LexFusion
COMPENDIUM

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Preview of the LexFusion Second Annual Legal Market in Review

By D. Casey Flaherty

January 1, 2023

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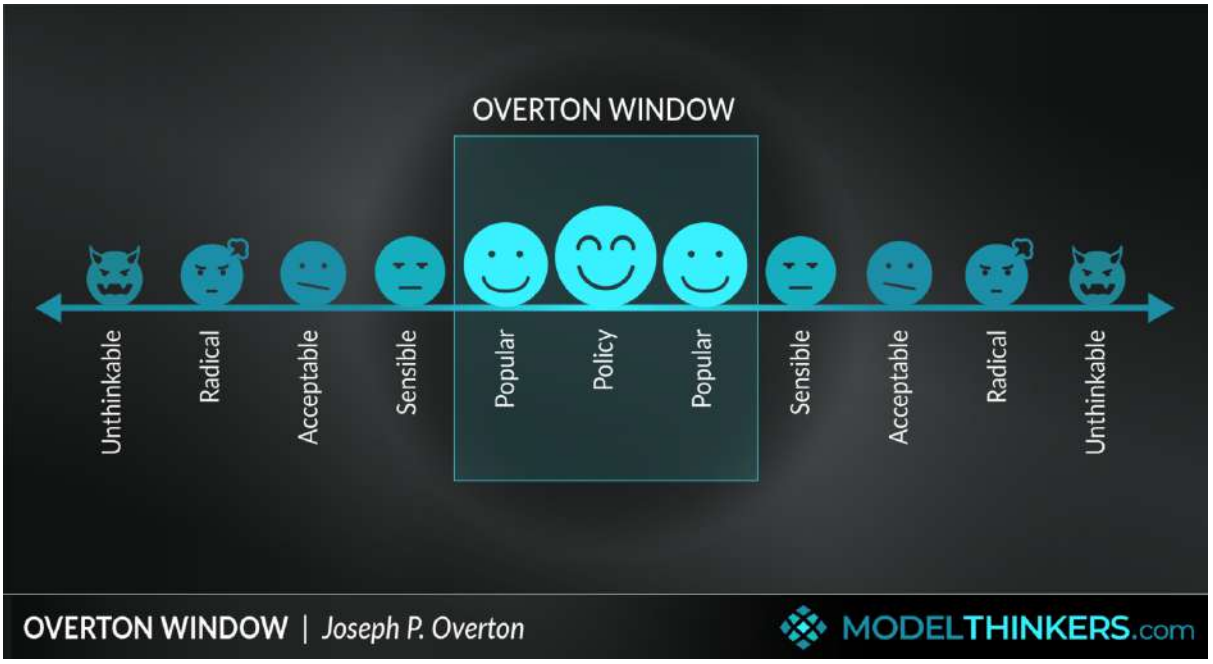
By D. Casey Flaherty on January 1, 2023



Winter is coming and many legal departments will be left in the cold.

Let's get a difficult conceptual issue out of the way. This is a long post that some might construe as a criticism of large corporate legal departments. It's also a preview of LexFusion's Second Annual Legal Market Year in Review. See Post 280 (First Annual Review). So it's fair to ask, "why is LexFusion's Chief Strategy Officer spending so much time delivering a difficult set of truths to his company's largest category of customers?"

My answer is two-fold. First, the LexFusion model does not work over the long run, or nearly as well as it could, unless we are helping solve significant operational and strategic problems. See Post 203 (discussing LexFusion business model). Second, as a lawyer counseling other lawyers, I owe them my honest assessments. And more so than any of my prior legal jobs, the LexFusion perch, with literally thousands of industry meetings per year, lends itself to root cause analysis. Root causes can be

difficult to communicate and even more difficult to hear, but they're also the ground floor of virtually all sustainable solutions.

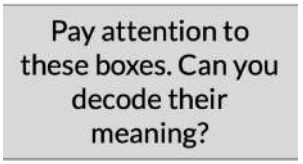
With two years under my belt at LexFusion, I have more to say than last year. Hence, Bill has been kind enough to publish this preview essay. Taking advantage of the elongated Holiday weekend, tomorrow we'll publish our co-authored Second Annual Legal Market in Review. See Post 348. Many thanks for your readership.

* * *

This preview essay is about the organizational and business problem of complicatedness, which afflicts most of the world's large and growing companies. See Reinhard Messenböck, et al., "How Complicated Is Your Company," BCG, Jan 16, 2018. More pointedly, however, the complicatedness inherent in running a large business interacts with legal and regulatory obligations in ways that create ~~very serious~~ existential risk management problems that lawyers are supposed to spot and head off.

None of this is anyone's fault. That said, as professionals, we need to get this problem into focus.

Trust is a good thing, but it rarely exists at scale



When I went in-house at an automobile company and first made the rounds introducing myself to business stakeholders, I employed self-deprecating humor to break the ice:

> I'm from legal, and I'm here to help.
>
> [*pause for sighs and groans*]
>
> I know, I know. If finance and legal ran the company, we'd simply shut down. Zero cost. Zero risk. It would be perfect!
>
> [*pause for modest laughs*]

> I recognize I need to earn your trust. The burden is on me to convince you I share your interest in selling cars.
>
> I can't promise I will never tell you "no." But I can promise I will not only explain these irrational constraints in practical, actionable terms, I will also work with you to devise how we might operate within these constraints to execute on the mission: sell more cars.

This worked, a little. My stakeholders chuckled. They were more open in subsequent interactions. But earning real trust took real time. Day after day, I had to prove my commitment to making the company money and advancing stakeholders' personal careers, despite often being impelled to deliver disappointing truths about how external regulatory complexity frustrated otherwise sound business logic.

I never uprooted the deeply ingrained operating assumption that legal was, at best, the *department of slow*, and, more often, the *department of no*. The best I could achieve was individual exception status.

I was not alone in being an exception. Indeed, exceptional in-house legal professionals are everywhere. Truly exceptional in-house departments, however, seem to exist mostly in the imagination. Great people. Good intentions. Bad systems. Structural barriers to change.

This is not to dismiss many worthwhile achievements in legal and operational excellence, especially outstanding individual contributions and elegant, department-level innovations in service delivery. But it is to say, bluntly, that **most of what exists at the enterprise level is painfully insufficient**. The delta between the business demands on law departments and the capacity for law departments to meet those demands is only increasing, as are the consequences thereof.

For completely comprehensible reasons, most law departments are poorly calibrated to meet the current needs of their business at scale or pace. Most law departments are even more ill-prepared for the wars to come, large portions of which they will observe from the sidelines.

I cannot emphasize enough how well I recognize that what follows sits stubbornly at the extreme end of the easier-said-than-done spectrum. That some things are hard, however, does not make them any less true.

The 0.03% cul-de-sac

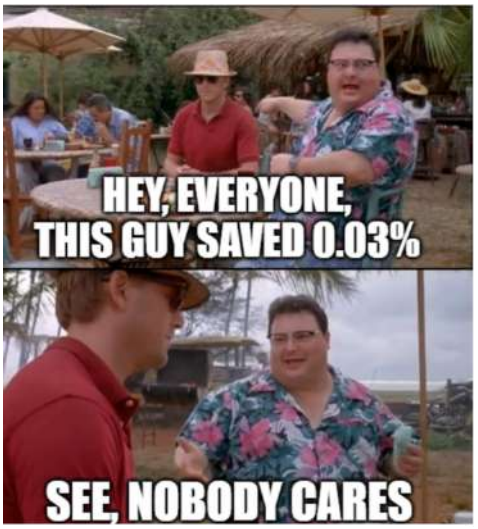
In September, ACC Legal Operations shared a LinkedIn post I found perplexing.

You are not interesting enough to be offensive

Per the below screenshot, the typical legal ops team is dropping ~0.03% of revenues to the company bottomline–a finding that is unsurprising as it is underwhelming. More befuddling than the post was the excited, celebratory comments that followed—along the lines of, "This is remarkable! Should be on every Legal Ops deck." and "What a powerful finding!" Of course, I chimed in with my typical tact and restraint.

It is easy enough to reframe the same finding more compellingly. For example, 0.03% represents an annual savings of $12.6m for the median Fortune Global 500 company ($42.1B in revenue). This translates to almost $160m in savings if the lower cost basis is maintained over a decade of

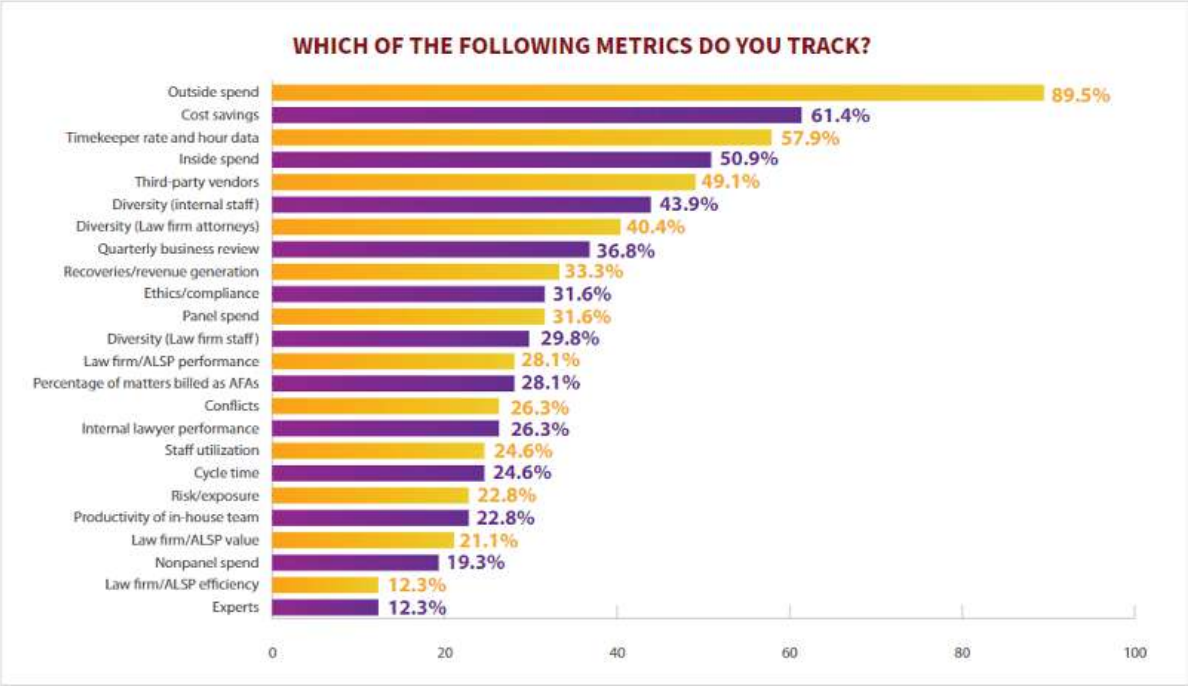
modest growth. The larger the company, the longer the time horizon, and the more aggressive the growth projection, the bigger these numbers become—which, is to say, significant in raw terms.



If the objective was to advocate for legal operations based on savings impact, many alternative presentations of the same finding produce more persuasive numbers. Indeed, I regularly deploy similar figure to support *my counterargument* that savings on legal spend is too inconsequential to be considered a rounding error. See, e.g., Stephanie Corey & Casey Flaherty, "Saving is a not a strategy," ACC, May 12, 2022 (noting that "a fractional amount of a fractional amount" is not enough savings to help the business).

My advocacy on this point sits comfortably outside the Overton Window (i.e., the range of socially acceptable opinions). A demonstrable reduction in near-term spend is not necessarily a marker of success. But more to the point, successfully integrating legal operations should often result in *more fiscal resources* being directed to legal—at least, in the near term, where investment is required to fund long-term projects designed to solve for scale. Part of our skillset as legal operations professionals is the ability to frame our ask for incremental resources in the language and metrics of the business. And in every case, we use value storytelling to show how modest investments in legal operations are going to create and preserve business value. See Casey Flaherty, "Value Storytelling – Summary," *3 Geeks*, Oct 21, 2021.

Because "savings" on legal spend is mathematically uninteresting from a business perspective, it is problematic that savings is law departments' sole standard KPI (spend, rates, and hours are data points in the savings calculus). Yet, per the 2021 Blickstein Group survey, that appears to be our focus:



Overcoming our origin story

Law departments center savings in their value narrative because this is what the business expects. "*We can, and should, spend less on legal*" is a hyper-palatable partial truth.

> Never forget what you are. The rest of the world will not.

It is important to remember that virtually every corporate law department came into existence because legal bills seem too high for the attendant service levels. That is, the origin story of most law departments is not a happy one. Frustration with outside counsel is endemic. Expensive. Nonresponsive. Inadequately familiar with the business. In-house counsel emerged as an alternative to outside counsel. More embedded (better). More accessible (faster). More affordable (cheaper).

Cheaper, however, is the only benefit quantifiable in a manner most business stakeholders will ever care to understand. Responding to organizational incentives, law departments over-index on savings while operating on the truncated time horizons of annual budget cycles and intermittent cost-cutting manias. The 2021 EY Law Survey found that 88% of general counsel are planning to reduce the overall cost of the legal function over the next three years, with 50% saying those reductions will be

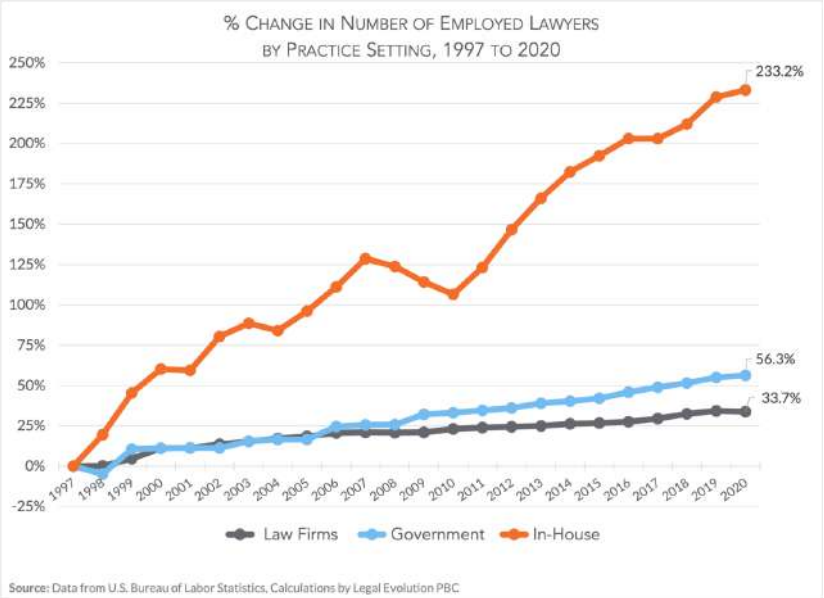
20% or more. (This is, in short, *bonkers*, but more on that later.) And that was before recessionary fears took hold.

