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## Leveraging Legal Analytics and Spend Data as a Law Firm Self-Governance Tool

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# LEVERAGING LEGAL ANALYTICS AND SPEND DATA AS A LAW FIRM SELF-GOVERNANCE TOOL

Nancy B. Rapoport & Joseph R. Tiano, Jr.\*

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## INTRODUCTION

In a world in which even top-tier law firms are fighting a multi-front battle for clients,<sup>1</sup> and only the most profitable parts of medium-sized

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Mr. Tiano is the Founder and Chief Executive Officer of Legal Decoder, Inc. I’d like to thank Professor Nancy Rapoport, a friend and colleague who epitomizes and exemplifies what it means to be a true legal professional and industry expert. Thank you also to my wife and best friend, Meredith, whose patience, support, and love throughout an exhilarating professional journey have been the most important constant in my life.

<sup>1</sup> See Joseph Tiano, *Law Firms Using Their Data Edge to Deliver What Clients Want*, LINKEDIN (Jan. 17, 2017), <https://www.linkedin.com/pulse/law->

law firms are absorbed into megafirms, many law firms are missing an opportunity to increase profitability by self-assessing their performance with legal analytics.<sup>2</sup> Just as advances in data-centric technologies made certain old-economy jobs obsolete—for example, slide rules gave way to phone apps that can do the same types of calculations<sup>3</sup>—attorneys who budget and bill based on gut hunches rather than data-driven analyses will be hard-pressed to strike the right balance between ethical obligations to keep fees reasonable and the ability to make a good living. Nearly every industry study concludes that clients expect their law firms to be technologically savvy, adopt new service-delivery models, improve the economic relationship between attorney and client, and employ best billing practices.<sup>4</sup>

The most forward-thinking law firms are coping with client pressure to deliver better and more predictable value by leveraging—as a self-governance and self-assessment tool—hundreds of billions in “legal spend” data.<sup>5</sup> Understanding the component cost of each aspect of legal service delivery can offer valuable insights into pricing and evaluating the

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firms-using-data-edge-deliver-what-clients-want-joseph-tiano/. In particular, they’re competing for the types of clients who are willing to pay four-figure hourly rates. *Id.*

<sup>2</sup> *Id.*

<sup>3</sup> Reed Albergotti, *How Apple uses its Apple Store to copy the best ideas*, WASH. POST: TECH. (Sept. 5, 2019, 5:00 AM), <https://washingtonpost.com/technology/2019/09/05/how-apple-uses-its-app-store-copy-best-ideas/>. Taxis are giving way to Ubers, and Uber’s self-driving cars may make their own drivers obsolete. See Colin Lalley, *Will self-driving cars replace Uber and Lyft drivers?*, POLICYGENIUS (June 2, 2017), <https://www.policygenius.com/blog/will-self-driving-cars-replace-uber-lyft-drivers/>.

<sup>4</sup> Bob Ambrogi, *Tech-Savvy Firms More Profitable Now, More Prepared for the Future, Finds Survey of U.S. and EU Legal Professionals*, LAWSITES (Apr. 3, 2019), <https://www.lawsitesblog.com/2019/04/tech-savvy-firms-more-profitable-now-more-prepared-for-the-future-finds-survey-of-u-s-and-eu-legal-professionals.html>; see also Eric Sigurdson, *The Evolving Legal Service Delivery Model: A 2018 Survival Guide for BigLaw and Traditional Law Firms - building a new business model*, SIGURDSON POST (Jan. 14, 2018), <http://www.sigurdsonpost.com/2018/01/14/the-evolving-legal-service-delivery-model-in-the-fourth-industrial-revolution-a-2018-survival-guide-for-biglaw-and-traditional-law-firms-building-the-new-law-firm-business-model/>.

<sup>5</sup> See Nancy B. Rapoport & Joseph R. Tiano, Jr., *Legal Analytics, Social Science, and Legal Fees: Reimagining “Legal Spend” Decisions in an Evolving Industry*, 35 GA. ST. U. L. REV. 1269, 1269–70 (2019) [hereinafter Rapoport & Tiano].

services.<sup>6</sup> Law firms that use, protect, and promote the use of legal spend data or legal analytics can differentiate themselves from the countless other firms that also have well-credentialed, hard-working professionals. In other words, using big data internally can give law firms a competitive edge and business development advantage.

