finance*, 78 TEX. BAR J. 776, 776 (2015).

[34] Jarett Lewis, *Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?*, 33 GEO. J. LEGAL ETHICS 687, 687 (2020).

[35] *Id.* at 690-91.

[36] John Pierce & David Burnett, *The Emerging Market for Litigation Funding*, THE HEDGE FUND J. 86 (June 2013), https://thehedgefundjournal.com/the-emerging-market-for-litigation-funding.

is whether that is actually the case and whether funders will continue to fund corporate "Davids" or, alternatively, target larger companies seeking "off the book" financing to wage nine and ten-figure wars against potential targets.[37]

Thankfully, there appear to be financers who still include small- to mid-sized businesses as potential partners. One of these financiers is Legalist.[38] The institution's website states: "Legalist is a technology platform that permits funding of litigation through a non-recourse investment in legal claims."[39] This philosophy gets to the heart of the problem. As explained by litigation funding expert Jameson Morton,[40] an underfunded litigant faces a critical choice. Does it dive into litigation, which will necessitate diverting funds from operating expenses to attorneys' fees? Or does it give up on the potential for a significant recovery in a lawsuit because litigation costs will cripple its ability to operate? Third-party litigation funding, as explained by Morton, can be a lifeline to a small business facing litigation.

The practical issue, however, is whether our franchisee client, who several well-financed contingency fee lawyers have turned down, can convince a funder that her suit can generate a potential return on its investment. Litigation funding is not easy to obtain. Like any rational investor, funders want to realize a return on their investment. So, they rigorously screen cases to determine the parties' positioning, the viability of the causes of action and defenses to be asserted, the potential range of damages available, and the likelihood of collection in the event of a win.[41] The screening process can be ruthless, but an aggressive and comprehensive Early Case Assessment can provide the client with

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[37] *See id.* (noting the Chamber of Commerce concerns that funders will have unethical control over "the outcome of cases because they are driven by economic rather than legal judgment or clients' best interest" and there may be a rise of "frivolous litigation by plaintiffs with no financial risk in bringing suit").

[38] LEGALIST, https://www.legalist.com (last visited Sept. 26, 2022).

[39] Terms & Conditions, LEGALIST (Aug. 5, 2020), https://www.legalist.com/termsandconditions.

[40] Interview with Jameson Morton, Investments Lead, LEGALIST (May 26, 2021).

[41] Robert B. Fuqua, *How Litigation Funders Have Improved the Quality of Settlements in America*, HARV. NEGOT. L. REV. (2020).

information it can use to align its interests with funders[42] and hopefully convince them that its case is a worthwhile investment.

This screening process has additional benefits. For the party seeking funding, it can provide an objective and well-reasoned third-party opinion on the case's viability. For example, suppose a third-party funder declines on the basis that the claim is unlikely to succeed; in that case, the client should strongly consider the funder's analysis in deciding whether to proceed.

The reverse can also be true. If the client's opponent learns that the client has received third-party funding, it will know that a sophisticated funder has made a reasoned decision that the case has merit and is more likely to believe that your client is competent and financially capable of waging war. In other words, funding puts your client in a position of greatly increased strength, both financially and psychologically.

Litigation funding brings with it traps for the unwary.[43] The possibility exists that a client, or its attorneys, will make privileged attorney-client communications or otherwise privileged materials discoverable by sending it to the third-party funder for analysis.[44] And the lawyer and client *must* ensure that the overall control of the lawsuit stays with them and is not inadvertently ceded to the funder in the funding contract.[45]

In recent years even more innovative and grassroots funding mechanisms have developed, including the crowdfunding of litigation.[46] Although an exhaustive discussion of the ramifications of this potential tool is beyond the scope of this article, the possibility of small, aggregated individual investments in lawsuits is within the universe of potential options. For instance, in Texas, craft brewer Deep Ellum Brewing Co. raised more than $34,000 from over 340 donors using an IndieGoGo

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[42] William P. Farrell, Jr., *Ask the Expert: Tough Questions on Litigation Finance*, LONGFORD CAP. LITIG. FIN. (2020).

[43] Luke Sbarra, *Third-Party Litigation Financing & Ethical Traps for the Unwary Lawyer*, LAWS. MUT. (2015).