As we all known, the quickest path to savings is to demand discounts from law firms. Performative cost savings—"rack-rate kabuki"—has proven an effective stop-gap measure to fend off the internal cost-cutting authorities. Thus, law departments are inclined to double down on discounts and their frequently misguided mutations (e.g., outside counsel guidelines, panels, RFPs, most AFAs). *See* "Trust Fall: the limits of discounts, panels, billing guidelines, etc.," 3 Geeks, Dec 5, 2022.

But slowing the growth rate of external spend leaves the savings craving unsated. Because of the mutual failure to forge true strategic partnerships, see Post 069 (discussing Microsoft's efforts in this area), most law firms remain too expensive for business-as-usual work. In contrast, over the years, insourcing—the captive law-firm alternative—has delivered substantially more savings impact than tinkering around the edges of legal buy.

While associate salaries and hourly rates garner consume much of the oxygen in the legal press, Varsha Patel, "General Counsel are Unwilling to Pay the Price of the Industry's Latest Salary War," *Corp Counsel,* Feb 4, 2022 (familiar headline for anyone with 20 years in legal), insourcing has been the story for several decades.

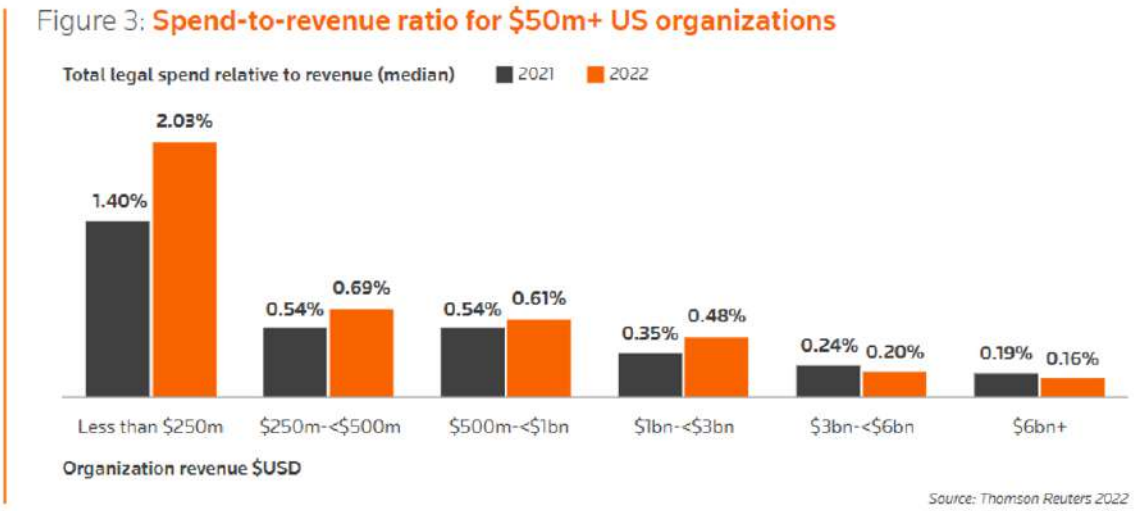
As noted in Post 262, there are now more lawyers working in legal departments in the US than the domestic office of AmLaw 200 firms–partners included! Indeed, over the last three decades, in-house legal departments have more than tripled in size while law firm headcount grow significantly trails government. According to the most recent ACC Benchmarking Survey, 54% of corporate legal spend has moved in-house. See Phillip Bantz, "In-House Spending Eclipses Outside Spending in New Legal Department Benchmarking Survey," *Corp Counsel*, June 14, 2022.



The insourcing saving math

The insourcing savings math is not as simple as discounts, but it is simple enough, and more defensible. While baselining eventually becomes a subject of fierce debate, the initial pitch is intelligible and digestible: "*we are currently spending $X on this externally; we will save Y% if we insource.*"

The pitch is appealing. Insourcing moves relative spend in the preferred direction and reinforces the expectation that legal spend should decrease over time. Moreover, as shown below, this statement is generally true when cost is expressed as a percentage of overall company revenue.



Source: Thomson Reuters 2022 State of Corporate Law Departments repor

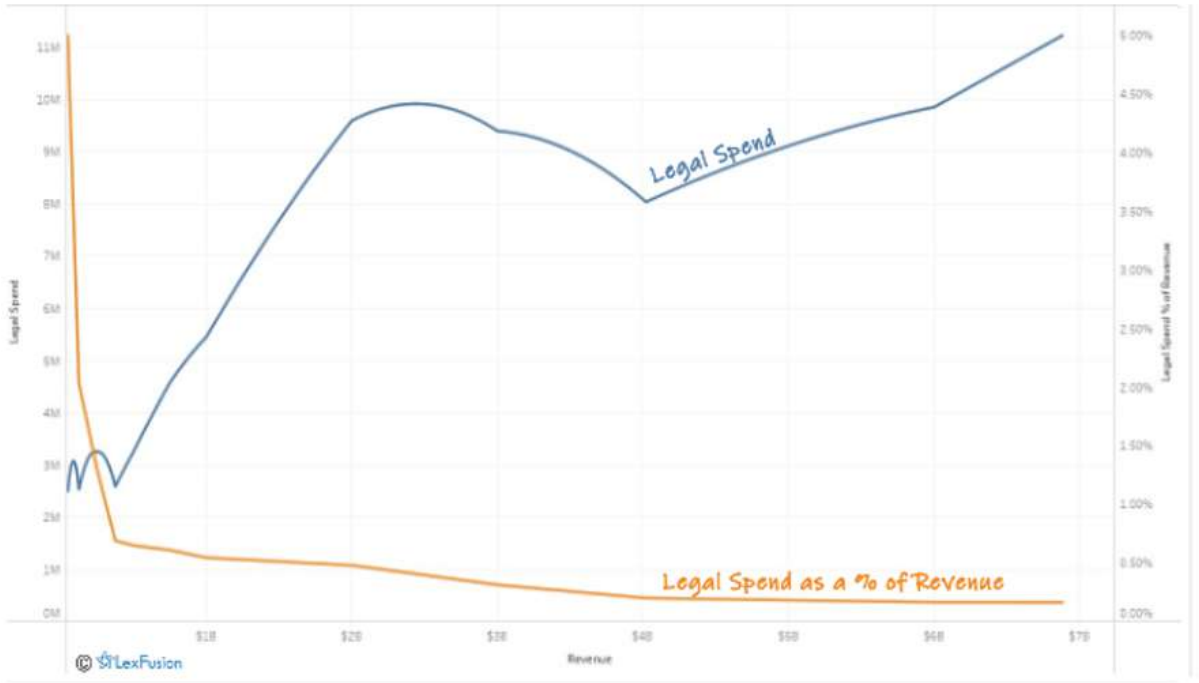
While many factors drive down relative spend, insourcing plays a starring role. Insourcing delivers immediate, measurable savings—until it doesn't, because savings stop being sufficient.

> When enough people make false promises words stop meaning anything. Then there are no more answers, only better and better lies.

In the above chart, let me draw your attention to two salient points. First, when I made my crack about saving on legal spend being "too inconsequential to be considered a rounding error," I fudged a bit, as that statement is technically limited to right side of the chart, or companies with >$3 billion per year in revenue. Albeit, my observation has a lot of practical meaning because the companies on the right side of the graphic (approximately 1,500) make up nearly 50% of the total US GDP and account for roughly a quarter of the total spend with law firms. See Post 286 (Bill pulling helpful data from the US Census Bureau).

Second, note how precipitously the precentages fall. Obviously, between "less than $250m" and "$250m-<$500m", the savings as enormous. Yet, as a percentage of company revenue, the $3b-$6b band is spending less than a third of companies in the $500m-$1b band.

Modeling out these numbers reveals that, early in a company's lifecycle, law departments can achieve meaningful reductions in *raw* spend.



In a very short window in a company's lifecycle, the percentage of revenue figure shrinks to almost nothing (from the perspective of business impact) but never reaches zero. It's what statisticians call an asympote. As a result, legal spend eventually returns to a mostly inexorable upward trend congruent with business needs.

A fleeting sense of happiness and safety

> A day will come when you think you're safe and happy, and your joy will turn to ashes in your mouth.

The saving math becomes less compelling even when the raw dollars remain significant. Sure, you're saving money, which appeals to the cost-cutting obsessions of senior management. But you're also proposing to add quite a few expensive FTEs, which sets off the corporate allergy to headcount. Irresistible force. Immovable object.

For a variety of reasons, there are limits to the number of human persons corporations are willing to employ at a given time. And the same preferences that inform not allocating infinite fiscal resources to legal extend to not allocating infinite FTEs to legal.

As legal headcount swells, the savings math loses its potency, and legal is pressed to explain why it cannot get by with all the heads it already has.

That is, inquiring minds want to know what these growing ranks of in-house legal professionals actually do.

To contextualize the perilous position of most legal departments that serve large organizations, scroll back up to the Blickstein law department metrics and endeavor to identify that which might be used to support a business case not centered in savings. Examine the number next to potential candidates—*see e.g.,* cycle time, 24.6%—to internalize how few departments are positioned to make anything that resembles a business case based on business impact.

Exclude savings and most law departments are not positioned to say much of anything. Meanwhile, the monomaniacal focus on saving only reinforces the enterprise view of the law department as an inefficient cost center—rather than an effective value center. This entrenched perspective makes the hard job of securing resources even harder, especially because many law departments struggle with self-awareness.

Although some readers may find this characterization harsh, untrue, and unhelpful, the industry data is overwhelming on this point.

According to the Onit Enterprise Legal Reputation Report, 95% of law department respondents considered their department efficient in managing service requests and 75% feel the strength of their relationship with the business is solid. The business does *not* concur. 73% of enterprise employees perceive legal as a "bad business partner" and 65% admit to intentionally bypassing their law departments to get their work done. See also Post 040 (John Grant getting identical findings in a large corporate legal

department to the dismay of the in-house lawyers who hired him).

The poor perception of lawyers among their business colleagues is partially driven by the reality that the business and the law department are often misaligned. According to Gartner, when legal guidance is too conservative, business decision-makers are 2.5x more likely to forego or suffer delays in capturing business opportunities. They are also 4x more likely to scale back the scope of an opportunity in response to legal guidance. As a result, "overly conservative legal guidance—in other words, guidance that does not align with the business's risk appetite—creates a **loss of $672,000 in value per lawyerannually**." Bryan Jordan, "Legal Must Help the Business Take Smart Risks to Grow," *Gartner Insights*, Oct 18, 2019.

Most law departments are poorly situated to capture hearts and change minds. They cannot explain why their current resource allocation is optimal (*spoiler*: it isn't) and are at even more are of a loss to justify why additional investment in legal is a prudent use of finite funds and headcount (*hot take*: it is), especially once savings stops being persuasive.

The resulting delta between demand and resources is reaching crisis levels. Indeed, consider the following headlines, all from 2022:

- "Legal Departments Are Eager to Do More with Less But Are Fuzzy on the Path," *Corp Counsel*, Fegb 14, 2022
- "'We Will Have to Do More With Less': Pressures From All Directions to Test Legal Departments in 2023," *Corp Counsel*, Oct 11, 2022.
- "Chaos, Complexities Overwhelming In-House Lawyers," *Corp Counsel*, Sept 28, 2022.
- "In-House Lawyers Are Stressed and Want to Walk Out," *Corp Counsel*, Oct 12, 2022.
- "Legal Departments Report Swelling Workloads—but Without Budget Increases," *Corp Counsel*, Oct 13, 2022.
- "Weak Earnings Reports Add to Legal Departments 2023 Anxieties," Law.com, Oct 27, 2022.
- "'Collision Course': Rising In-House Workloads Run Up Against Cost-Cutting Mandates," *Corp Counsel*, Dec 12, 2022.

We’ve got a complexity problem

The chronic underfunding of law departments tends to worsen over time, as does the fallout therefrom for the business.

The night is dark and full of terrors.

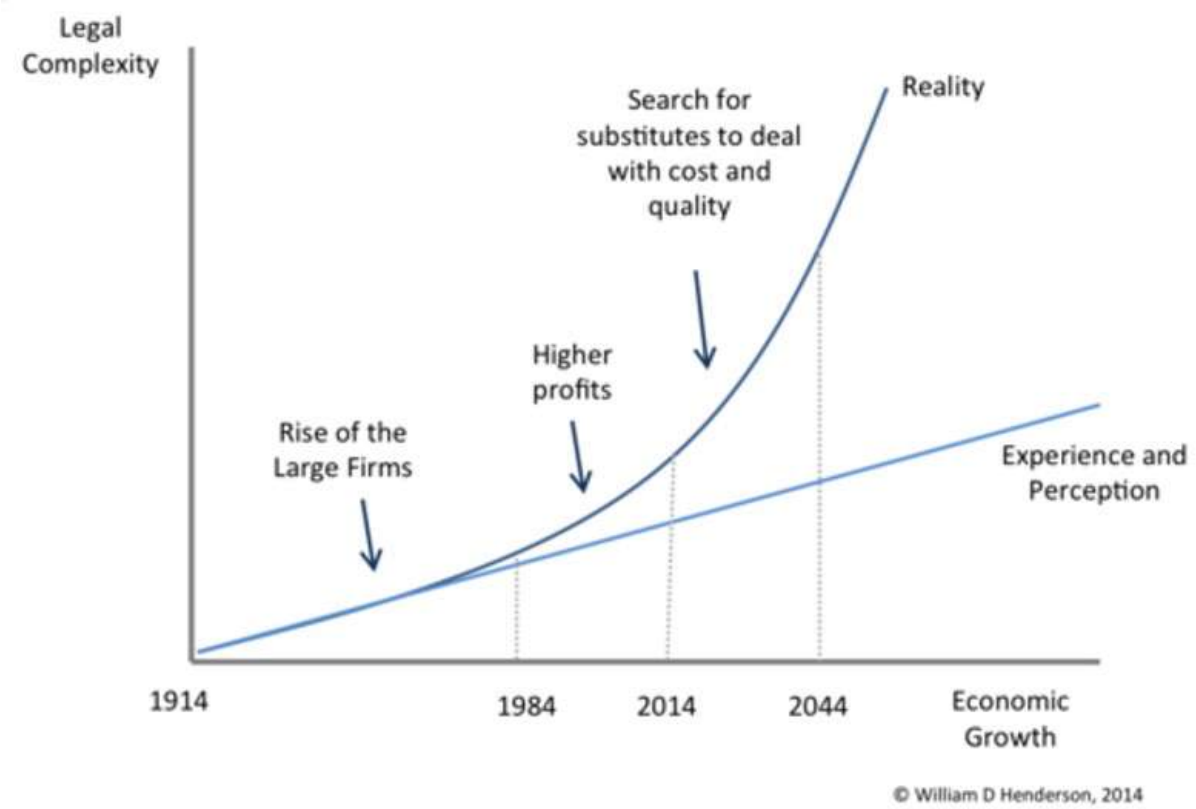
What is true, underappreciated, and unquestionably annoying is that even businesses that have entered cost-cutting mode may experience a net increase in legal needs because the complexity of the external operating environment continues to explode.