Our essay has five parts: (i) a discussion of how external forces are reshaping the economics of today's legal industry; (ii) examples of the types of decisions that tend to drive up the cost of bills in contravention of ethical duties; (iii) a discussion of possible reasons for those decisions (including a short discussion of social science explanations); (iv) a description of how attorneys can use data analytics tools to self-govern their staffing and deliver and bill for their legal services; and (v) recommendations for how clients and law firms can benefit from proactive management on the front end of legal costs.

## I. EXTERNAL FORCES RESHAPING TODAY'S LEGAL INDUSTRY

Until just recently, attorneys in the United States practiced law as quasi-monopolists. For several generations of lawyers, a law school degree and a bar license, coupled with state ethics rules, precluded meaningful competition from anyone except other attorneys.<sup>7</sup> A lawyer's competitive edge was tied largely to substantive legal knowledge, strategic advocacy skills, experience, business development skills, and reputation.<sup>8</sup> Legal services were consultative, qualitative, and advisory.<sup>9</sup> Clients weren't hyper-focused on hourly rates or the costs of legal services.<sup>10</sup> If you were a pretty good lawyer, you could make a good living for thirty, forty, or fifty years, often with the same law firm. We like to call this period, which lasted until the 1990s, the "Golden Age" of the legal industry.<sup>11</sup> As with other "Golden Ages," though, the legal industry's "Golden Age" has been overtaken by relentless, converging waves of competition, conflict, technological advancements, and culture change.<sup>12</sup> Notions deemed inconceivable during the Golden Age, such as client pricing pressure, disaggregation of legal services, delivery of legal

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<sup>6</sup> *Id.*

<sup>7</sup> Mark A. Cohen, *The Golden Age of The Legal Entrepreneur Why Now and Why It Matters*, FORBES (June 1, 2018, 5:57 AM), <https://www.forbes.com/sites/markcohen1/2018/06/01/the-golden-age-of-the-legal-entrepreneur-why-now-and-why-it-matters/#611f03087803>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* Good times to be a lawyer, for sure. *Id.*

<sup>12</sup> *Id.*

services by non-lawyers, and outside investment in the legal industry, have changed the practice of law from a noble profession into the ultra-competitive business of delivering “legal solutions.”<sup>13</sup>

Two distinct offerings of “legal solutions” have emerged in today’s legal industry: (1) the practice of law and (2) the business of delivering legal services.<sup>14</sup> Clients now receive a hybrid qualitative/quantitative service by which the mass customization and legal analytics provided by third party industry disruptors influence the traditional practice of law.<sup>15</sup> Litigators are using e-discovery tools to expedite document review, law firms created self-service templates for early-stage venture capital transactions, and companies like LegalZoom,<sup>16</sup> Fastcase, and RocketLawyer developed technologies that empower non-lawyers to undertake routine legal tasks. These disruptive technologies push the legal industry in the right direction from an efficiency perspective, reducing the time it takes to analyze an issue or handle a task.<sup>17</sup> Alternative legal service providers (ALSPs) destabilized the rate side of the economic equation by offering competent, lower-cost professionals and processes capable of handling high-volume legal work at a steep discount from the fees of major law firms.<sup>18</sup> Amid these innovations, law schools (until just recently) graduated law students at a pace that has created a supply/demand mismatch for legal services.<sup>19</sup> All of these developments irreversibly affected the legal industry’s competitive landscape by altering the time that it takes a lawyer to do his or her job (and the overall costs), thereby precipitating a reevaluation of legal fees.<sup>20</sup> Although a client has always had a major interest in assessing the balance between fees and the value of legal services, law firms must also now monitor their activities if they hope to stay competitive.<sup>21</sup> Forward-thinking law firms are leveraging data analytics tools to show

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Steven J. Harper, *Too Many Law Students, Too Few Legal Jobs*, N.Y. TIMES (Aug. 25, 2015), <https://www.nytimes.com/2015/08/25/opinion/toomany-law-students-too-few-legal-jobs.html>.

