

## Expert insights: Best practices in expanding risk-based law firm practices

Evan Myerson

*In August 2023, Evan Meyerson, a Director at Burford Capital, posed questions about building risk-based litigation practices to a panel of leading law firm lawyers at four global law firms. Their answers are gathered below.*

More and more law firms are now expanding their risk-based, plaintiff-side litigation practices, including large, brand-name, traditionally defense-oriented firms. How much of the impetus for this expansion is coming from clients, and how much is being driven by other factors impacting firms?

**Timothy Mungovan, Chair of the Securities Litigation practice, Proskauer Rose:**

Big Law has always pursued plaintiff-side claims on behalf of corporate clients. What has changed is the willingness to take some risk on the plaintiff side. The practice really originated out of patent litigation practices in the early to mid-2000s and grew meaningfully following the credit crisis. Some of the impetus is coming from clients, but there are other factors at play too, including the opportunity for profits above a pure hourly rate model and the availability of third-party capital to underwrite some of the risk.

**Theane Evangelis, Co-Chair of the Global Litigation Practice, Gibson Dunn:**

While client demands are certainly a considerable factor driving expansion, other factors include developments in the law, as well as advances in technology and data analytics that have made it easier for firms to assess and manage risk. Increased access to funding sources to help offset some of the firm's risk also plays a role. In other words, it is partly client demand, but in many respects the expansion is driven by the availability of better tools and platforms to allow us to take on cases that may have been harder to take on in the past.

We are always looking for ways to realize value and partner with clients on assuming both risks and rewards. Many clients find themselves on both sides of related issues, and we work with them on a consistent and coordinated message in order to achieve their goals.

As a firm, we have a deep history of being more inclined to plaintiff-side work than many of our peer firms. That's because clients on both sides of the "v" turn to us to tackle their most important matters. Plaintiff-side

work is often the epitome of bet-the-business work; being in a position to increase our risk allows us to bring top level services to cutting-edge cases, which draws more clients to both our plaintiff and defense side practices.

**Troy Brown, Leader of the Global Business Disputes Practice, Morgan Lewis:**

The expansion is driven by both law firm strategy and client goals. As a firm, Morgan Lewis has found success in taking on both partial and full contingency matters. We are able to leverage our expertise, especially as defense counsel, to understand the cost drivers and case management strategies that can be brought to bear by plaintiffs' counsel. From that experience and knowledge base, we are creating efficiencies along the litigation lifecycle. In addition, we established strong early economic analysis protocols based on real experience that enable us to make well-informed decisions about the viability of contingent fee matters.

When our clients are confident in the strength of their position, we take that very seriously. We see them looking to partner with their outside counsel to allow significant upside claims to be prosecuted without a corresponding hit to their legal spend budget. While many of our clients expect their outside disputes counsel would put some "skin in the game" for plaintiff -side work, there appears to be a growing appetite for these matters in recent years, and we want to be on the frontlines prosecuting these claims.

**Michael Lackey, Global Management Committee member, Mayer Brown**

From my perspective, both clients and other factors are driving the change. There is much greater awareness of the various options that are now available to help finance valid claims that, before these market developments, might not have been pursued for lack of budget or appetite for risk. Moreover, law firms see this as another valuable service they can provide their clients—i.e., helping clients identify and pursue valid claims where it makes business sense to do so. This, in turn, can reflect favorably on the in-house legal department, allowing it to make a positive contribution to the bottom line and burnishing its reputation as a business partner within the organization.



“ While many of our clients expect their outside disputes counsel would put some 'skin in the game' for plaintiff -side work, there appears to be a growing appetite for these matters in recent years, and we want to be on the frontlines prosecuting these claims.”

TROY BROWN  
Leader of the Global Business Disputes Practice, Morgan Lewis

Taking on more risk-based work, particularly on the plaintiff side, requires assessing a matter through a somewhat different lens than on the defense side. This includes surviving dispositive motions (instead of defeating them), conducting a more fulsome upfront assessment of case economics, incorporating contingent fee compensation models into more traditional structures at your firm, and other considerations. What has helped you make such a transition? And what skillsets do you believe overlap between the defense side and plaintiff side?

**Troy Brown:** Because we have taken plaintiff-side matters on contingency for many years, we have developed and refined a sophisticated approach to contingent fee compensation models that are a consistent feature in our overall portfolio of work. That model is informed by our strong track record of success in defense-side claims. We have a deep understanding of the factors that can determine which cases survive a motion to dismiss and leverage that expertise both at the case evaluation stage and then in opposition to motion to dismiss inflection point. We also understand very well the expense drivers on the plaintiff side, and the combination enables us to make the determination of whether to take on a case and how to manage it most effectively.