Noel Semple

As Professor Noel Semple observes, “We live in a law-thick world. To secure a benefit or avoid a loss in this world, we often find that we must somehow use the law. This is as true for global corporations as it is for ordinary individuals[.]” *Legal Services Regulation at the Crossroads* at 3 (2015).

It ought to give us pause that the world’s richest corporations want the benefits of law yet are simultaneously underfunding their own legal department. What is this happening?

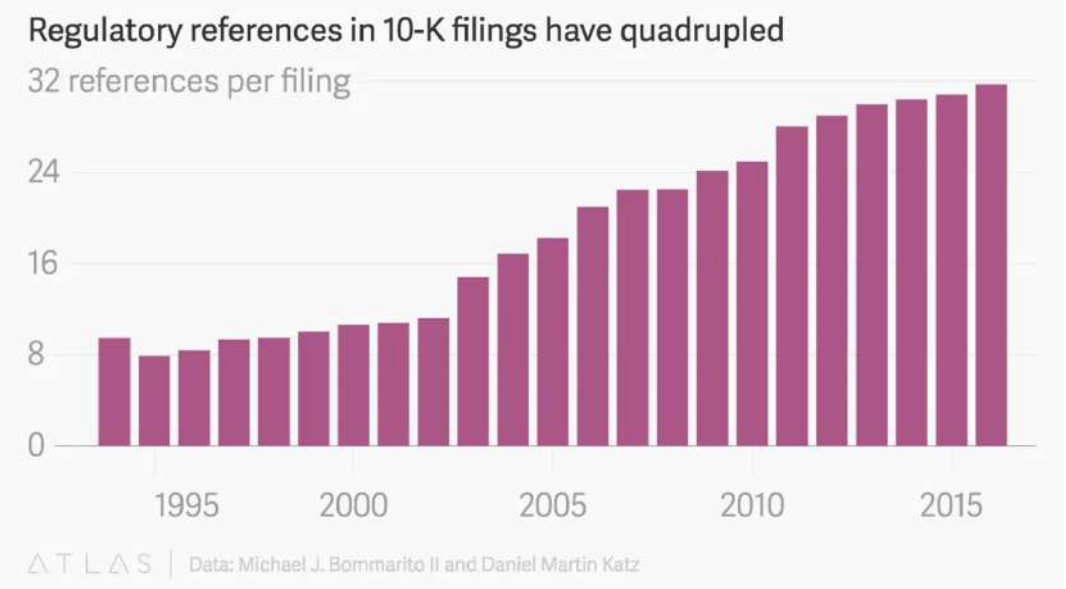
Nearly a decade ago, during the Legal Whiteboard days, Bill Henderson published the chart below, which makes the simple but important point that in a rapidly globalizing world, every unit of economic growth carries with it an ever larger burden of legal complexity. Thus, over time, assessing the benefits and protections of law becomes corresponding more expensive.



Source: Bill Henderson, "A Counterpoint to 'The most robust legal market that ever existed in this country'," *Legal Whiteboard*, Mar 17, 2014.

Our law-thick world thickens by the day, and to the extent we failed to invest in new systems to keep pace with the growing cost and complexity of properly managing our legal affairs, operational risks accumulate. Today, Regalytics, a regulatory update provider, estimates "there are over twenty-five thousand regulators in the US, and more than **five million** globally."

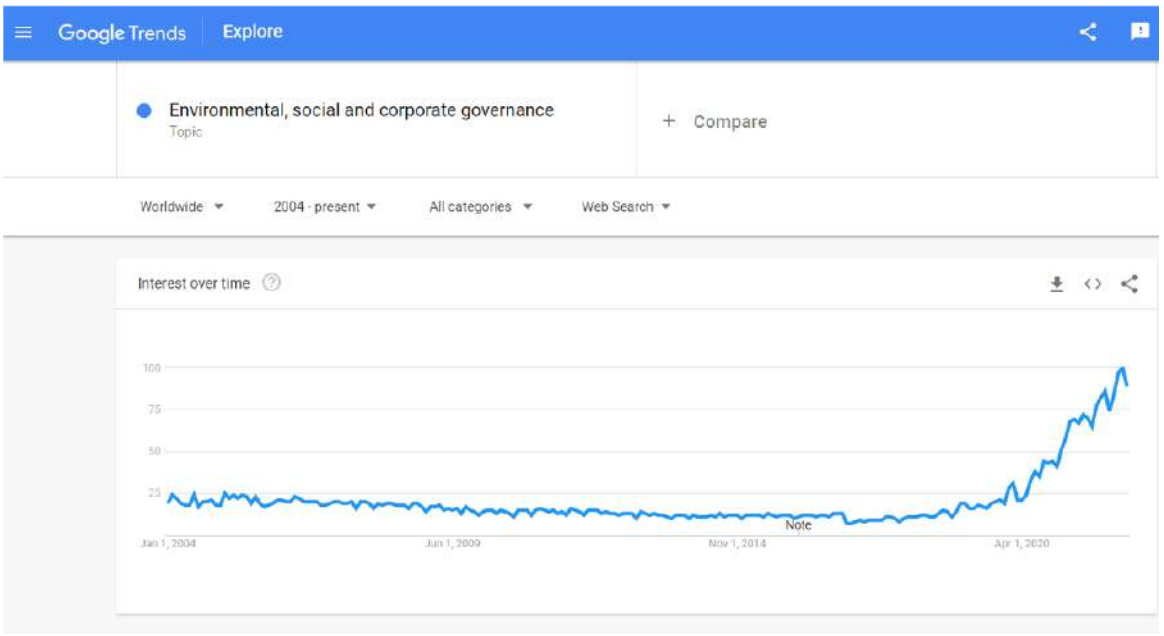
Regulators regulate. Further, regulations don't merely accrete–they overlap, intersect, and, often, as you cross borders, conflict. Professor Dan Katz and his collaborators have quantified the resulting complexity in a variety of ways (*see* here, here, here, here) with my favorite being citations to regulations in corporate 10-Ks, the best available artifacts of what businesses themselves identify as materially affecting their economic performance:



Source: Christopher Groskopf, "The rate at which US companies cite regulations as an obstacle has quadrupled over the last 20 years," *Quartz*, Jan 5, 2017.

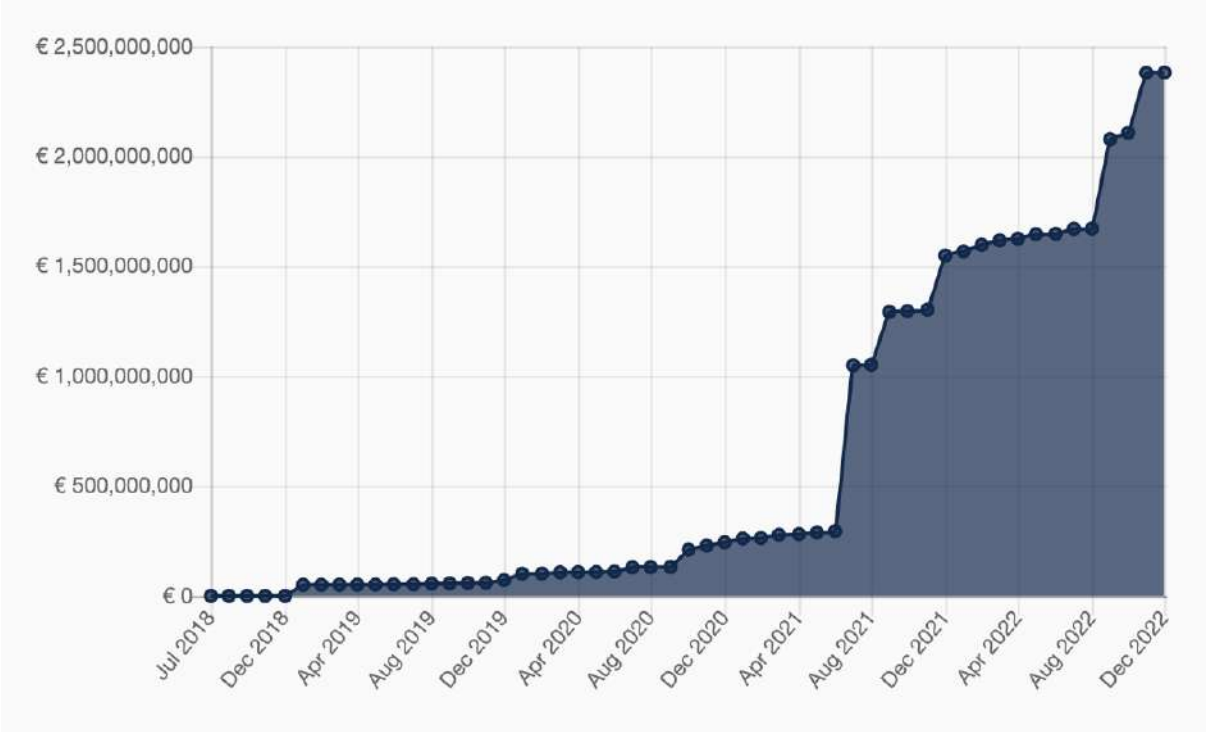
Jae Um summed up her own work on "the silent in explosion of demand" thusly, "It's up. Like, a lot." See Posts 216, 218, 279.

Consider the new hotness: ESG (environmental, social, and governance). The term was virtually unknown a few years ago. In a blink, ESG became a fertile ground for regulatory expansion, resulting in shareholder activism, litigation, fines, and all manner of net-new complexities that demand deft navigation.



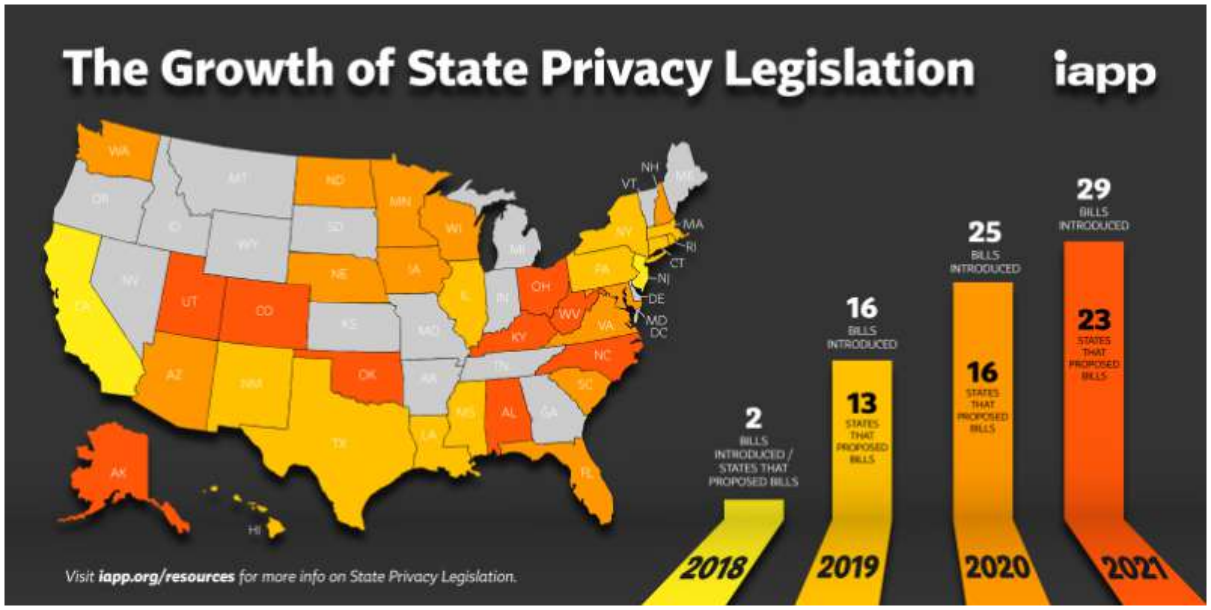
Corporations must navigate new regulatory landscapes that introduce new risks for the business and generate new work for the law department. Yet, as mentioned earlier, 88% of general counsel are planning to reduce the overall cost of the legal function over the next three years, with 50% saying those reductions will be 20% or more. Because math is a harsh mistress, it is unsurprising that ESG is both labeled a “high priority” and yet represents an area where corporations suffer from a substantial “lack of readiness,” per an August 2022 survey. See Susan Reisinger, “Companies Call ESG A Top Priority But See Lack Of Readiness,” *Law360*, Aug 30, 2022.

ESG is the latest in a long line of complexity-increasing regulatory expansions that overlap, intersect, and conflict. The meteoric rise of ESG looks strikingly similar to the fines under GDPR, as tracked by CMS. Fines are a lagging indicator of the emergence and impact of data privacy laws.



Source: Fines Statistics, CMS Enforcement Tracker (January 2023)

Like ESG, data privacy was not actually a thing—from a business regulatory perspective—until it was. And then it went parabolic. Recent data from the IAPP provides an example very close to home.



Meta: when legal risk begin to swallow the business

To get concrete on the business impact, contemplate the journey of our friends at Meta, who faced minimal regulatory resistance as a startup but ultimately encountered "regulatory headwinds" that led to a $251 billion single-day drop in market valuation, the largest in history. Since January of 2022, Meta's market cap is down 75%, or $750 billion. See "Does A $750 Billion Decline In Meta's Market Cap Make Sense?," *Seeking Alpha*, Nov 15, 2022.

This seismic stock market nosedive occurred long after a $5 billion settlementwith the FTC, which should not be confused with the pending $7 billion class action in California or the $3.2 billion class action in the UK—all of which inform, but are distinct from, the $20 billion derivative action against the Facebook board in the Delaware Chancery Court, which has been called "the mother of all lawsuits."