<sup>20</sup> See Cohen, *supra* note 7.

<sup>21</sup> Josh Becker, *4 Ways that Law Firms Benefit from Legal Analytics*, LEXISNEXIS (2018), <https://www.lexisnexis.com/pdf/legal-analytics/Legalanalyticwhitepaper.pdf>

clients that they understand those tactical decisions that can make legal fees skyrocket.<sup>22</sup>

## II. DECISIONS THAT TEND TO DRIVE UP THE COST OF BILLS

The biggest reason that the bottom line of a legal bill tends to go ever-skyward is the failure to analyze, in real-time, the myriad of daily decisions—staffing and tasks—that the representation of a client entails. We’ve written before about some of the social science behind faulty law firm decision-making.<sup>23</sup> Those social science reasons for costly decisions can include anchoring (focusing on one factor, such as hourly rates, to the exclusion of all other factors), social pressure (where one or two group members sway the decisions of the rest of the group), and cognitive dissonance (where an individual can talk himself into justifying a costly decision in order to maintain his own good opinion of himself—as in, “It was smart to bring ten people to the hearing today because we’d be able to answer any question the judge might have asked.”).<sup>24</sup> Countless cognitive errors might contribute to costly decisions, but we won’t list all (or even most) of them here.<sup>25</sup>

Given the speed of law practice today, where law firms strive to provide the fastest, most thorough service, clients have to choose among “fast, good, and cheap,” and the rule that clients can only get two of those three variables at any given time still applies.<sup>26</sup> Let’s assume that clients always want “good.” Let’s also assume that law firms are afraid to provide

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<sup>22</sup> *Id.*

<sup>23</sup> See Rapoport & Tiano, *supra* note 5 (discussing the cognitive errors of anchoring, social pressure, and cognitive dissonance); see also Dwayne J. Hermes, Erica R. LaVarnway & Nancy B. Rapoport, *A Solutions-Oriented Approach: Changing How Insurance Litigation Is Handled by Defense Law Firms*, 2017 J. PROF. L. 129; Randy D. Gordon & Nancy B. Rapoport, *Virtuous Billing*, 15 NEV. L. J. 698 (2015) [hereinafter Gordon & Rapoport]; Nancy B. Rapoport, “Nudging” Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms, 4 ST. MARY’S J. L. ETHICS & MALPRACTICE 42 (2014); Nancy B. Rapoport, *The Case for Value Billing in Chapter 11*, 7 J. BUS. & TECH. L. 117 (2012); Nancy B. Rapoport, *Rethinking Fees in Chapter 11 Bankruptcy Cases*, 5 J. BUS. & TECH. L. 263 (2010).

<sup>24</sup> *Id.*

<sup>25</sup> We will, however, suggest two great resources, in addition to the articles mentioned in note 23: JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION AND DECISION MAKING* (A.B.A 2013); Jean R. Sternlight & Jennifer K. Robbennolt, *Behavioral Legal Ethics*, 45 ARIZ. ST. L. J. 1107 (2013).

<sup>26</sup> See Rapoport & Tiano, *supra* note 23, at 1278.

less-than-good work for fear of being accused of malpractice.<sup>27</sup> That leaves a choice between the two remaining variables—fast and cheap.<sup>28</sup>

Let's start with what we're not saying. We're not saying that law firms routinely inflate bills to benefit their bottom line, as we think that there are far fewer examples of law firm greed than simple law firm inadvertence.<sup>29</sup> But we do think that there is likely a bias against providing discounted service, especially with client pressure to provide the most responsive and timely work product to clients.<sup>30</sup> Therefore, law firms seem inclined to use "fast and good" as their two variables, irrespective of whether a client would choose "cheap and good" while accepting the concomitant delays. "Cheap," though, might not mean "slow." It might mean "staffed with fewer people," or "staffed with those professionals whose seniority matches the tasks that they need to perform," or "discounted rates in exchange for significantly more work from the client."