[44] *Id.*

[45] Julia H. McLaughlin, *Litigation Funding: Charting a Legal & Ethical Course*, 31 VT. L. REV. 615 (2007).

[46] *Democratizing Justice: Can I Crowdfund My Lawsuit?*, COBB & COUNS. (Apr. 28, 2020), https://cobbxcounsel.com/2021/04/democratizing-justice-can-i-crowdfund-my-lawsuit.

campaign they called "Operation Six-Pack To-Go."[47] Deep Ellum sued the Texas Alcoholic Beverage Commission, claiming the state's rules prohibiting craft brewers from selling their beer on-site for off-premise consumption were unconstitutional.[48]

However, funding litigation via platforms such as GoFundMe could potentially magnify the potentially inherent issues in the third-party funding model, including waiver of privilege and conflicts of interest.[49] Litigants will need to proceed with caution in going forward with these mechanisms.

The bottom line is this; the underfunded client should *always* consider the option of third-party litigation funding. At the very least, it can provide the client with a sophisticated, objective, and external second opinion on the merits of its case. In the best-case scenario, it can provide the financial lifeline the company needs to bridge the corporate justice gap. Attorneys knowledgeable about third-party financing options can potentially guide the client into an arrangement that will finance the battle, transfer risk from the client to the third party, and greatly increase the firm's possibilities of being compensated for their work. The probability of compensation, in turn, will increase the number and quality of firms willing to do the client's work.

V. Explore Alternate Attorneys' Fee Agreements

Our franchisee example assumes that the franchisee's case is legitimate, but not quite attractive enough for a skilled contingency fee firm to take on. With that fee model unavailable, the "usual" alternative will be to turn to firms that bill the client hourly. But the prospect of paying hourly attorneys' fees for several years could be so financially crippling to deter the client from proceeding with the case.

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[47] *Id*.

[48] *Id.*

[49] Sarah Andropoulos, *The Ethics of Crowdfunding for Lawyers: Uncharted Territory or Familiar Terrain?*, JUSTIA (June 26, 2017), https://verdict.justia.com/2017/06/26/ethics-crowdfunding-lawyers.

More firms, however, are moving away from the hourly model and agreeing to represent clients under Alternate Fee Agreements (AFAs). These can be as diverse as the attorneys' imagination, so long as they comply with all applicable legal and ethical rules. As described by Richard Susskind, in his book *Tomorrow's Lawyers, An Introduction to Your Future*, "[t]hese proposals have generally been prompted by in-house lawyers who, under cost pressures, have formally invited law firms to submit 'new' or 'innovative' suggestions for the pricing of their services."[50]

In their book, *The Power of Legal Project Management*, Susan Randon Lambreth and David A Rueff, Jr.[51] describe the most common types of such arrangements, including

> •time-based billing—including hourly rates, blended rates, discounted rates, and volume discounts.
>
> •fixed fees—including a fixed price for a defined matter, task-based fees, and retainers.
>
> •success fees—including project success fees, contingency fees, and performance-based billing.[52]

So even if contingency fee arrangements and hourly billing are taken off the table for the franchisee, numerous AFAs are still feasible. An attorney informed on AFAs may recognize the merits of the client's case and her inability to pay hourly rates but may also be persuaded by the potential fees that the client may bring when freed up to make large profits after the litigation concludes. With those assumptions, the franchisee and the firm could agree on a flat fee arrangement. Or they could agree to a (1) greatly reduced hourly rate during the course of the litigation and (2) "success" fee or bonus at the end of the litigation, contingent upon the outcome.

Another option could be a "value-based" AFA, "determined by a mutual agreement about the anticipated value of the representation in the

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[50] RICHARD SUSSKIND, TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE 18 (2d ed. 2017).

[51] *See* SUSAN RARIDON LAMBRETH & DAVID A. RUEFF, THE POWER OF LEGAL PROJECT MANAGEMENT: A PRACTICAL HANDBOOK (2014).