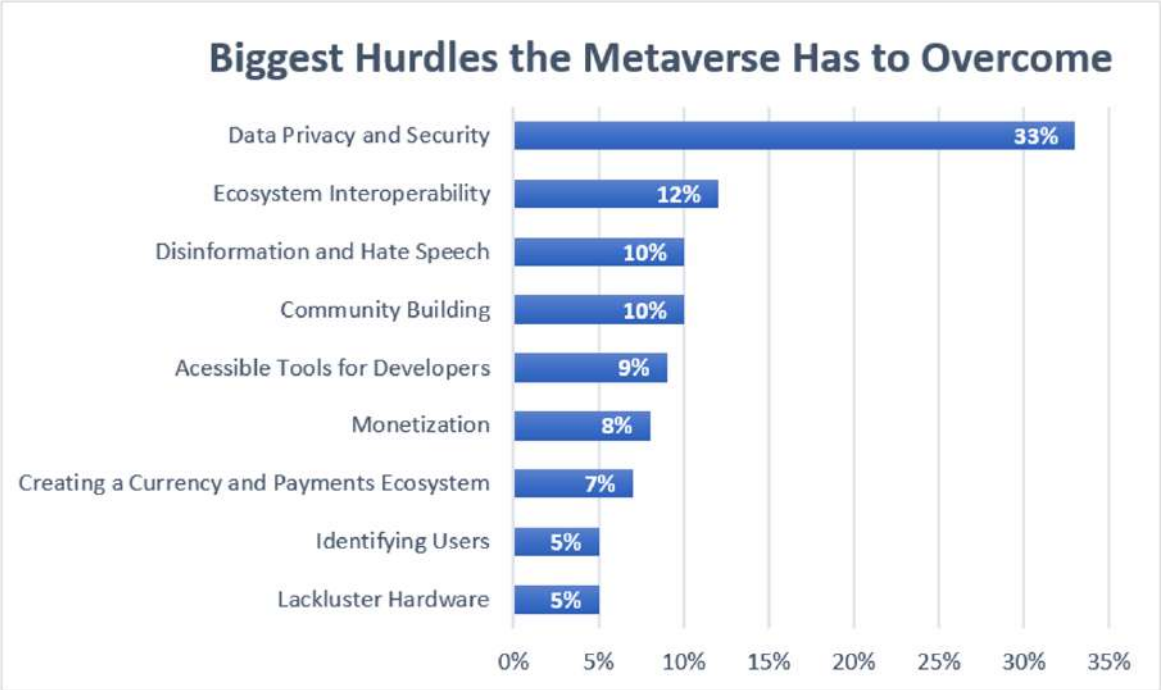
Big as these numbers are, fines and damages can be far less damaging to Meta's core business than the regulatory climate's impact on the larger ecosystem—like being forced to jettison advertising tools (how Meta makes

its money) in a settlement with the US Justice Department related to allegations of discrimination, or being blocked from making strategic acquisitions (a primary path to growth) by the Federal Trade Commission due to anti-trust concerns. To compound matters, Apple's new privacy features will likely cost Meta $10 billion in lost sales. See Katie Conger & Brian X Chen, "A Change by Apple Is Tormenting Internet Companies, Especially Meta," *NY Times*, Feb 3, 2022. Is that itself a potential antitrust violation? Expect no one in Washington to care.

There is an entire "Lawsuits involving Meta Platforms" Wikipedia page. The page starts in September 2004 with the film-inspiring allegations from the Winklevoss twins, one of only 3 entries for the 2000's. The 2010's were more active, with 32 lawsuits identified as wiki worthy. Despite only being 30% into the decade, there are already 35 lawsuits listed for the 2020's, including 16 in 2022.

Given the unprecedented valuation drop–again, largely attributable to an unfavorable regulatory environment's impact on earnings potential–and a general economic slowdown that has rocked big tech, it is completely understandable if Meta executives would prefer to slash what must be astronomical legal bills in order to allocate increasingly scarce resources to the technical and marketing challenges of their massive bet on the Metaverse, currently costing ~$3 billion *per quarter*. See Nelson Wang, "Facebook Parent Meta Loses $2.8B on Metaverse Division in Q2," *Coindeck*, July 27, 2022.

The business implications of a $12b per year—that's billions with a "b" —investment make traditional legal spend metrics look like chump change. Saving $100m on legal would be impressive but also only 0.8% of the annual Metaverse investment and 0.1% of Meta's FY2021 revenue. Critically, as shown in the below chart, legal considerations appear far more material to the success of the Metaverse than 0.8%.



Source: *Venture Beat* citing a study from Agora.

Work not getting done, business units bypassing legal

Given flattening/declining resources, the insourcing allergy, and exploding regulatory complexity, 75% of general counsel recognize that growth in workloads will outpace budget. See Cornelius Grossman, "The General Counsel Imperative: how do you turn barriers into building blocks?," *EY*, Apr 7, 2021 (citing results from EY survey).

Paint stripes on a toad, he does not become a tiger.

A persistent delta between work to be done and the resources available will result in *work not being done.*

In the normal course of business, the most conspicuous impact of insufficient legal resources is lengthened response times resulting in reduced business velocity (Dept of Slow). Being underwater can also amplify legal's risk aversion due to the lack of time to perform analysis and engage with stakeholders (the Dept of No; because "no" feels like a safer default setting). While manifesting as a superficial restraint on business activity, the natural friction of insufficient legal support can actually increase the business's overall risk profile because unresponsiveness further activates the natural desire to circumvent legal in the first instance.

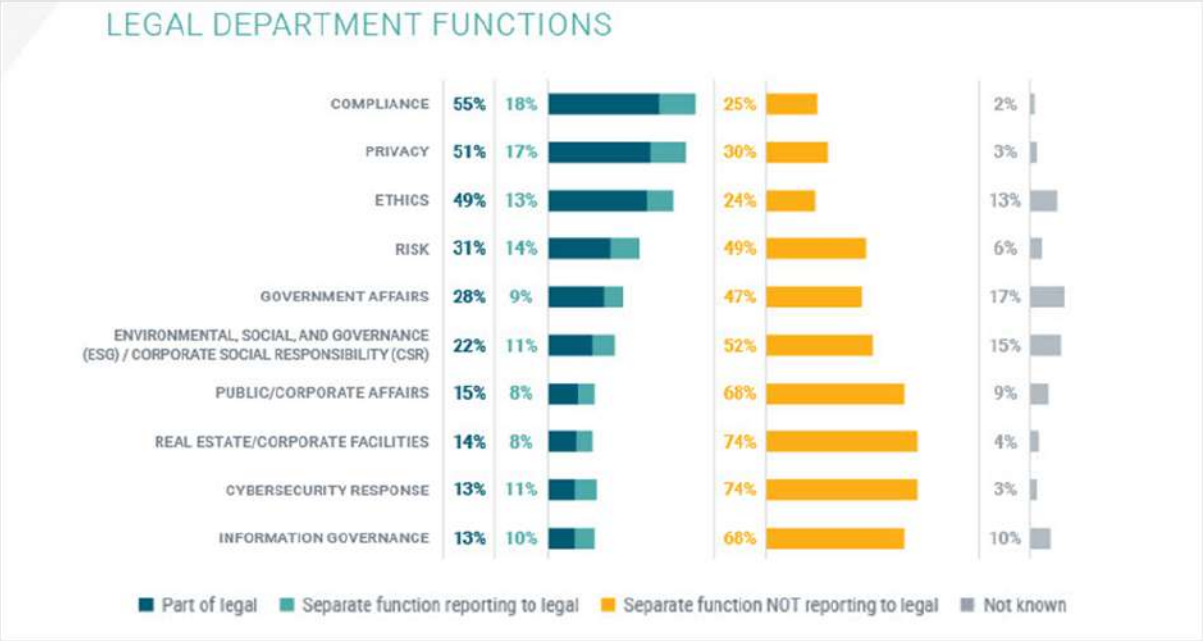
Despite negative internal perceptions, calibrated legal expertise becomes more valuable with every passing regulation. And the most critical impact of insufficient legal guidance is the accumulation of operational risks. When balls get dropped, bad things happen, eventually.

As latent regulatory risks become persistent business pain, sophisticated corporations respond. They begrudgingly direct more fiscal resources to the strategy-enabling expertise required to better navigate an increasingly law-thick world.

But many of the newly allocated resources are not routed to the law department, which is viewed as having not been up to the task in the first instance.

While I regularly cite the inconsequential nature of legal spend as a percentage of revenue and the resulting microscopic ROI of “savings” on legal, I am convinced the spending numbers are significantly larger than reflected in the survey data. Rather, extensive market listening (LexFusion met with 435 law departments last year) suggests that corporate spend on what would be traditionally considered legal advice is much higher than what is reported because what is reported mostly comes from law departments, which represent a shrinking share of legal-related spend.

Unfortunately, I lack the stats to fully substantiate our impressionistic sense. But law departments, too, are in the dark. Nonetheless, they know some of what they don’t know with respect to the other functions whose remits involve a substantial level of navigating legal complexity. From the same ACC 2022 Law Department Benchmarking Report that found the 0.03% savings impact of legal operations, consider the following graphic:



On the one hand, I don't care whether a particular chief legal officer or general counsel expands their corporate dominion. On the other hand, none of this is about the law department, let alone any individual therein. The raison d'etre is, as always, the business.

Redundancy can increase the reliability of a system. Redundancy, however, comes at a cost. My core concern is not the stature of law departments but the creeping complicatedness of business.

Complicatedness as a general business problem

Several years ago, some very talented business consultants at BCG started publishing some very useful analyses on the business problems of the modern world, particularly as applied to very large organizations that are attempting to do business on a global basis.

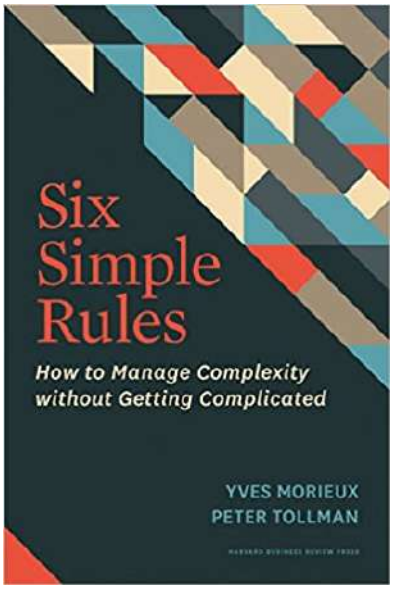
You don't cure a disease by spreading it to more people.

The core issue underlying their analysis is "complicatedness," which they define as the increase in organizational structures, processes, procedures, decision rights, metrics, scorecards, and committees that companies impose to manage the escalating complexity of their external business

environment." Reinhard Messenböck, et al., "How Complicated Is Your Company?," BCG, Jan 16, 2018.

Specific to the present discussion, "organizational structures and processes typically increase in complicatedness as new units and functions arise." Most critically, "complicatedness hampers growth by slowing innovation and the deployment of new products and services. And it cuts margins by injecting inefficiency and cost into operations." Id.

Counterintuitively, the size of an organization does not appear to be an influential factor. Completely intuitively, greater levels of regulation do correlate with higher levels of complicatedness. As the BCG consultants characterized it, organizations that "face daunting levels of external complexity … seem to have mimicked that complexity within their own organizations." Id.



BCG is responsible for the landmark analysis of complicatedness, the fabulous *Six Simple Rules* (2014)(h/t to the fabulous Jae Um for putting it on my reading list). When they released the book in 2014, BCG calculated that while business complexity had increased 6x, organizational complicatedness had increased 35x—i.e., unchecked, internal complicatedness tends to increase at a multiple of external complexity. The resulting demotivating labyrinth is one of the reasons, as I once observed far less eruditely, that "[e}very institution, no matter how venerable, looks like a goat rodeo from the inside." Flaherty, "The Legal Department Goat Rodeo," 3 Geeks, July 15, 2018.

One driver of complicatedness is that those responsible for creating it—and addressing it—are often insulated from experiencing it:

Every organization's top leaders have a substantial impact on its degree of complicatedness. Yet as a rule, they fail to perceive just how much their company's complicated activities, processes, and interactions reduce

employee productivity. They are not regularly in the trenches, so they rarely feel the painful effects of complicatedness.

Moreover, they typically don't need to live by the many rules and procedures they create and instead can work outside the systems that apply to their workers. Our findings suggest that many managers take little responsibility for how complicated life is for their employees. Many of them even believe they are quite successful at reducing it.

But if company leaders and senior managers don't have an accurate view of the degree to which complicatedness affects their companies, then any effort to simplify it becomes much more difficult.

Messenböck, "How Complicated is Your Company?," supra.

If you think that all this focus on complexity is just MBAs trying to sell their services, consider Post 321, which reviewed Joseph Tainter's seminal book, *The Collapse of Complex Societies*(1982). Although complex societies generate massive increases in output, the process of always getting more from less necessarily requires ever greater levels of planning and ingenuity. Eventually, the costs of one more unit of "solution" outweigh the benefits. With no more options to save itself, the polity collapses under its own weight. To me, it seems eerily similar to BCG's complicatedness thesis.

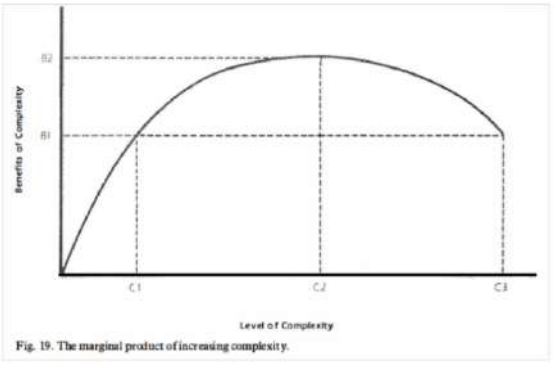


Fig. 19. The marginal product of increasing complexity.

Source: Tainter, *The Collapse of Complex Societies* at 119.

Another driver of complicatedness is that organizations do not typically converge on optimal outcomes but, rather, choose satisficing paths of least resistance. Herbert Simon won the Noble Prize in Economics for developing the concept and explained in his acceptance speech, "decision makers can satisfice either by finding optimum solutions for a simplified world, or by finding satisfactory solutions for a more realistic world."

In a simplified world, it is less burdensome in the immediate to add new functions to address new problems than it is to properly transform, align,

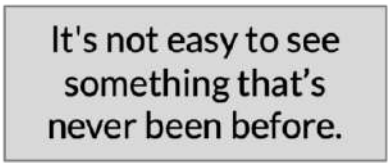
and integrate existing functions. But in a realistic world, new functions, like all functions (in no way limited to legal), focus on fulfilling their narrow mandate to solve for a specific local optimum, often at the expense of the global optimum, including at the cost of increased complicatedness.

When the law department does not appear to be on top of legal issues that impact the business, the business to stand-up a separate function to address issues that need addressing–at least that is how I make sense of the growing number of corporate units that touch on legal but stand on their own. .This may in fact be an operationally sound decision—specialization is foundational to productivity at scale—but requires deep work to ensure alignment and avoid the trap of complicatedness that comes with adding another layer. See Herman Vantrappen & Frederis Wirtz, "Making Silos Work for Your Organization," *Harv Bus Rev*, Nov 1, 2021.

Unfortunately, the strongly siloed nature of in-house legal work is a root cause of the predicament in which we now find ourselves.

Steering clear of labels placed on people

Finally, it is time to set up the actual LexFusion Legal Market Year in Review.



If there is one thing I have learned by listening to, and trying to help my clients, it is that no one is a caricature. Even those who give caricatures credence are rational actors. People behave rationally according to the incentives and constraints of their context. In-house professionals are people. If their behavior appears irrational to us, the most probable conclusion is we lack sufficient understanding of their context.

"Not being yelled at" is an incentive. Alternatively, "being busy" is a constraint.

This context explains a substantial percentage of workplace behavior. People are busy doing that which needs to be done in order to minimize the frequency and severity of unpleasant interactions, especially with their superiors and others who hold positional authority. In most enterprises, operations (getting work done) take precedence over projects (changing

what work is done, and how). As result, our professional aspirations to build proactive systems are constantly subordinated to the backlog of "real work." This was a core observation from last year's LexFusion Legal Market Year in Review. See Post 280 (discussing inherent tension between operations and projects).