So, what types of decisions tend to drive up the costs of bills? Here are some categories of costly decisions that we've discovered over the years:

- Overstaffing certain tasks, such as multiple-party attendance at meetings or hearings.<sup>31</sup>
- Rank/task mismatch, where high-rate billers are performing tasks that lower-rate billers could perform.<sup>32</sup>
- The arms race toward mid-four-figure hourly rates for the most senior professionals.<sup>33</sup>
- Uncovering every possible argument, rather than focusing on the most likely arguments, through over-researching.<sup>34</sup>
- Re-researching topics that the firm's expertise would normally indicate was part of the firm's prior knowledge base.<sup>35</sup>

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<sup>27</sup> *Id.* at 1275.

<sup>28</sup> *Id.* at 1278.

<sup>29</sup> *Id.* at 1270–72.

<sup>30</sup> *Id.* at 1271.

<sup>31</sup> *Id.* at 1276.

<sup>32</sup> *Id.* at 1293.

<sup>33</sup> See Rapoport, *supra* note 23, at 60.

<sup>34</sup> Matthew Guarnaccia, *Clients Leaving Firms with the Bill for Research*, LAW360 (Mar. 20, 2017, 4:44 PM), <https://www.law360.com/articles/903628/clients-leaving-firms-with-the-bill-for-research>.

<sup>35</sup> Rapoport & Tiano, *supra* note 5, at 1271.

- Not keeping real-time records of billable work. (The longer the delay between doing the work and recording the time entries, the less likely that the time entries will be accurate.)<sup>36</sup>
- Statistically improbable hours (the 0.1, 0.5, and 1.0 time entries, when they occur more frequently than statistics would tell us is likely) as a way of compensating for not tracking time accurately.<sup>37</sup>
- Failing to budget appropriately.<sup>38</sup>

Any of these decisions can drive up the cost of legal services and having more than one of these types of decisions occur in a given matter will drive up the cost exponentially. If law firms are not trying intentionally to increase their bottom line, then why would we see these categories of decisions so frequently?

### III. WHY WOULD SMART, WELL-RUN LAW FIRMS MAKE BAD CHOICES ABOUT BILLING?

Let's assess the categories we have listed above and consider why a law firm might make such costly decisions.

#### *Overstaffing.*

There appears to be an issue, at least among the law firms that we observed, with overstaffing meetings and hearings with an array of specialists to address discipline-specific questions. That drives up billing times.<sup>39</sup> In an ultra-connected, telecom-enabled world, simple principles of efficiency justify having these specialists on standby, rather than physically present, just in case their knowledge is needed. Although many courts don't allow cell phones in the courtroom,<sup>40</sup> we doubt that a judge would object to a brief recess if a problem arose and someone in the courtroom didn't know the immediate answer. On the other hand, we recognize that the rationale for having these specialists physically present,

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<sup>36</sup> *Id.* at 1279.

<sup>37</sup> *Id.*

<sup>38</sup> See Rapoport, *supra* note 23, at 89.

<sup>39</sup> See Rapoport & Tiano, *supra* note 5, at 1276.

<sup>40</sup> See Jenny Tsay, *What Are the Rules on Cell Phone Use in Court?*, FINDLAW (Apr. 10, 2014), [https://blogs.findlaw.com/law\\_and\\_life/2014/04/what-are-the-rules-on-cell-phone-use-in-court.html](https://blogs.findlaw.com/law_and_life/2014/04/what-are-the-rules-on-cell-phone-use-in-court.html).



rather than on standby, might be along the lines of:<sup>41</sup> “It is more beneficial to ask everyone to attend, rather than to risk not knowing the answers to specialized questions.” Any attorney considering this type of staffing really should do a cost–benefit analysis that weighs the difference between having everyone attend in person and having some people on standby.