[52] *Id.* at 129.

context of the client's over-arching objectives, and then staffed."[53] With a value-based AFA, the attorney is financially rewarded based on how quickly and efficiently she resolves the case. For example, they might agree that if the attorney successfully resolves the case in the first three months she will receive a $150,000 fee, but that the fee will decrease if the matter is resolved in longer set periods of time. Such an arrangement greatly incentivizes the attorney to pursue the case aggressively and creatively at the outset. If the strategy is successful, the lawyer will be fairly compensated, and the client will be rewarded due to the timely resolution. Thus, overall fee expenditure is reduced, and the client can return her focus to running the business and making a profit.

VI. Electronic Discovery Management

One of the more difficult topics for an attorney to explain to an unsophisticated litigant is the importance, pervasiveness, and expense of electronic discovery.

> E-Discovery is the process by which parties share, review, and collect electronically stored information (ESI) to use as evidence in a legal matter. ESI is a broad term that can encapsulate a whole host of digitally created content. Emails, Microsoft Word documents, social media posts, company-specific databases, and audio and video files all fall under the domain of ESI.[54]

This means potentially discoverable information can reside in text messages, social media messaging apps, such as Facebook, Snapchat, WhatsApp,[55] and data created and stored by "the [i]nternet of [t]hings."[56]

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[53] *Alternative Fee Arrangements*, CARLTON FIELDS at 4, https://www.carltonfields.com/Libraries/CarltonFields/Documents/2018/CF_AlternativeFeeArrangementsHandout.pdf (last visited Sept. 26, 2022).

[54] Eddy Burmudez, *Everything You Need to Know About E-Discovery*, 12 NAT'L L. REV. 177 (June 26, 2017), https://www.natlawreview.com/article/everything-you-need-to-know-about-e-discovery.

[55] Cori Faklaris & Sara Anne Hook, *Oh, Snap! The State of Electronic Discovery Amid the Rise of Snapchat, WhatsApp, Kik, and Other Mobile Messaging Apps*, 33 COMPUT. & INTERNET L. 1, 1 (2016).

[56] *Hot Topic: The Internet of Things and eDiscovery*, WARNER NORCROSS+JUDD LLP (Jan. 24, 2019), https://www.wnj.com/Publications/%E2%80%8BHot-Topic-The-Internet-of-Things-and-eDiscovery.

In even a simple lawsuit, all relevant and potentially discoverable ESI must be preserved, collected, stored, produced, and potentially used at trial.[57] Failing to do so can have case-ending consequences, including monetary penalties, barring a party from presenting certain claims or defenses, and, in the most extreme cases, dismissal.[58]

The cost of waging even moderate electronic discovery fights is daunting at best and prohibitive at worst. An E-discovery battle waged with less than full effort can lead to a loss, significant sanctions, or both. But can knowledgeable trial counsel identify and leverage technology and the global workforce to deliver acceptable electronic discovery results? If she can force the franchisor into a $1 million electronic discovery bill while her firm locates and utilizes a competent and reasonably priced overseas vendor, can the playing field tilt back toward the franchisee?

Aggressive trial lawyers will seek to exploit an opponent's relative inexperience or inadequacies in the E-discovery arena. This literally means that a party with the more meritorious position can lose the case based on failures to properly locate, preserve, maintain, store, and disclose ESI.

> Advances in modern technology have caused the production of information at incredible rates, which in turn has driven the cost of e-discovery skyward. Due to major differences between traditional discovery and e-discovery, chief among which is the sheer disparity in volume of stored information, traditional discovery costs have been far superseded by incredible modern e-discovery costs. Requesting parties have capitalized on this trend and use it to force arbitrarily high settlements from producing parties who have no choice but to settle or pay the even higher price of e-discovery.[59]

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[57] Steven D. Ginsburg, *A Practical Look at Preserving ESI*, AM. BAR ASS'N (Jan. 31, 2017), https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2017/a-practical-look-at-preserving-esi.

[58] *See* Charles Yablon, *Byte Marks: Making Sense of New F.R.C.P. 37(e)*, 69 FLA. L. REV. 571, 572 (2017) ("[T]here is a duty on many corporate parties to implement and maintain a reasonable system of information governance and ESI retention, and that a conscious decision not to do so can give rise to severe penalties under the new Rule.").