Particularly pertinent to in-house lawyers is that "mastery" is also an incentive while "perspective" is another constraint. In-house lawyers have mastered lawyering, and this shapes their perspective. Their perspective is further informed by the narrow mandate for most law departments to operate as lower-cost, more-accessible alternatives to law firms. Law departments, and the people within them, solve for this local optimum by performing the legal work the business sends them as well, quickly, and cost-effectively as they can—i.e., just like a law firm. These professionals are busy doing what they are trained to do, what they are hired to do, and what they are asked to do. See Casey Flaherty," Scary Stories About Our Wicked Problems," *3 Geeks*, Oct 31, 2022 (discussing the mismatch created when we're asked to solve wicked problems).

Indeed, the joke that opened this contemplation could apply to any function. Yes, Finance is obsessed with controlling costs. Yes, Legal is militant about mitigating risks. Take either mission to the extreme, and closing shop is the conclusion. But, unchecked, Marketing will spend like drunken sailors and say things not worth the lawsuits they generate. Unconstrained, Sales will move product at a loss, make impossible commitments, and agree to terrible contracts. Et cetera. Balancing competing incentives and constraints in a large enterprise is not easy—and there is little reason to believe lawyers are outliers in this regard, good or bad.

What the lawyers do is mission-critical. It also is not enough.

Cost discipline is essential business hygiene. But, in most mature corporations, "savings" on legal are too minuscule to be meaningful, especially relative to the business impact of successfully navigating an increasingly complex operating environment.

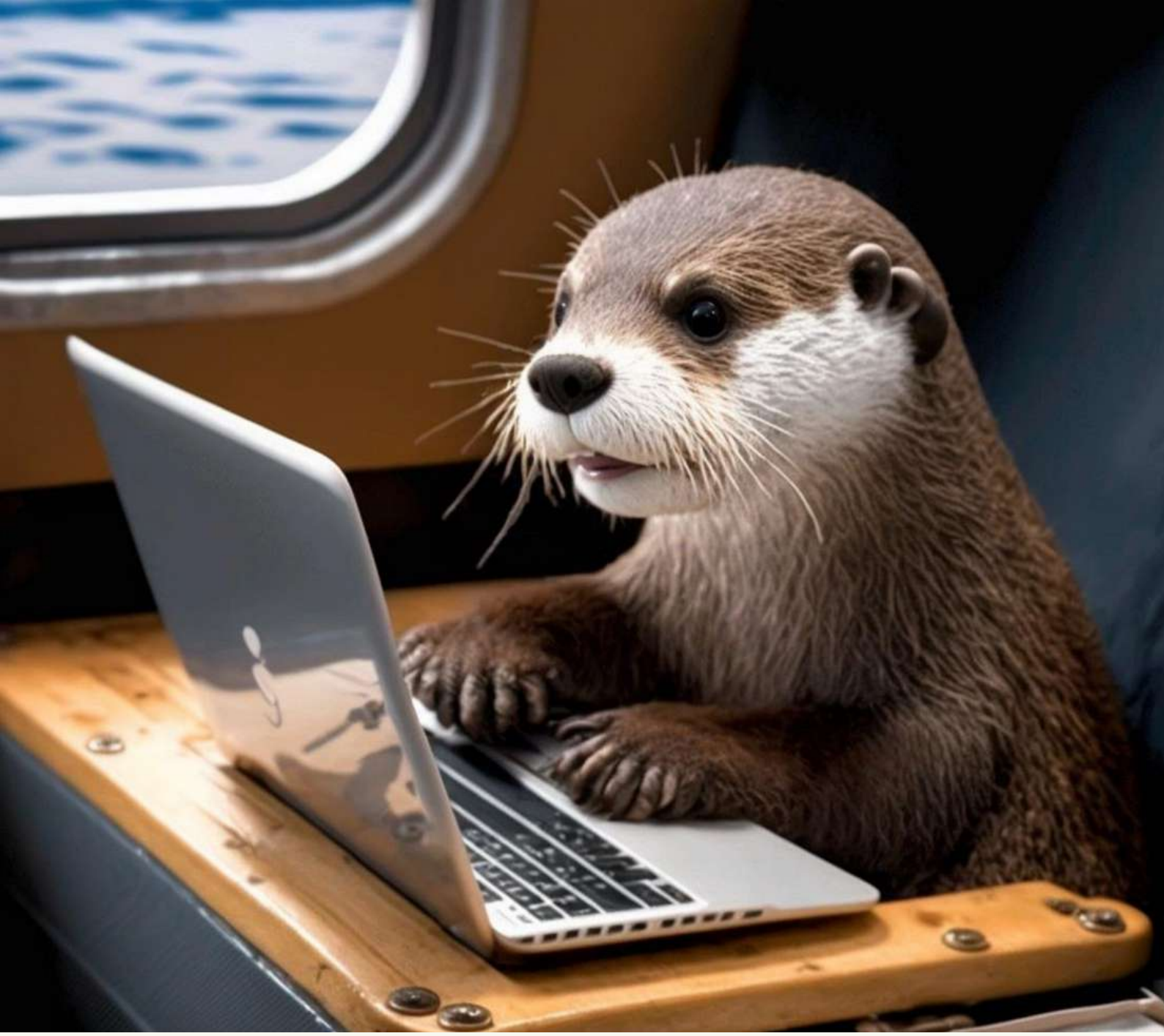
Instead of savings, the better framing is *spend optimization*. Spend optimization is concerned with maximizing the yield from every dollar allocated in order to fund long-term investments that serve the needs of the

business. The actual LexFusion Legal Market Year in Review (348) explores the disconnect between where investments are being made (legal labor) and where investments should be made (scaling legal expertise to enable better business outcomes)

If you've been paying attention and are a *Game of Thrones* fan, you will recognize that all the grey boxes, like the one to the right, are quotes from the show. Much of the brilliance in that wonderous piece of storytelling is how it deployed common fantasy tropes to create expectations that it then violently subverted

> If you think this has a happy ending, you haven't been paying attention.

Tomorrow's Legal Market Year in Review will be more positive in the narrow sense of being more prescriptive, not merely descriptive. See Post 348. But do not hope for hope.



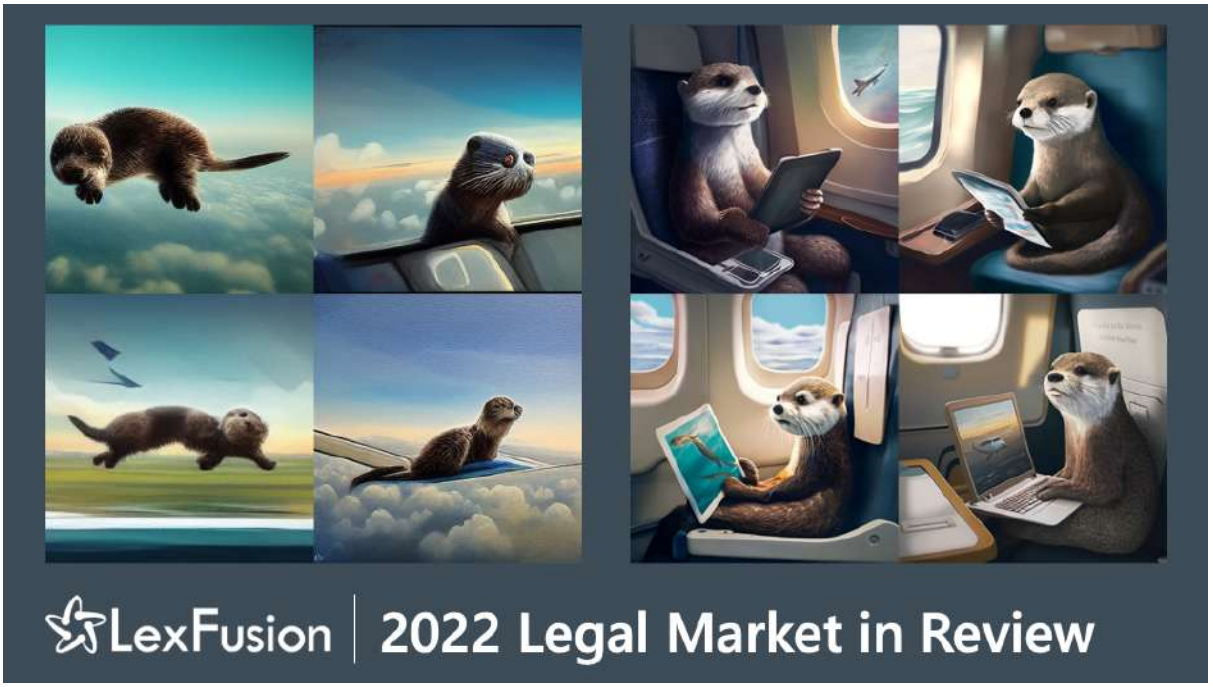
LexFusion's Second Annual Legal Market Year in Review

By D. Casey Flaherty,
Joe Borstein & Paul Stroka

January 2, 2023

LexFusion's Second Annual Legal Market Year in Review (348)

By D. Casey Flaherty, Joe Borstein & Paul Stroka on January 2, 2023



The summer of our discontents

Two months ago, if you prompted Version 3 of the AI-art generator MidJourney to generate depictions of an "otter on a plane using wifi," you were rewarded with the nonsense in the left panel of our lead graphic. A month later, Version 4 could take the same prompt and render, in seconds, multiple detailed drawings that are likely beyond 80% of the population's imagination and certainly beyond 99.9% of the population's acumen at illustration (above right panel).

Imagine what our new year will bring.

This matters. And we shall return to our wifi-enabled Mustelidae further down.

This lengthy essay has a lengthy preview essay authored by CSO Casey Flaherty. See Post 347. These two essays reflect nearly everything we are learning through our industry meetings. Although the act of writing is a crucial step in crystalizing our thinking for ourselves and our clients, we've done our best to make these essays enjoyable for readers.

2022 was a very good year, and 2023 looks even better (for us)

LexFusion operates at the intersection of enterprise, legal services, and innovation. Market listening and trust are core to our unique value proposition. See Posts 203, 267 (exploring the LexFusion model). Business is booming. We recently brought on a superstar Global Director of Litigation Solutions in Canby Wood. And we have now opened the search for her transactional counterpart—*if anyone knows an uber-connected innovation obsessive with a transactional background, send them our way.*

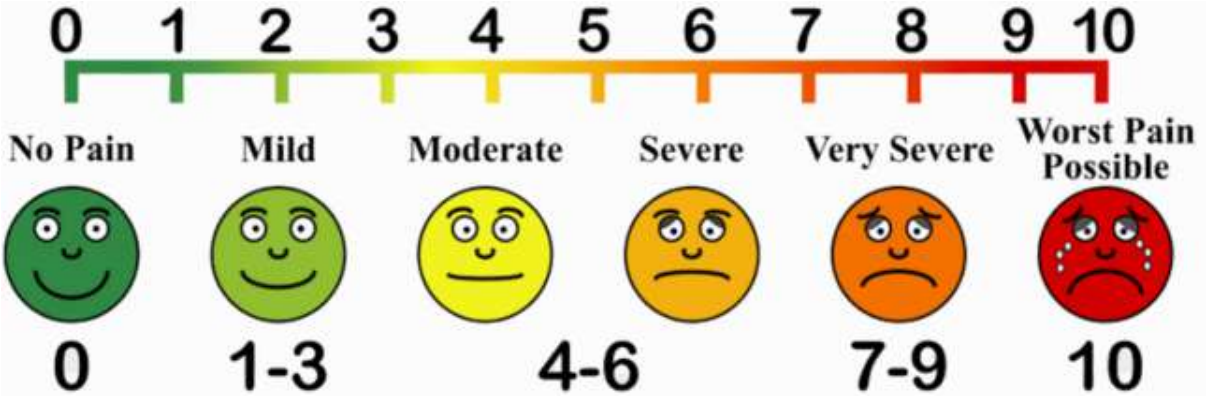
Canby Wood

LexFusion, however, benefits from self-selection bias. Our sample is skewed. Our success is not predicated on unanimity, a majority, or even a plurality. We thrive at the center of the edge. For our small company, with its outsized reach, prosperity depends merely on the existence of innovative outliers—of which there are many, relatively, in raw numbers.

In 2021, we heard the hopes, dreams, and fears of 327 law departments and 240 law firms. We analyzed market sentiment in Post 280, where we celebrated the excitement in the ecosystem while lamenting the cultural conditions that often frustrate the attendant ambition (also ice zombies).

As much as we hate to admit it, our conclusions have only hardened. In 2022, we conferred with 435 law departments and 250 law firms. We did not merely have more meetings. We had deeper conversations. We executed NDAs with multiple law departments and law firms so we could dig beneath surface-level discussions of practical innovation into the painful

realities of budgets and politics. We uncovered far more chronic pain than even we anticipated.



What follows is a rather literal year in review. We frequently write follow-on summaries of meetings for our customers' own reference—contributing to the decks/memos they are preparing as part of internal pitches and value storytelling. We've remixed that content here, excising all identifying information. We're sharing some of what we have been telling law departments and law firms. Importantly, our insights mirror what we have been *hearing* from law departments and law firms.

What may come off as criticism is, in fact, a reflection of our customers' lived experience. While we may help them refine their vocabulary and advance their thinking, the discontent being conveyed is theirs, not ours. Broadly, they know what needs to be done. Depressingly, they recognize most of it will not happen, regardless of how righteous their cause and how superhuman their effort. The inertia of immediacy has a preternatural win rate. See Casey Flaherty, "Maybe, Don't Be MacGyver," 3 Geeks, Sept 12, 2021; Casey Flaherty, "Scary Stories About Our Wicked Problems," 3 Geeks, Oct 31, 2022.

If you prefer to skip ahead to the otters, we offer a TLDR version of the long middle section, which very much builds on Casey preview essay (347):

> *Short-term easy is long-term hard. Long-term easy is short-term hard.*
>
> Legal organizations (departments and firms) should calculate what percentage of their total spend is directed to projects that will progress

their ability to deliver at scale—i.e., the leveraging of expertise through process and technology such that an increase in work does not require a proportionate increase in human labor.

In most legal orgs, this percentage is near negligible, especially if the org is being honest with itself about (i) how many personnel in putative innovation roles (legal operations, knowledge management, project management) are consumed by active matters, existing programs, and administration, (ii) how much technology spend is maintenance, and (iii) how many projects are purely aspirational with no real resources save the illusory spare hours of already busy people.

Anyone interested in shifting this equilibrium should contemplate the politics required to boost the resources allocated to real innovation to 1% of total budget. Which stakeholders would need to assent? Which stakeholders would need to affirmatively contribute, including expending political capital to achieve, and maintain, consensus?

In most legal orgs, these politics present as impossible without an external, existential threat. In the case of law departments, active and sustained C-Suite intervention. For law firms, a clear and sustained change in buying behavior by a critical mass of clients.

How much would this dynamic recalibrate if a truly transformational technology emerged? See Casey Flaherty, "My legal tech innovation: The Magic Money Machine.," *3 Geeks*, Feb 9, 2018. How far and how fast could your legal org move without an external, existential threat?

The bitter truth is most legal orgs would move neither fast nor far. The (i) requirement for consensus combined with (ii) key stakeholders being too busy to reach, let alone act on, consensus is more than sufficient to delay the supposedly inevitable. Add in the (iii) practicalities and politics of fiscal friction, and there are more than enough structural barriers to change without ever citing bad decisions or bad faith.