*Rank/task mismatch.*

There is no question that, sometimes, a senior professional is what we call the “lowest efficient biller.”<sup>42</sup> For example, there are complicated issues that are best researched by someone with years of experience, because that person can find the pertinent information in a hurry, sift through it quickly, and come up with an answer that he or she can use immediately. A first- or second-year lawyer faced with a complicated question of law might take hours—or even days—on the same research project, so the cost to the client is less if the senior person performs the research. Similarly, it’s important that a more senior person reviews document production for privilege issues before producing documents that might waive that privilege. Search algorithms will identify those instances of rank/task mismatch, but we can then ask questions to determine the reasonableness of the choice of professionals.

Other rank/task mismatches, though, are presumptively unreasonable. Each of us has heard numerous excuses for higher-rate professionals performing tasks better suited for lower-rate professionals. The most common explanation tends to be that there were no junior people around when the task needed completion. In one-off, “emergency” situations, it can be appropriate for a legal professional to handle a task below his or her expertise level, but when people are continually assigned tasks below their pay grade, one justifiably wonders whether senior professionals are searching for ways to keep their monthly hours up.

*The arms race toward mid-four-figure hourly rates for the most senior professionals.*

Much like the arms race for executive compensation, in which everyone wants to come from Lake Wobegone (where the children are all

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<sup>41</sup> See Rapoport & Tiano, *supra* note 5, at 1276.

<sup>42</sup> See Rapoport, *supra* note 23, at 92.

above average),<sup>43</sup> the major law firms have raised their top performers' hourly rates steadily, having broken the four-figure barrier<sup>44</sup> We believe that social pressure (the subconscious desire to conform to what a few people in a group are doing),<sup>45</sup> coupled with good old-fashioned envy, may be causing this desire to see just how high the market will let hourly rates go.

#### *Research decisions.*

Law professors may be at least partially to blame for the tendency to search for every conceivable argument, no matter how likely to prevail. If law schools don't teach the difference between "arguments" and "good arguments," graduates of law schools aren't entirely to blame for leaving no (research) stone unturned. Moreover, the "argument not made" may come up to bite the lawyer later in a malpractice suit.<sup>46</sup> At some point, a senior legal professional should say "enough is enough" and end the billing frenzy.

In particular, we've seen belt-and-suspenders research on basic issues that the law firm's expertise should already have. For example, in very large bankruptcy cases, those firms chosen to represent the debtor or the creditors' committee should not be re-researching topics that we would classify as "Bankruptcy 101." These law firms won a beauty contest because of their expertise. That expertise, by necessity, should mean that the lawyers in the law firm don't have to re-learn bankruptcy basics.

#### *Time entry failures.*

Of all of the billing frustrations that outside counsel have, probably first on the list is keeping track of billable time.<sup>47</sup> The failure to keep contemporaneous time records, though, results in a cost either to the law firm itself or to the client, because time worked ends up not being recorded or the "estimate" of the time worked exceeds the actual time

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<sup>43</sup> "Welcome to Lake Wobegon, where all the women are strong, all the men are good-looking, and all the children are above average." Garrison Keillor, *Garrison Keillor Quotes*, BRAINYQUOTE, <https://www.brainyquote.com/quotes/garrisonkeillor137097>.

<sup>44</sup> See, e.g., Jay Reeves, *Top 10 Lawyer Hourly Rates by City*, LAW.MUTUAL BLOG, (Apr. 6, 2018), <https://www.lawyersmutualnc.com/blog/top-10-lawyer-hourly-rates-by-city>.

<sup>45</sup> See Rapoport & Tiano, *supra* note 23, at 1278.

<sup>46</sup> *Id.* at 1275.