[59] Karel Mazanec, *Capping E-Discovery Costs: A Hybrid Solution to E-Discovery Abuse*, 56 WM. & MARY L. REV. 631, 642 (2014).

For all but the largest and most sophisticated companies and attorneys, ESI is rarely a do-it-yourself proposition. Even in litigation involving "small" companies, the burden is great. In order to meet its obligations under the rules, the business will have to head the typical "flowchart" of ESI, including:

1. Issue a litigation hold, ordering all employees to preserve all relevant ESI and take steps to avoid its loss (including suspension of routine purging of data);
2. Determine all potential sources and repositories of ESI. This will necessarily include the company's servers and workstations, data residing on third party software applications and employees' personal devices;
3. Collect the data from all such sources;
4. Store and catalog the material;
5. Review the material to determine the extent to which it is relevant and discoverable and what portions of it are protected by privilege;
6. Produce discoverable ESI and file the appropriate motions to protect privileged material; and
7. Use the materials at trial.[60]

Electronic discovery costs are rarely, if ever, an inexpensive proposition. Costs in the tens of thousands can be expected for a modest case, and often range well into eight figures for larger ones. A 2012 RAND Corporation study reported an average E-discovery cost of $18,000 per gigabyte.[61]

The difficult question, then, is how does an underfunded litigant compete against an opponent who is ready and willing to mount a lengthy and sophisticated E-discovery fight? Simply ignoring the issue will only compound the problem. Again, if ESI is not properly searched for, preserved, collected, analyzed, and properly produced, there will be serious, and potentially case-destroying, consequences. A winning case can be undermined by the mishandling of discovery.

The problem must be addressed in the Early Case Assessment process, as the costs must be considered in determining whether to proceed. The

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[60] Ellie Kim, *RM 101: e-Discovery in 7 Steps*, COLLABWARE (Aug. 7, 2019), https://blog.collabware.com/2013/05/29/e-discovery-for-records-managers.

[61] Nicholas M. Pace & Laura Zakaras, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, RAND INST. CIV. JUST. 20 (2012), https://www.rand.org/pubs/monographs/MG1208.html.

client must be proactive. Occasionally an attorney will tell the client that his firm can handle all aspects of electronic discovery. That attorney may be knowledgeable and well-meaning, but few firms have the ability and expertise to take on the responsibility of a case's electronic discovery in its entirety. The firm is hiring a lawyer for his legal expertise, not to locate, protect, collect, and manage tens of thousands of emails, texts, and other ESI. Often the ideal role for the attorney is to act as a "general contractor" for the ESI aspect of the case.

Numerous third-party vendors base their marketing on their claimed ability to tame the costs of ESI. A few examples include Logikcull,[62] Lexbe,[63] and Nextpoint.[64] These and other providers utilize SAS based platforms to perform and assist with E-discovery.

Lastly, the underfunded client should always keep in mind the possibility of asking the court to shift the costs of burdensome electronic discovery to the other side.[65] The standard for doing so is high, but the threat of cost-shifting may serve to deter the opposing party from making additional and increasingly burdensome requests.[66]

VII. Outsourcing of Legal Work

One of Hollywood's greatest traditions is the "assembling the team" story. From *The Guns of Navarone*,[67] to *Ocean's Eleven*,[68] to *The Avengers*,[69] we are all familiar with the story of a leader assembling a crack team to take on the Nazis, pull off a heist, or save the world. And as we all remember, at the end of the movie, the team disperses back to wherever they came from.

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[62] LOGIKCULL, https://www.logikcull.com (last visited Sept. 26, 2022).

[63] LEXBE, https://www.lexbe.com (last visited Sept. 26, 2022).

[64] NEXTPOINT, https://www.nextpoint.com (last visited Sept. 26, 2022).

[65] *See* Jonathan Remy Nash & Joanna Shepherd, *Aligning Incentives and Cost Allocation in Discovery*, 71 VAND. L. REV. 2015, 2025-27 (2018) (discussing the incentives for low-resource plaintiffs in requesting discovery).

[66] Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773, 778-80 (2011).

[67] THE GUNS OF NAVARONE (Highroad Productions 1961).

[68] OCEAN'S ELEVEN (Village Roadshow Pictures 2001).