Which is not to say, nothing changes. Rather, it should be unsurprising that change is episodic and insufficient. Our organizational orientation services the short term. We should therefore recognize that the long term

will become increasingly challenging.

OTTER-FREE ZONE <START>

A quick aside on law firms

The composite that follows is written with law departments as the primary audience despite incorporating much of what we've expressed to law firms. The single POV is aimed at coherence and ease of consumption. But it is also an acknowledgment of positional authority.

Clients have always been the channel captains and urgency drivers. But, increasingly, the locus of corporate legal activity has shifted in-house, both in terms of bodies (see Post 262) and money (54% of spend is now in-house per the ACC 2022 Law Department Management Benchmarking Survey).

It is a buyers' market. Clients get the law firms they want—even if these are not the law firms law departments *say* they want.

A founding mantra of the in-house revolution is "we hire the lawyer, not the law firm." David B. Wilkins, *"The In-House Counsel Movement, Metrics of Change," The Practice,* May/June 2016. This is the mantra of individualism, both internally and externally. It elevates individual in-house counsel as the arbiters of the worthiness of individual external lawyers while also exempting all parties from scrutinizing the accompanying infrastructure—i.e., how individual and collective expertise are leveraged through process and technology.

In an environment where clients hire lawyers, not law firms, the rational response from law firms is to allocate their marginal dollars towards attracting and retaining the lawyers clients hire. Lateral frothiness. The abandonment of lockstep. The growing compensation spread within the shrinking equity partner ranks. Boom-and-bust associate hiring/salary frenzies. All explicable reactions to law department buying behavior.

In an environment where clients hire lawyers, not law firms, the rational response from the lawyers clients hire is to maximize their annual take-home pay while keeping their book as portable as possible. This includes resisting any investment of (their) money into infrastructure that makes the firm stickier for themselves or their clients. They need not be self-aware Machiavellians in this regard. Rather, they merely need to be laudably client centric—always consumed by client work or client development—and therefore too busy to be consulted. When major investment decisions arise, they can genuinely object that they were not consulted and are not comfortable approving expenditures they do not understand.

Jae Um

We can't recommend enough Bill's recent series, and the included commentary by our beloved advisor Jae Um, on law-firm dynamics, see Posts 330, 331, & 335). One inescapable conclusion is that Everyone Else (the non-premier firms) should pursue service-model innovation. But service model innovation is necessary and hard across the board, including for law departments. Service model innovation is particularly challenging for law firms when their clients will not permit them to change.

This dynamic will persevere as long as current client buying behaviors persist. Thus, it is the clients to whom we now turn.

YOUR ROOM TO MANEUVER IS LIKELY LIMITED

Fine, you must save money, immediately. Cost discipline is essential business hygiene. But it becomes more acutely essential during periods of economic turmoil.

No matter what we say, you will likely feel compelled to do the whole performative discount thing with your law firms. We implore you to try to avoid governance by fiat and, at least, engage in dialogue with your primary firms around time-boxed, mutually beneficial commercial arrangements that satisfy whatever mandates you face.

More productively, we urge you to seize the opportunity to explore more impactful and enduring changes to your buying behavior that can also deliver immediate fiscal results:

- *Package work*. Identify opportunities to enter portfolio arrangements, including integrated law relationships with New Law offerings.
- *Move work*. Right source, including greater use of legal marketplaces to find the right talent at the right price.
- *Re-examine costs on autopilot*. Major advances in e-discovery, ADR, staffing, etc. present substantial, immediate spend-optimization opportunities.

While we're happy to help with the above, we recognize it likely seems daunting given your timelines, bandwidth constraints, and the stifling politics of doing anything differently–which is a great segue into our broader point that change management is a lie.

The lie of change management. Change management is a fine discipline. Applying change-management best practices is beneficial. But there is a lie at the heart of the common discourse around change management. It is a disservice to perpetuate the myth that, with good change management, all change is possible.

Absent the proper environmental and cultural preconditions, many changes will simply never happen. These preconditions often involve structures, systems, politics, and resources beyond the purview of the would-be change agent.

> In particular, leadership buy-in is a pre-requisite, not an outcome—despite what one may read about managing up, managing your manager, influencing up, leading without authority, etc. And it is *buy*-in, not "lip service." There is a price to be paid.

Leadership is not a person in a position of authority remarking in the abstract about the desirability of a particular outcome. Expressing the expectation that subordinates find a way to forge and maintain

consensus—so no political capital need be spent—is a leader's subtle way of informing everyone, including skeptics, they have not bought in.

Leadership entails exercising authority to the extent required to achieve the outcome. The exercise of authority is required for real change. Not everyone will come along willingly even with excellence in empathy, communication, the art of the business case, value storytelling, planning, stakeholder engagement, listening, pivoting, execution, measurement, transparency, etc.

Not all change is possible. Thus, choosing which changes *not* to pursue is mission-critical. This demands reasonable clarity as to critical paths (which stakeholders must be on board, and to what degree) and constraints (authority, attention, time horizons, money, immovable objects).

A bad outcome is energy wasted accomplishing nothing. A worse outcome is energy consumed by innovation theater that feeds the illusion that *something is being done*. The worst outcome is path-of-least-resistance comprises that result in energy expended moving in the wrong direction—sprinting the wrong way is regression, not progress.

The lies we tell ourselves about our commitment to change.
One-million dollars is life changing for most people. It is 2,261% of the median American income. One million dollars does not move the needle at most large corporations. It is 0.002% of the median Fortune Global 500 company's revenue. One million dollars is to the median Fortune Global 500 company as one dollar is to the median American. Our minds are rather bad at appreciating such orders of magnitude–indeed, Casey's preview essay (347) suggests that the entire legal ops movement is at risk of getting this wrong.

There is a natural inclination to speak rather breathlessly about how much an enterprise is spending on this or that. When put in raw terms, the numbers are substantial. When translated into percentage terms, they often become microscopic. Percentages place numbers in context.

Often, context is absent when discussing organizational investment in change. Sometimes, this entails using raw numbers instead of percentages. But, more frequently, it involves avoiding numbers entirely.

Instead, we are subject to the recitation of long lists of in-flight projects, technologies under consideration, and aspirational goals. These are smashed together, conflated, and presented devoid of context to support the general proposition that a team is “already doing a lot” on the innovation front.

They probably are doing a lot, relative to available bandwidth and fiscal resources. But if we broaden the context so the investment is situated relative to other expenditures, the size of the problems being addressed, and the expected return on investment for the business, we find most change efforts border on trivial.

Speaking in, and comparing, percentages surfaces actual priorities. For law departments and law firms, the priority is legal labor.

Spend optimization and scale—two paradigm shifts that probably will not happen but should. Generally, the only reward for coming in under budget is a lower budget in the future. Excepting Veblen goods, everyone would prefer to spend less money on everything while getting more for each dollar spent. Corporations would *like* to spend less on legal. Law departments would *like* to spend less on law firms. We all want things. But life, unfortunately, demands tradeoffs.

What law departments and law firms are not currently positioned to do well is meet the legal needs of business at scale and pace. Legal services remain labor centric. Labor is not only expensive, it’s linear. The relationship between corporate legal needs and the attendant demand for legal labor is largely static. When legal needs increase (which they almost always do), then so, too, does the attendant demand for legal labor. Thus, starving a law department of resources generally results in corporate needs going unmet, in the long term.

In the near term, fiscal shortfalls can be addressed through savings. But most instances of “savings” are one-time lifts because they are different flavors of labor arbitrage. Discounts are about paying less per hour. Insourcing is mostly pre-purchasing hours in bulk at a low(er), fixed price point. Same with most ALSP and shared-services plays, etc.

There is nothing wrong with labor arbitrage per se. Right sourcing is imperative. But labor arbitrage does nothing to fundamentally bend the cost curve. While savings efforts may result in the mixed cost of legal labor being temporarily reset to a lower baseline, the linear relationship to business needs remains.

Centering “savings” as the law department’s mission results in short-term glory and long-term pain. It amplifies the hyper-palatable partial truth that the enterprise can, and should, spend less on legal. Long term, the pure-savings narrative only leads to chronic underfunding of the law department and, most importantly, business needs going unmet. See Post 347 (preview essay).

Thus, the first easier-said-than-done hurdle for law departments is to graduate from cost center to value center, shifting the narrative from savings to *spend optimization*. Spend optimization is still concerned with maximizing the yield from every dollar. But spend optimization is not only focused on spending less, it also accounts for where and how the resulting savings are invested.

Savings should be invested in scale, the second easier-said-than-done hurdle. Scale is about decoupling business needs from legal labor, such that increased business needs can be satisfied without a proportionate increase in legal labor. Very few law departments or law firms are making meaningful investments in scale.

WHERE REAL CHANGE COULD START

Segregate extraordinary spend. You need a clear view of where you are currently spending money. Eventually, you will also need to figure out why.

Extraordinary spend encompasses massive, discrete, outlier disputes, investigations, transactions, etc. These are the kind of big-ticket items on which there is constant communication with the C-suite. The budget is often a separate line item (bc extraordinary). Prominent 10-K, annual-report-level type one-offs. Such anomalous matters are not particularly informative for long-term planning purposes and can be so

material they skew any attempt at analysis. Extraordinary spend can, and should, be addressed directly—just separately.

Consolidate ordinary spend (if you can). When law departments fail to meet the needs of the business (and they frequently do), the corporate instinct is to create rival, quasi-legal silos (e.g., compliance, privacy, government affairs, regulatory affairs, tax) or even spilt the law department in two outright. Some adjacencies are so significant from a business perspective they warrant their own function (often larger than Legal itself). But, consistent with the scholarship on complicatedness, see Post 347, these new functions are usually layered on (additional stakeholders, procedures, chokepoints) rather than integrated/aligned. This layering increases friction and reduces business velocity. It also obscures true "legal" spend and frustrates attempts to bring rigor thereto.

Divide ordinary legal spend between "plug the dikes" and "build the dams." Headcount should be translated into dollars (fully loaded). And dollars should be translated into percentages of total budget. At massive organizations, large raw dollar figures can represent minuscule percentages and trick the mind into believing the org is making a sizeable investment when it is not, on a relative basis.

- *Plug the dikes* is work that increases in a linear fashion with the needs of the business. You, of course, still need to understand the nature of the work itself (work sorting), including the composition of the work (work decomposition), the business drivers of work volumes (work drivers), and the value of the work to the business (work segmentation).
- *Build the dams* is work that enables scale—i.e., reduces the demand for legal labor relative to business needs. This is project work, a key theme of last year's Review, see Post 280, that should be as upstream as feasible (i.e., compliance by design). But leveraging legal labor through process and tech remains necessary; underestimating the return on reducing low-end friction is a common mistake.

In most organizations, a candid assessment is likely to reveal that almost all current spend is dedicated to plugging the dikes. Thus, if business

needs increase, legal resources must increase proportionately or business needs will go unmet in some form or fashion. That's the math. And while modest decreases in labor costs can offer temporary relief, labor arbitrage cannot fundamentally bend the cost curve long term.

Skeptical stakeholders are not wrong when they suspect that taking attention away from plugging the dikes in order to build the dams will result in drowning long before the dams are complete. Our dour perspective is that *some drowning is inevitable*, one way or the other, and building the dams is, on net, more critical to the long-term health of the business.

Further categorize ordinary spend. Again, headcount translated into dollar figures, and then dollar figures translated into percentages. While there may be some baby splitting (multiple hats), the key is to allocate individuals according to how they actually spend their time—aspirations are non-pertinent.

Here are seven categories of ordinary spend. It's a mistake to skip even one.

1. *High-end, embedded, internal advisory*. These are lawyers with valuable expertise deeply embedded within the business. They are in the room where it happens—where the most impactful business decisions are made. The business considers them part of the leadership team and integral to making better decisions, faster. This is the category where it will be most tempting to fudge (many in-house lawyers would place themselves here; most, though not all, would be wrong). Do not succumb to temptation.
2. *Core internal personnel*. This is the high-volume legal work, as well as departmental operations. Contracting. Marketing reviews. IP. Standard litigation. Routine advice. External resource management. Program administration. Et cetera.
3. *Traditional matter-level external spend.* Matter-by-matter assignments to law firms with fees calculated at the matter level. Includes panel firms, discounts of any flavor, matter-specific fee arrangements (no matter how alternative), etc.

4. *Structured external arrangements for substantive legal work.* Portfolio partnerships and managed-service relationships with law firms and New Law providers, as well as the use of legal marketplaces. A law firm exclusively handling an entire tranche of work (i.e., the entire portfolio) is not automatically a portfolio partnership unless the pricing has been negotiated at the portfolio level (i.e., the price is for the portfolio, as opposed to rate concessions predicated on being awarded the portfolio).
5. *Core infrastructure*. Tech, support, maintenance, etc. Already committed and already implemented. Includes SaaS.
6. *Other external.* This is a catch-all category, which does not make its content unimportant. These expenditures (sometimes routed through outside counsel) can represent significant outlays. Staffing. Electronic discovery. Mediation & arbitration fees. Court reporting. Subscriptions. Non-substantive managed services (e.g., first-pass review of outside counsel bills). Often, these costs have been on autopilot for years and can therefore offer some relatively quick, sure-footed first steps towards spend optimization, presuming the savings are put towards meaningful investments in scale.
7. *Project resources.* These are resources dedicated to building the dams (i.e., sustainable scale). Projects involve a series of planned activities designed to generate a deliverable (a product, a service, an event). These activities—which can be anything from a grand strategic initiative to a small program of change—are limited in time. They have a clear start and end; they require an investment, in the form of capital and human resources; and they are designed to create predetermined forms of value, impact, and benefits. Every project has elements that are unique. That's key: Each contains something that has not been done before. Here, too, the temptation to fudge will be strong. A headcount with "legal ops" in their title is core personnel if most of their time is spent administering e-billing or some other standard system/program. Same for a "project manager" whose primary activities involve maintaining systems/programs or supporting core personnel performing plug-the-dikes work. This is particularly true of in-house lawyers who may be listed as stakeholders on 74 project plans but never

> have time to contribute to any of them because they are so crushed with “real work.”

In most departments, most resources will be dedicated to core personnel and traditional external spend. Thus, an upsurge in demand will result in overflow captured by law firms until the law department “saves” money by insourcing what it can. This savings noise distracts from the fact that the response remains fundamentally linear in nature.

Press most law departments on their spend-optimization efforts, and they will point to (i) purportedly aggressive external cost containment programs, (ii) insourcing, and (iii) a long list of projects, including a grab-bag of tech under consideration. Depressingly, the department may have more projects than people. Yet these people have no time for projects, most of which are somewhere between aspirational and unserious. This is identical to what we discussed in last year’s Review. See Post 280.

Spend percentages are a more reliable signal of seriousness than lists, decks, plans, and target operating models. If only a minute percentage of spend is dedicated to projects, then few projects will be completed, and little will change.