<sup>47</sup> The second most likely is dealing with annoying colleagues or opposing counsel.

worked.<sup>48</sup> The longer the delay between doing the work and recording the time entries, the less likely that the time entries are accurate.<sup>49</sup> Not only is misrecording time an ethics violation,<sup>50</sup> but it also contributes to a suspicion that other corners are being cut.<sup>51</sup> There are several signs of misrecorded time. One such sign is a statistically higher than expected series of time entries ending in .0 or .5 (rounded hours) or many 0.1s.<sup>52</sup> Certainly, some tasks can take a half-hour or an hour, but significant amounts of such time entries can indicate that the time is being “remembered” rather than billed contemporaneously.<sup>53</sup> Other such signs can include incomplete information (e.g., “conversation with” entries that don’t indicate with whom a conversation occurred, or “discuss strategy and tactics with client”) or a supplemental bill to the client with newfound additional time entries.<sup>54</sup>

*Missing or incomplete (or unreconciled) budgets.*

Law firms seem to hesitate before providing meaningful budgets to their clients for big-ticket matters.<sup>55</sup> Notwithstanding the deep, widespread experience of the market-leading firms, their lawyers often declare that they can’t possibly guess how much a given matter might cost the client.<sup>56</sup> Some of that reluctance has real roots—because some of what affects a budget has to do with decisions by those other than the law firm or its client.<sup>57</sup> Opposing counsel can make choices that result in unpredictable new work. Some of that reluctance, though, also stems from a fear that a budget might underestimate the cost of doing the work and thus cut into profits.<sup>58</sup> The use of legal analytics easily mitigates unpredictability and underestimates by law firms, which also helps

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<sup>48</sup> See Gordon & Rapoport, *supra* note 23, at 721.

<sup>49</sup> *Id.*

<sup>50</sup> See, e.g., MODEL RULES OF PROF’L CONDUCT r. 1.5 (reasonableness of fees).

<sup>51</sup> See Gordon & Rapoport, *supra* note 23, at 721.

<sup>52</sup> *Id.* at 727.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 718.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

establish benchmarks, ensure reasonableness of fees, and prevent billing disputes between law firms and clients.<sup>59</sup>

In a case originally filed in federal district court<sup>60</sup> and then moved to state court,<sup>61</sup> a client accused a major law firm of, among other things, spending excessive time and performing unnecessary activities. The complaint included the following allegation of work run amok:

After being retained, [the law firm] proceeded to assign what finally became 34 different timekeepers to the file. These timekeepers billed at least 669 hours in a two-month period, at a total cost of \$477,910.00 in that period. This should have been a straight-forward assignment. Experienced lawyers (particularly those who bill at over \$1,000/hour as [the law firm] did) should know that one of the first steps would be to file certificates of dissolution in Delaware. In fact, this was one of the few items that Plaintiffs specifically charged [the law firm] with accomplishing. However, [the law firm] did not accomplish that, nor took any other steps to formally wind the companies down.<sup>62</sup>

The complaint went on to state:

In late July 2018, Plaintiffs became concerned about the “services” that [the law firm] was providing and was not providing. At that point, [the law firm] had been working for two months but had not sent a bill or an accounting of any of Plaintiffs’ funds held in [the law firm]’s trust accounts. Plaintiffs asked [the law firm] to provide current bills and an accounting. On August 3, 2018, [the law firm] finally provided a billing statement and a summary of the amounts received in the trust account. The billing reflected grossly excessive billing, which totaled 669 hours at \$484,321.39 – for two months of work. The statement also reflected that Plaintiffs had paid \$30,000 in retainer payments, and that [the law firm]

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<sup>59</sup> See Rapoport & Tiano, *supra* note 5, at 1281.

<sup>60</sup> Synergies Corp. v. Morrison Foerster, LLP, Case 1:19-cv-00110-RP, United States District Court for the Western District of Texas (Feb. 14, 2019).

<sup>61</sup> Synergies Corp. v. Morrison Foerster, LLP, Cause No. D-1-GN-19000956, District Court of Travis County, Texas (Feb. 26, 2019).