**Theane Evangelis:** The foundational skills of an effective litigator—such as strategic thinking, creativity, effective communication and negotiating prowess—are universal. To be an effective litigator, whether defense- or plaintiff-side, you have to put yourself in the shoes of your adversary. By understanding motivations and strategies, you can better anticipate the other side's moves, identify weaknesses in your opponent's argument and develop a stronger case. And, by maintaining active practices as both defense and plaintiff counsel, we are well positioned to game out the strategies our opponents will take. The same applies to case economics—good defense counsel will want to analyze the plaintiffs' economics as it helps drive strategy. As plaintiffs' counsel, we apply those same skills to analyze cases. We just implement the results of that analysis a bit differently. We take an affirmative approach to litigation, developing the best legal and factual arguments for our clients. We have successfully represented plaintiffs in state and federal courts and in trial courts and on appeal. Our litigators have a unique ability to see the big picture in order to achieve the best possible results.

**Michael Lackey:** I think the transition is not that difficult, because both plaintiff and defense counsel assess the validity of litigation claims, the potential damages from the claims and the jury appeal of the case. Thus, I think there is substantial overlap between the two sides, and even attorneys who predominantly defend clients are sometimes retained by their defense-side clients to pursue claims.

**Timothy Mungovan:** There is a shift in mind-set, which includes embracing an entrepreneurial approach to litigation. There is also a need for new systems and ways of working. For example, we have invested in sophisticated pricing and legal project management professionals who can work as part of the team to evaluate every aspect of the case from intake to enforcement and develop pricing models to evaluate profitability and isolate profitability drivers. [They] work closely with the litigation team to test assumptions and develop workflows to increase efficiencies, including opportunities for leverage. This integrated team works together to develop a realistic model for the case—at the front end. In terms of compensation models, the firm underwrites the risk and earns the profits.



“ [B]eing in a position to increase our risk allows us to bring top level services to cutting-edge cases, which draws more clients to both our plaintiff and defense side practices.”

THEANE EVANGELIS  
Co-Chair of the Global Litigation Practice, Gibson Dunn

Even firms that are happy to take on significant risk reach a limit in their risk tolerance. How do you think about navigating and managing the additional risk that comes with taking on more contingent work?

**Theane Evangelis:** With more risk, you need to be more rigorous in your analysis because there's greater potential for financial loss. It's important to have a thorough understanding of the potential risks involved, clear communication and awareness, both internally and with the client, throughout the process. To be more profitable in the contingent space, you need to take on good cases that present upside for everyone and partner with the right client to make sure the arrangement is mutually beneficial and there's the right upside for everyone. You need to make sure you have agreed-to objectives and are aligned on how to proceed should unanticipated events occur. Most of this is important no matter how large or small your risk profile is. As the risk profile increases, it becomes more and more critical that you are not just asking these questions on a case-by-case basis, but making sure that you have a clear understanding of the overall risks of all your contingency work. As a firm we bring this analysis to bear in all our alternative fee arrangements, and we can and do tap into that work as we expand our risk profile.

**Michael Lackey:** I agree that it is important to understand and manage this additional risk. In that regard, I think a firm needs to be very deliberate and strategic in developing its portfolio of cases, have budgets for the overall portfolio and for each case in the portfolio, and track performance against those budgets and projected recoveries . You need to have a plan and manage to that plan.

**Troy Brown:** Our case analysis is subject to the same level of rigor we apply to managing the firm's finances. We also are realistic about the success factors, including whether a judgment is likely to be enforced, considering all factors: US cases, international arbitrations and cases in foreign jurisdictions. This is obviously critical for the health of the enterprise, but also important to our clients who can feel confident in our analysis of, and management of, their case.

We look at our litigation portfolio from a holistic management perspective, much like you would a personal investment portfolio. There are no guarantees of success. Some investments will pay off and some will not. With sound analysis, disciplined management of matters across an entire portfolio and top-of-market litigators and trial lawyers involved in every case, our clients and we expect many more successes than setbacks.

**Timothy Mungovan:** We evaluate risk on a case-by-case basis and make a risk tolerance assessment on intake. In terms of aggregated risk, we are aiming for a portfolio of risk-based matters (not necessarily full contingency) that will generate a pre-determined range of revenue, as a percentage of the revenue of the litigation department.



“ I think a firm needs to be very deliberate and strategic in developing its portfolio of cases, have budgets for the overall portfolio and for each case in the portfolio, and track performance against those budgets and projected recoveries.”

MICHAEL LACKEY  
Global Management Committee member, Mayer Brown

As law firms pursue more risk-based work, do you see an increased role for AI—or, short of that, a need for more rigorous data analytics?