Despite that dismissive comment about target operating models, the department should have one, as well as the roadmap to get there. Most models, however, suffer from a decided lack of specificity (more of the same, vaguely better, #innovation). Most roadmaps, therefore, present a similar absence of focus and patience.

The result is disparate projects that throw insufficient resources at unachievable goals on unrealistic timelines. While underpinned by the best of intentions, unserious projects are distractions that consume finite resources (there are still meetings and, more often, endless email exchanges regularly rescheduling meetings). Unfortunately, some projects are in fact semi-serious and achieve the status of folly—consuming considerable resources but delivering negligible-to-negative ROI because of poor planning, execution, or, most frequently, follow through.

A REAL CHANGE AGENDA

It depends on context. Organizational context is key. It is your job to master organizational context. This demands more than being able to explain to outsiders why “that won’t work here.” Real change requires figuring out what will work and then making it work, including proper sequencing. What follows is general advice that will only be useful if meticulously tailored to the specific context. We know you want a fish, but all we can offer is a worm.

Make extraordinary spend less extraordinary. Most law departments need more standard mechanisms for formally segregating extraordinary spend. Otherwise, they are reliant on the fidelity of short-term institutional memory when periodic reviews surface instances of blown budgets. Many well-run departments appear profligate due to some massive matter(s) they could not have possibly anticipated or controlled. They also see their priorities derailed by the unexpected and then lack the audit trail necessary to validate why they are under-resourced.

This is not to suggest prevention is impossible, let alone that matter management is useless. The former is a major topic below (i.e., embedded advisory and compliance by design). With respect to the latter, we know of seven- and eight-figure cost reductions on matters just because someone asked for a budget (not even with an eye towards savings, simply for the purpose of understanding the matter plan). Extraordinary ≠ blank check. There should be a programmatic approach to external matter management that becomes more rigorous and bespoke as size, scope, and impact increase—emphasizing total cost of ownership, outcomes, and ROI.

Cream work will remain mission-critical and expensive (external). Cream work is one step down from extraordinary. More common. Slightly less material. Still periodic and bespoke (i.e., mostly not systematizable from an in-house perspective) with substantial business impact (high ROI). For too long, too much work has been considered cream in order to sidestep scrutiny (and, as a result, too many law firms have been treated as sacred cows). But accurate as this observation may be, it does not obviate the fact that premium work still exists.

Parroting the sharpest mind in legal, Jae Um, Premier League law firms remain excellent at fulfilling their original purpose. They have deep benches of pedigreed lawyers across specialties who can be assembled into ad hoc tactical teams to address intermittent business needs that involve extremely complex questions in high-consequence matters.

PREMIER LEAGUE

		HEAD COUNT	REVENUE PER LAWYER	PROFITS PER PARTNER	AVG. PARTNER COMPENSATION	PRACTICE CACHET	SECTOR FOCUS
1	Wachtell	288	$3.9M	$8.4M	$8.4M	P	
2	Davis Polk	1,025	$1.9M	$7.0M	$7.0M	P	◆◆
3	Simpson Thacher	1,163	$1.9M	$6.0M	$5.5M	P	◆◆
4	Kirkland	3,025	$2.0M	$7.4M	$3.4M	P	◆◆
5	Sullivan & Cromwell	797	$2.2M	$6.4M	$6.4M	P	◆◆◆
6	Latham	3,078	$1.8M	$5.7M	$4.1M	P	◆◆◆
7	Debevoise	788	$1.7M	$5.0M	$5.0M	P	◆
8	Paul Weiss	1,008	$1.8M	$6.2M	$6.2M	P	
9	Cahill	284	$1.8M	$5.5M	$5.1M	S	
10	Ropes & Gray	1,372	$1.9M	$4.3M	$4.3M	P	◆◆◆
11	Paul Hastings	979	$1.6M	$4.7M	$3.6M	P	◆
12	Milbank	819	$1.7M	$5.0M	$4.7M	P	◆◆
13	Weil	1,180	$1.6M	$5.2M	$4.0M	P	
14	Cravath	492	$2.0M	$5.8M	$5.8M	P	
15	Fenwick	427	$1.7M	$3.7M	$3.1M	S	◆◆◆
16	Skadden	1,644	$1.8M	$5.1M	$5.1M	P	◆◆◆
17	Fried Frank	581	$1.6M	$4.3M	$3.5M	P	◆
18	Quinn Emanuel	900	$1.8M	$5.7M	$4.1M	P	
19	Gibson Dunn	1,538	$1.6M	$4.4M	$3.7M	P	
20	Cleary	1,051	$1.4M	$4.7M	$4.7M	P	◆
NP	Cooley	1,267	$1.6M	$4.1M	$3.0M	S	◆◆◆
NP	Goodwin	1,315	$1.5M	$3.7M	$2.5M	P	◆◆◆

PRACTICE CACHET
Preeminence
Prestige
Elite
Specialist

SECTOR FOCUS
◆◆◆ Very Strong
◆◆ Strong
◆ Fair

NP: Newly Promoted

Source: Jae Um, "Kings of the Hill," Am Law (May 2022) at 48.

Oversite should not be absent. But the focus should be on consistent quality of outcomes (malpractice claims skyrocketed during the recent M&A boom) at market prices (much harder to determine than one would think) rather than achieving microscopic, mostly performative savings (relative to business impact).

Top-end advisory is the crème de le crème (external). Top-end advisory is a small subset of cream. Invaluable, niche expertise. Required irregularly. Universally recognized (by the business) as having extraordinary yield. Largely price insensitive. Though we concede cost discipline is essential, no one really cares whether tax advice that saves $5 billion (with a "b") per annum comes in at $1,800/hr or $2,200/hr—because the ultimate aim is to price the work, not the lawyer, based on business value. Indeed, group this under "extraordinary spend" if feasible, except it will rarely meet the materiality threshold.

Embedded advisory should become a focus (internal). When top-end advisory starts becoming regular, it should become embedded, if possible. These roles will likely never be numerous (on a relative basis), even at the largest orgs. But the business impact is considerable, and the attendant relationship with leadership is instrumental in changing the narrative around the department. Consistent with the understanding that headcount will be capped, the bias should be towards filling strategically vital roles rather than insourcing routine work, despite the latter being easier to effect and the savings easier to measure. Almost all legal work benefits from proximity

to the business (less friction). But the real question, given headcount constraints, is "*where does the business benefit most from proximity to legal?*" Embedded advisory is the answer.

Solve for scale complexity, orienting towards compliance by design. This is the core struggle, literally. For completely comprehensible reasons, short-term demands get in the way of the investments necessary to sustainably drive superior business outcomes at scale and pace—better decisions, faster and more consistently, in an increasingly complex operating environment.

While the industry constantly invokes "people, then process, then technology," there is scant evidence that people are being deprioritized. Much the opposite. Ultimately, leverage through process and tech is the whole ballgame when it comes to tackling scale complexity—i.e., the high-volume core work.

Compliance by design is a system-level solution that involves moving upstream and embedding legal knowledge into business processes (i.e., de-lawyer without de-legaling) to enhance outcomes and velocity. When business process throughput increases, the quantity of interactions with legal professionals should not (or, at least, in a far less linear fashion than today).

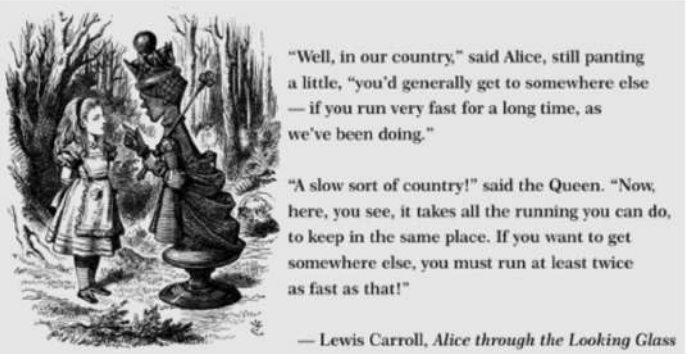
Compliance by design may not always be feasible, especially in the near term. There will often be intermediate steps, like process redesign and tech enablement, that deliver incremental improvements on the path to compliance by design.

Compliance by design and the intermediate steps are project work. There is nothing unique to law departments in their struggle to allocate sufficient resources to projects. Projects are disruptive. Projects not only consume the same bandwidth needed for operations; projects interfere directly with operations because their express purpose is to change operations—transform *how* work is done.

Almost no one is good at solving for scale. If you dig beneath the surface at the most lauded law departments, you will find the resources devoted to solving for scale are negligible. So, too, is the impact thereof. The success

stories are quite real; they're just small relative to the size of the problem (again, no reason to believe this is peculiar to law departments).

Be willing to automate so many tasks your efforts eliminate some roles in their current form. This is where most people get off the bus. While the framework is to automate tasks, not jobs, eventually this results in some jobs being so materially transformed that they become different in kind, not just degree. It is all well and good when we are talking about making everyone more efficient through tech. Few, however, are prepared to follow this logic to its natural conclusion.



Source: Peter Ungphakorn, The 101

The savings trap is not merely that the Red Queen's Race offers no respite, let alone any offramps. It is that, in the quest to realize near-term savings, law departments insource routine work. Easiest to insource. Simplest savings calculation. But also the work most amenable to process improvement and automation. Thus, it is law department personnel who are now subject to the greatest threat from solving for scale.

Unfortunately, personnel can be difficult to repurpose. Meanwhile, their survival instincts are well honed—every in-house hire is another potential impediment to real change. And pursuing projects that negatively affect the livelihood of colleagues is painful. Understandably, the most common choice is simply not to do so.

This dynamic, btw, is one of the rationales behind the corporate allergy to headcount. See Post 347 (preview essay).

Stop insourcing routine work even if it will save money short term; outsource routine work to free up headcount for strategic roles. Automating work is far less fraught when the work is being handled externally. This is true in the compliance-by-design sense of eliminating touchpoints with legal professionals as legal knowledge becomes

embedded in business processes. But it is also true from a process-improvement/tech-enablement/right-sourcing perspective.

The wallet can be a much more potent change instrument than the retail politics of effecting change inside a law department already drowning in work. But this presumes the wallet is being deployed properly. Sophisticated spend management requires projects that eventually become programs.

Where possible, package the work, and price the package. Portfolios are the proper level of resolution for many large tranches of legal work. The transition to portfolio partnerships can offer both near-term and long-term benefits. Portfolios can be structured to continuously improve outcomes, speed, predictability, consistency, and data quality while reducing unit cost from a total-cost-of-ownership perspective.

On the litigation side, law firms are the primary portfolio partners, augmented by a programmatic approach to managed services (like e-discovery) and other associated costs (like ADR). On the transaction side, there is likely to be more of a mix (and even combination of) law firms and New Law (i.e., ALSPs) with the objective in many instances being integrated law (a topic that requires its own post).

Paying bottom dollar is not the goal. But, consistent with spend optimization, cost-effectiveness is. We must avoid the savings-filter where an option is considered “better because it is cheaper” in order to achieve a deeper understanding of how and where an arrangement can be “cheaper because it is better.” Portfolio arrangements can shift us in this direction, in part, because they are material enough to merit the appropriate level of sustained attention, from both sides.

Yet, packaging is not always possible, especially with the onslaught of novel issues introduced by net new regulatory complexity. In re-thinking non-cream work, law departments should not only reconsider their law-firm mix (are you deluding yourself with discounts? are you paying premium rates for non-premium work?), they should also look to mechanisms like legal marketplaces to expand their options, reduce administrative burden, and enhance pricing rigor (another topic that demands its own post).

THE LAW DEPARTMENT REORIENTED

Admittedly, all easier said than done. It is quite understandable if much of the above proves infeasible. Accomplish what you can. But, more importantly, avoid wasting precious energy pursuing the unobtainable.

The current orientation of most law departments is that of cost centers trying to manage traditional matter-by-matter law firm relationships through discounts (and their variants) while insourcing as much work as permitted to fulfill their more-with-less savings mandate.

The proposed orientation is that of value centers seeking to optimize spend in the service of business value with an emphasis on (i) embedded advisory, (ii) compliance-by-design and other scale-enhancing projects, and (iii) a programmatic approach to the external value chain, moving more work into portfolio partnerships and diversifying sourcing (law firm mix, New Law, legal marketplaces).

The proposed orientation tends to elicit plenty of nodding agreement. But theoretical support for change is meaningless without congruent actions, including a material shift in resource allocation. The latter is rare, for comprehensible reasons. Indeed, endless discussion and highly abstract agreement around change are among the status quo's greatest allies.

OTTER-FREE ZONE <END>

For those who took that almost 5,000-word tour summarizing what LexFusion heard this last year, thank you. We hope it merited your time and attention. We assure you we will bring it back around.

For this coming year, we have a bold prediction:

> In 2023, AI will be capable of generating, near instantly, a legal opinion or contract superior to the work product of 90% of junior lawyers.

We are convinced. We've had sufficient exposure to transformer-based neural nets through our business relationship with Casetext's AllSearch to form strong opinions (lightly held) on what might become possible. But we recognize—and understand why—various contingents vehemently disagree. While who is right or wrong has profound implications, we have a more modest prediction that will produce some of the same outcomes and is likely to garner sign-off from even the most well-informed skeptics:

> In 2023, 90% of the population will believe AI is capable of generating, near instantly, a legal opinion or contract superior to the work product of 90% of junior lawyers.