<sup>62</sup> *Id.* at 5.

had arranged for \$625,319.00 to be sent into [the law firm]’s trust account, for a total of \$655,319.00.<sup>63</sup>

The case recently settled<sup>64</sup> and, therefore, we’re not taking the plaintiff’s allegations as true, but our first thoughts when reading the complaints were: “Did a ‘Tier 1’ law firm, in 2018—the age of ‘Big Data’—work from a gut hunch?,” “Where was the budget?,” and “Was anyone monitoring the budget?”<sup>65</sup>

#### IV. LEGAL ANALYTICS<sup>66</sup> AS A WAY TO COUNTERACT BAD GUT

##### DECISIONS

When law firms and clients use legal analytics intelligently, the resulting data provide a supplemental information source that can hone how legal professionals budget for and monitor the delivery of legal services.<sup>67</sup> Legal analytics are extremely effective and can be a prophylactic countermeasure to the pitfalls of incorrect gut hunches. The pitfalls from gut hunches almost always materialize in the form of pricing misfires, poor matter-staffing, or related workflow challenges—in other words, runaway legal costs.<sup>68</sup> The key benefit to legal analytics tools comes from using them to identify mistakes that gut hunches often trigger.

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<sup>63</sup> *Id.* at 9.

<sup>64</sup> See Debra Cassens Weiss, *BigLaw Firm Settles Suit Accusing It of ‘Billing Feeding Frenzy’*, A.B.A. J. (May 14, 2019, 10:44 AM), <http://www.abajournal.com/news/article/biglaw-firm-settles-suit-accusing-it-of-billing-feeding-frenzy>.

<sup>65</sup> *Id.*

<sup>66</sup> Rapoport & Tiano, *supra* note 23, at 1283 (“[L]egal analytics can be defined as the process of using technology to transform raw data associated with any aspect of the legal industry into actionable information and insights used by legal industry participants to develop, analyze, forecast[,] [and] manage legal risks and opportunit[ies]; legal strategy; matter management; legal process management and improvement; and legal department and law firm financial and business operations.”); see also *Whitepapers and Resources*, LEGAL DECODER (2019), <https://www.legaldecoder.com/whitepapers/>.

<sup>67</sup> See Rapoport & Tiano, *supra* note 5, at 1281.

<sup>68</sup> *Id.* at 1284.

### A. *Avoiding Pricing Misfires*

Forward-thinking legal industry leaders need a systematic edge to price legal services accurately.<sup>69</sup> Legal analytics tools now analyze billing data in a manner that allows for creative, reliable, and predictable pricing.<sup>70</sup> These tools analyze, on a line-item by line-item basis, “who” (legal professional credentials) did “what” (work elements identified in narrative) and how long the work took to do.<sup>71</sup> The data analytics tools then categorize that data, showing industry-specific pricing trends.<sup>72</sup> With data properly categorized, a four-dimensional analysis (one that looks retrospectively across matters, tasks, law firms, and time) can inform future pricing decisions.<sup>73</sup> For instance, where a client finds himself or herself (or itself) in similar litigation in multiple jurisdictions, it is now possible to determine that Attorney *X* at Firm 1 handled four key witness depositions at a cost of \$12,000 each, Attorney *Y* at Firm 2 handled six key witness depositions at a cost of \$8,000 each, and Attorney *Z* at Firm 3 handled three key witness depositions at a cost of \$10,000 each. One can then correlate the cost of the key witness depositions with the outcome in each case to inform future litigation strategy. Pricing legal services can and should be a data-driven strategic analysis, not a gut hunch.<sup>74</sup>

### B. *Optimizing Matter Staffing*

Both law firms and clients expect their matters to be staffed so that a mix of lawyers delivers high-quality, technically proficient legal services at a cost-effective, industry-benchmarked price.<sup>75</sup> Efficient staffing runs along a continuum: partners handle complex, high-risk, and high-value legal work; competent associates handle moderately complex, moderate-risk, and high-value legal work; and low-risk and low-value tasks are redeployed elsewhere (such as with contract attorneys) or eliminated altogether (for example, using computers to do the first cut in document

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<sup>69</sup> *Id.* at 1296.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 1283.

<sup>74</sup> *Id.* at 1296.