[69] THE AVENGERS (Marvel Studios 2012).

The concept is one that underfunded businesses and their counsel should keep in mind. The legal market, in conjunction with the "gig economy," is becoming more and more fragmented and has created opportunities for hiring skilled professionals, at a reduced cost, to achieve a result for a client.[70] An outgunned client may find counsel that is willing to represent it but does not have the staffing to take on a large firm with a deep bench of partners, associates, and legal assistants. But with aggressive Early Case Assessment, budgeting, planning, and resource allocation, the firm can temporarily staff up to take on the litigation. The more firms that are aware of this option, the more options the client has.

For example, Lawclerk[71] is an internet platform that matches attorneys and clients with a nationwide team of skilled and contracted briefing attorneys, who handle projects on a bid basis. The attorney or client posts a proposed project and a suggested fee for the work. Willing attorneys in Lawclerk's pool send their proposal to do the work. The attorneys' profiles and prior reviews are also posted. The company offers a Virtual Associates' Subscription Program,[72] which allows the client to retain a selected number of hours per month from a "virtual associate" on a monthly basis.

For counsel stretched too thin with depositions and hearings, companies such as Docketly[73] and Attorneys in Motion[74] provide networks of attorneys to appear at hearings and depositions.

Any number of overseas vendors, such as Flatworld Solutions[75] and Viable Outsource Solutions,[76] provide document review and summary

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[70] Bob Dolinsky, *Can the Gig Economy Work in a Law Firm?*, THOMSON REUTERS (Jan. 19, 2021), https://www.thomsonreuters.com/en-us/posts/legal/practice-innovations-january-2021-gig-economy.

[71] LAWCLERK, https://www.lawclerk.legal (last visited Sept. 26, 2022).

[72] *Lawclerk Remote Associate Subscription Program*, LAWCLERK, https://www.lawclerk.legal/virtual-associate-subscription (last visited Sept. 26, 2022).

[73] DOCKETLY, https://docketly.com (last visited Sept. 26, 2022).

[74] ATTORNEYS IN MOTION, https://www.attorneysinmotion.com (last visited Sept. 26, 2022).

[75] *Legal Document Review and Management Services*, FLATWORLD SOLUTIONS, https://www.flatworldsolutions.com/legal-services/legal-document-review-management.php (last visited Sept. 26, 2022).

[76] *Hire for Document Review*, VIABLE OUTSOURCE SOLS., https://viableoutsourcesolution.com/hire-for-documents-review (last visited Sept. 26, 2022).

services at a fraction of the fees that would be charged by any market-priced domestic legal assistant.

For litigation involving voluminous medical records, services such as Record Reform[77] provide access to overseas professionals, at attractive rates, to generate medical chronologies, timelines, demand letters, evaluations, and medical opinions. The process is simple. Records are uploaded, scope of work is set by the client, an estimate is provided, and, assuming it is approved by the attorney, the work begins.

Services such as Speakwrite[78] and Rev.com[79] offer lightning-fast web dictation services which can free up time or even limit the need for professional legal secretaries. Lastly, countless online platforms can source temporary litigation paralegals on a project-by-project or "hours per month" basis.

Again, these are tools to be utilized and suggested by the law firm, though a knowledgeable client could certainly suggest the possibility of them to a firm that seems willing but physically incapable of helping. Rather than staffing up via conventional hiring, the understaffed litigation firm can create a small army of capable, willing, and reduced-cost professionals for the duration of the case.

Conclusion

Potential options are available to decrease the corporate justice gap. It begins and ends with meticulous and aggressive Early Case Assessment and communication with the client about the assessment. Skilled and resourceful counsel, knowledgeable about the law, technology, the gig economy, and financing options will, at the very least, open the doors of the courthouse to small- and mid-sized businesses that otherwise could not possibly take the fight to large corporations. When that happens, the Corporate Justice Gap closes.

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[77] *Record Reform*, MEDQUEST, https://www.medquestltd.com/record-reform (last visited Sept. 26, 2022).

[78] SPEAKWRITE, https://speakwrite.com (last visited Sept. 26, 2022).

[79] REV, https://www.rev.com (last visited Sept. 26, 2022).