**Timothy Mungovan:** We have been actively evaluating AI since at least 2017. That said, the impact of AI—and generative AI in particular—is still in its early stages. AI will likely impact all aspects of litigation, not just risk-based work. The things that litigators spend their time on will logically shift to the things that AI cannot do, such as trials. Therefore, trial work will become even more important. AI will also help with case intake, including legal analysis, financial modeling and risk-weighting.

**Michael Lackey:** There are many tools already available to help firms manage their portfolios but having newer tools at our disposal can be invaluable. One area in which AI might be able to help is in case assessment, which is a very difficult task. Understanding the strength of the claims and the economics of the case is integral to being successful in this area.

**Troy Brown:** At Morgan Lewis, we have already incorporated several AI solutions into our transactional and e-discovery practices to support contract analytics, managed review and investigations with great success. We are cautiously exploring the integration of generative AI for more complex litigation tasks, whether as defense or plaintiffs’ counsel, and irrespective of the nature of the financial arrangements with our clients. At the same time we embrace these technological advancements, we are also deeply committed to maintaining the highest standards of data security and client confidentiality. Therefore, any technology solutions we adopt must meet stringent security protocols and compliance standards to ensure the safeguarding of sensitive information.

**Theane Evangelis:** Increased risk requires increased analysis. And increased analysis involves deeper investigation work and a better understanding of relevant data, both with respect to case economics and broader litigation trends that might inform when and where to assert certain types of claims. Gibson Dunn is focused on the potential and capabilities of AI, and we are taking steps to evaluate how to deploy such technologies where they can deliver client value while managing attendant risks. At the same time, we are also looking at how to harness these same technologies for our own purposes, since our internal risk assessment in this regard is closely linked to the risk assessment we provide on behalf of clients.

AI and data analytics tools can help with risk assessment. To the extent firms pursue risk-based work that puts more of the firm's resources at stake, AI and data analytics may play an increasingly important role. The evolving landscape of AI and analytics tools may provide nuanced ways of splicing litigation facets and linking to expected outcomes, using both internal and external data sources. These tools can spot trends and patterns in data, which can be useful for weighing the strengths and weaknesses of cases, managing risks and exploring settlement calculations. In the future, firms using AI and data analytics may have a leg up in the competitive world of plaintiff-side litigation. They will also have to take great care to ensure any AI tools they use are accurate and meet all ethical and legal standards.



“ Some of the impetus is coming from clients, but there are other factors at play too, including the opportunity for profits above a pure hourly rate model and the availability of third-party capital to underwrite some of the risk.”

TIMOTHY MUNGOVAN  
Chair of the Securities Litigation practice, Proskauer Rose

# Participants

## TROY BROWN, LEADER OF THE GLOBAL BUSINESS DISPUTES PRACTICE, MORGAN LEWIS

Troy Brown has successfully first-chaired jury and bench trials as well as complex commercial arbitrations in the US, and international arbitrations in Europe. Mr. Brown is on the firm's global Advisory Board, is the leader of the firm's global business disputes litigation practice and is a co-leader of the firm's global life sciences industry team.

## THEANE EVANGELIS, CO-CHAIR OF THE GLOBAL LITIGATION PRACTICE, GIBSON DUNN & CRUTCHER LLP

Theane Evangelis is a partner in the firm's Los Angeles office and Co-Chair of its global Litigation Practice Group. She previously served as Co-Chair of the firm's Class Action Practice Group. Ms. Evangelis has served as lead counsel in a wide range of bet-the-company appellate, constitutional, class action, labor and employment, media and entertainment and crisis management matters in trial and appellate courts across the country.

## MICHAEL LACKEY, GLOBAL MANAGEMENT COMMITTEE MEMBER, MAYER BROWN LLP

Michael Lackey serves on the firm's global Management Committee and practices both civil and criminal litigation, focusing in particular on complex antitrust, cartel and competition cases. He previously served as the global head of litigation at the firm. Mr. Lackey has represented major companies and individuals in state and federal proceedings, including multi-district and class actions with billions of dollars of potential liability at stake.

## TIMOTHY MUNGOVAN, CHAIR OF THE SECURITIES LITIGATION PRACTICE, PROSKAUER ROSE LLP

Timothy Mungovan chairs the firm's Securities Litigation practice, is a member of its Executive Committee and is immediate past chair of the Litigation Department. His practice is focused on securities, commercial litigation, governance and bankruptcy-related matters, and he advises sponsors of private investment funds in a wide variety of matters, including litigation, governance, securities, fiduciary obligations and regulatory enforcement.

# About the moderator

Evan Meyerson is a Director with responsibility for assessing and underwriting legal risk as part of Burford's investment team, and manages Burford's US commercial investment pipeline.