<sup>75</sup> See Harrison Barnes, *Meeting And Exceeding Your Legal Clients' Expectations*, LAW CROSSING (accessed Sept. 28, 2019), <https://www.lawcrossing.com/article/900008572/Engaging-the-client/>.

production).<sup>76</sup> Clients often rely on and defer to outside counsel on staffing decisions based on the natural and reasonable assumption that outside counsel will employ a staffing mix that follows the recipe above.<sup>77</sup> Such reliance is not an entirely misguided approach, as outside counsel frequently handles the same categories of work and intimately knows the talents, skills, strengths, and weaknesses of its team.<sup>78</sup> That said, both law firms and clients can leverage legal analytics tools to further improve staffing efficiency.<sup>79</sup> The practical upshot of evaluating and monitoring staffing efficiency may be as simple as leaving legal work with the same outside law firm but with a reshuffling of staffing resources.<sup>80</sup> Sometimes, it may mean diverting some tasks to lower cost or alternative legal service providers.<sup>81</sup>

### C. *Improving the Workflow Process*

Gut decisions usually lead to waste, redundancy, or friction in workflow processes.<sup>82</sup> Workflow challenges, such as two (or more) legal professionals at the same skill level handling the same task at the same time (or excessive internal office conferences) often stem from uninformed hunches on how to manage a matter from inception until completion.<sup>83</sup> Evaluating data that demonstrates how work ideally flows from person to person, establishing standards for who does which tasks, continually monitoring the process, and identifying opportunities for improvement all make for a better product for the client.<sup>84</sup> When law firms and clients use legal analytics intelligently, the resulting data provide a supplemental information source that augments how legal professionals manage and deliver legal services.<sup>85</sup>

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<sup>76</sup> Cf. Ashley Montgomery, *Lawyers and Light Bulbs: A Guide to Case Staffing*, QUOVANT (May 10, 2017), <https://www.quovant.com/blog/lawyers-and-light-bulbs-a-guide-to-case-staffing/>.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> See generally Becker, *supra* note 21.

<sup>80</sup> See Montgomery, *supra* note 76.

<sup>81</sup> *Id.*

<sup>82</sup> See Rapoport & Tiano, *supra* note 5, at 1290.

<sup>83</sup> *Id.* at 1303.

<sup>84</sup> *Id.*

<sup>85</sup> See generally Rapoport & Tiano, *supra* note 5.

V. PROACTIVE MANAGEMENT OF THE COSTS OF REPRESENTING A  
CLIENT

There are certain ways that clients can help law firms control costs. Budgets can be useful, especially budgets that recognize the need for flexibility when the unexpected occurs (but adjustments to budgets need to include advance notice to clients, not *ex post* notice). For law firms with expertise in various subjects, mining their own data to understand the likely components from which to build a budget would not be difficult. Let's assume that a law firm has access to its own historical data in a way that lets it sort and classify different types of engagements. It can take a look at staffing, both in terms of the number of professionals who worked on the matter and the rank of each of those professionals, and be able to tell prospective clients a tighter range of potential costs of representation than it could with just the gut-hunch method.<sup>86</sup> Moreover, it should be able to monitor its actual engagements more closely by being able to stick to reasonable budgets.<sup>87</sup> In turn, that ability to monitor should enable the firm to increase its realization rate. As we pointed out in an earlier article:

By using legal analytics, clients can realize greater value and results from their legal spend, and law firms can operate more efficiently (and more profitably) with greater client attraction, retention, and satisfaction. Why do we say, "more profitably"? Because the realization rate (the amount that the client actually pays) is far more important than what the law firm bills to the client. If a client doesn't pay all of the bill, that lost time—and lost income—is gone forever.<sup>88</sup>

Even if law firms aren't yet able to invest full-bore in legal analytics, they could at least mine their data to create frameworks for the staffing and pricing of future engagements. Moreover, they could track each professional's time entries to find those whose descriptions were not particularly useful or those whose entries are always late and find more precise ways to encourage better behavior.<sup>89</sup>

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<sup>86</sup> *Id.* at 1270–71.

<sup>87</sup> *Id.* at 1293.

<sup>88</sup> *Id.* at 1282.



CONCLUSION

The era of legal analytics is here, and there will be winners and losers. Self-assessment and self-governance will go a long way towards fending off unplanned obsolescence. In this regard, the successful law firms will leverage legal analytics to give them a competitive edge. Those who do not leverage legal analytics do so at their peril.