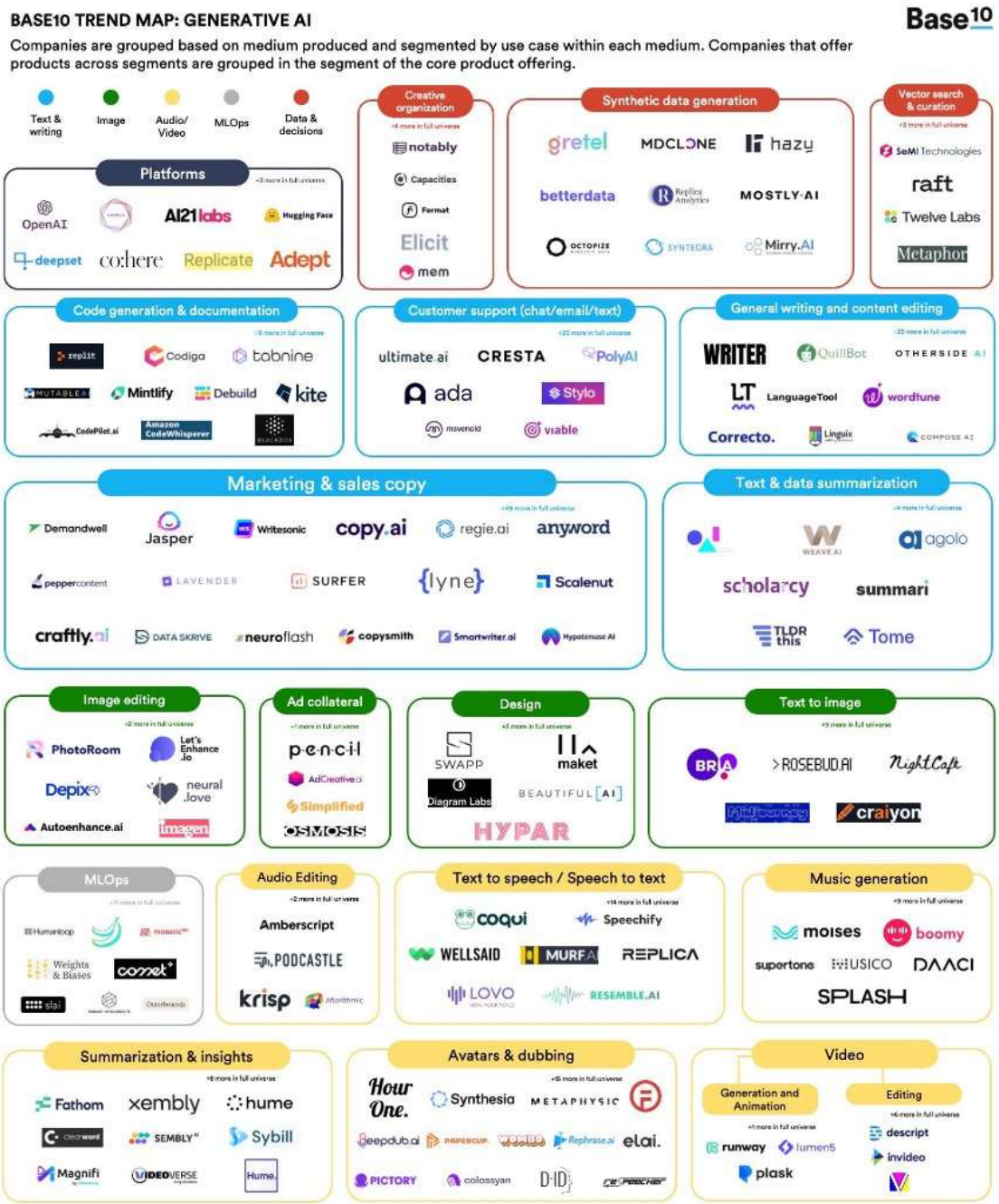
That is, we can disagree on the trajectory of the tech while coalescing around likely perceptions thereof, especially with the avalanche of buzz being generated by ChatGPT.

ChatGPT is a driver and a distraction

Almost all the current chatter centers on what ChatGPT is and is not capable of, *today*.

We, however, opened the piece not with ChatGPT but with a little-known AI-art generator, MidJourney, and its one-month progress from useless to impressive when prompted to illustrate "otter on a plane using wifi." Midjourney is representative of an entire generative AI landscape where rapid progress is being made—OpenAi's ChatGPT's is but one player. Sam Altman, OpenAI's CEO, has himself referred to ChatGPT as merely a "preview of progress."

The important question is not so much “What can ChatGPT do today?” A better question is “What will emerge from this constellation of companies, and new entrants, in the relatively near term?”



Source: Base10

Moreover, even the focus on the “generative” aspect of AI distorts the productizable potential. Generative capacity is cumulative— the output of collation, categorization, connection, analysis, synthesis, and production of content based on enormous data sets. Each of these foundational steps is a capacity in and of itself. Anyone who has spent time in legal tech, for example, is painfully aware of the challenges in adding structure to unstructured data—any advancements on that front extend the shadow of the possible, whether or not AI ultimately uses the more structured data to generate first drafts.

Again, our deepest exposure is to Casetext’s AllSearch. As the unfamiliar can infer, it is a search tool. Casetext trained transformer-based neural nets on legal language to develop the most advanced case law search tool ever (and Parallel Search is next-gen, the first true concept-based search). But Casetext also quickly realized neural nets trained on legal language enable applications far beyond searching case law—e.g., searching contracts, brief banks, deposition transcripts, knowledge management, prior art, etc.

Casetext is not on the above map of the generative AI ecosystem—and we doubt Base10 will ever include a “legal” box. Rather, Casetext is a node, working on domain-specific applications. They bring technical acumen, a massive corpus of legal language to enrich the general large language models, and expertise to train the models—reinforced learning from human feedback is critical.

From the perspective of integrating new tech into the corporate legal market, the answer to the question “What can ChatGPT do today?” is interesting but not that informative. A better question would be, “What will emerge from the constellation of generative AI companies and other new entrants?” But even that answer would lack sufficient specificity.

A potential formulation of a more salient inquiry:

> In the relatively near term, what is likely to emerge from the domain-specific application of these multi-modal advances in tech as they are enriched by legal language and reinforced learning from expert feedback by various market participants seeking to address specific points of friction?

We've seen this movie before (Part 1)

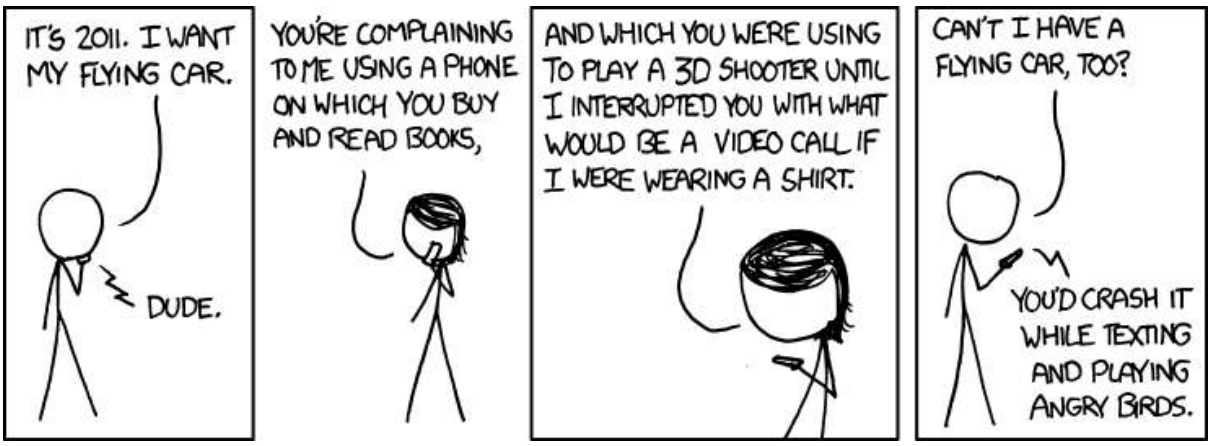
Larry Summers, former Secretary of the Treasury and president of Harvard, went on BloombergTV to tell the world ChatGPT is a *development on par with the wheel and fire*. And then he signal boosted himself via tweet.

Such hype is not new. In 1970—fifteen years before OpenAI CEO Sam Altman was born—*Life* magazine proclaimed:

In from three to eight years we will have a machine with the general intelligence of an average human being. I mean a machine that will be able to read Shakespeare, grease a car, play office politics, tell a joke, have a fight. At that point the machine will be able to educate itself with fantastic speed. In a few months it will be at genius level and a few months after that its powers will be incalculable.

In 2016, we chronicled the history of these wild pronouncements in parallel with the career trajectory of a successful lawyer who had finished law school in 1977—at that time, 1977 was the median and modal graduation year of the chairs of the Am Law 10. See Casey Flaherty, "Real Lawyers v. Cyborgs," *3 Geeks*, Feb 19, 2016. We recounted how, every few years, the lawyer could read something about being replaced by AI. Or they could ignore it. Because this never happened. Instead, the failure to live up to the hype resulted in repeat AI Winters—before the cycle would begin anew.

Throughout our history, we compared the hyperbolic statements re AI overlords to the far more mundane reality: the rise of PCs, the internet, email, and smartphones. We concluded by observing that the mundane had slowly transformed reality—the story reads very differently if you excise the hype of everything everywhere changing, in unimaginable ways, all at once. The introduction and maturation of technology has truly changed how lawyers work.

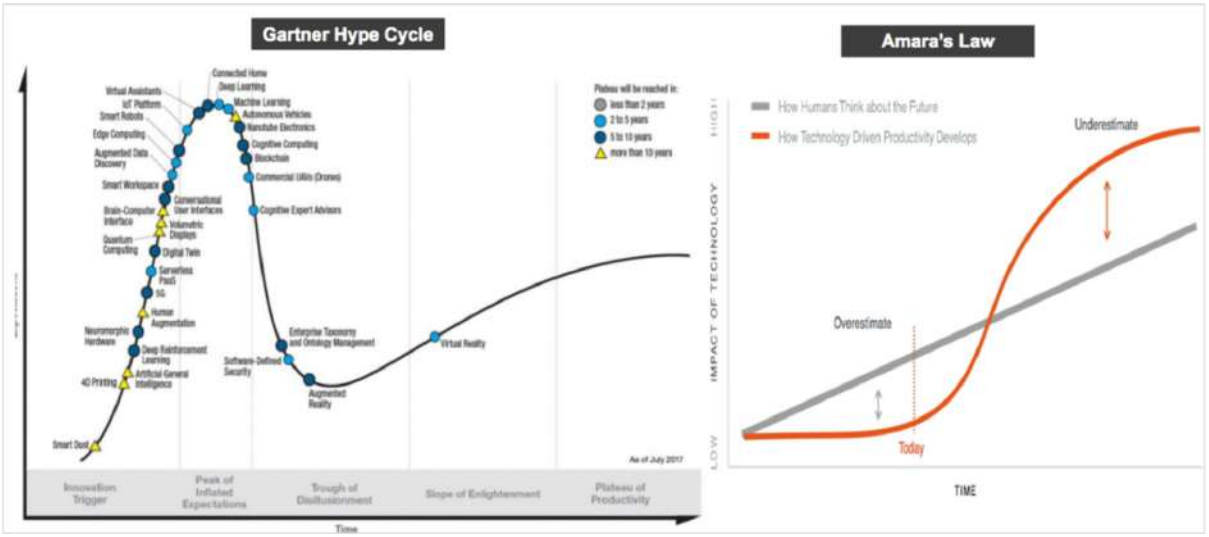


Source: wkcd.com. *A webcomic of romance, sarcasm, math, and language.*

Going forward, we expect a deluge of nonsense hype counterbalanced by ample skepticism, some well-informed and much of it wildly uninformed. There will be impressive progress (like the otters) to bolster the bulls and spectacular failures (like Meta's Galactica) for the bears to mock.

Indeed, to return to our original markers, there is quite a distance to be traversed from (i) what the tech is capable of and (ii) actually productizing the tech in a manner that can be integrated into a coherent workflow. See also annotated version of Susskind's five stages. There will be a rush of activity, including many missteps. But the felt impact will not be so immediate nor universal.

The skeptics are correct. We are headed for peak hype. But we submit the advancements also represent crossing an inflection point consistent with Amara's law: "*we tend to overestimate the effect of a technology in the short run and underestimate the effect in the long run.*" What is emerging today is result of many decades of work (including myriad disappointments) as several technology trends converge—we've long had the math and the models behind neural nets, but we lacked the computing power and the vast reservoir of digitized language.



Source: "I.A. vs. A.I. – what's the difference and why I.A. comes before A.I. (Part 1)," *Lawtomated*, Apr 10, 2019.

We've seen this movie before (Part 2)

Our backgrounds all include a fair amount of e-discovery, and that means far too much exposure to painful discussions around technology-assisted review (TAR). For those of you who had the good fortune to skip that interlude, a brief summary:

1. The Cambrian explosion in data volumes turned document discovery into a complete nightmare, especially the crazy costs of eyes-on document review
2. A bunch of tech emerged to try to cut down on the volume of documents requiring eyes-on review
3. Many lawyers objected that they could not trust a machine to do as good a job as a lawyer in reviewing documents
4. Subsequent empirical studies, now reflected in the caselaw, established that the machines were not perfect but still outperformed lawyers in terms of both accuracy and speed—debunking human review as the so-called "gold standard." See Maura R. Grossman & Gordon V. Cormack, "Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review," 17 *Rich. J.L. & Tech* 11 (2011).

5. More than a decade later, this remains a topic of debate. But a much larger share of documents are categorized by machines—better, faster, and cheaper.

Importantly, it is technology-*assisted* review. Experts remain at the helm.

To be simplistic, the machine models the decisions that humans make. Predicting each human decision in the background, the humans review, and the models iterate, until a certain confidence threshold is hit—i.e., that the machine will come to the same conclusion as the human experts, whose judgment the machine then applies across the remaining corpus. Humans still look at relevant documents—because they are relevant. But they waste far less time looking at irrelevant documents.

Human expertise remains central. The objective is to properly leverage the expertise through process and technology to reach better outcomes, faster and more cost-effectively. It is not perfect. But it is superior to the untenable status quo ante. And it continues to improve—with the emerging tech likely to represent another quality-improving, labor-sparing refinement.

We are all scarred from straining to explain to people who did not want to hear it that reducing the number of irrelevant documents humans had to review was a positive. In that same vein, we have road-tested our prediction, "*In 2023, AI will be capable of generating, near instantly, a legal opinion or contract superior to the work product of 90% of junior lawyers.*"

Unsurprisingly, what many people hear is, "*2023 will be the AI apocalypse for lawyers.*" They respond accordingly.

First, 90% is not 100%. More importantly, "junior" is deliberately responsible for an enormous amount of heavy lifting. While *garbage in, garbage out* merits attention with regard to the reliability of unrefined large language models, we should not forget that so much of junior lawyering is already mindless copy and paste, just slower or more error-prone. See Casey Flaherty,*"* How Much of Lawyering is Being a Copy-and-Paste Monkey?," *3 Geeks*, Jan 28, 2018. Not only do junior lawyers not graduate practice ready, but they also lack structure in their subsequent professional learning environment. See Casey Flaherty, "CLE is Broken (as is our approach to learning/innovation)," *3 Geeks*, Oct 31, 2021. The thing about being

chained to a desk to review an endless stream of irrelevant documents is that it is dreadfully boring and not the least bit educational.

It is a straw man to characterize the new AI frontier as some sort of galaxy brain that performs like a limitless agglomeration of the smartest humans. Rather, the better framing is an extensible corps of trainees who can perform lower-level work at warp speed.

Consider that until the 1950's, "computer" was a human occupation. For two centuries, computers were people, who performed long, laborious calculations by hand, making invaluable contributions to the advancement of science and technology. When machines suddenly surpassed humans in accuracy, speed, and cost-effectiveness, facility with math became more, not less, valuable. Advancements in science and technology accelerated while finance and business shifted increasingly towards being data-driven.

We appear to be crossing a similar threshold with respect to language. It is not an event horizon. The new applications are likely to surpass humans at lower value, labor-intensive language-based tasks that insert so much invisible friction into how we currently work. Integration will take time. And not all of it will be good. But, on net, it will be better. *On net*.

The Luddites were right

Today, Luddite is a pejorative term applied to those who oppose new technology. Indeed, the "Luddite fallacy" is used to dismiss concerns around long-term technological unemployment—i.e., structural unemployment because the machines permanently took our jobs.

In early 19th-century Britain, the Luddites were an organized faction that waged a five-year rebellion that needed to be suppressed by military force. The Luddites were textile craftspeople being displaced by machinery. Many Luddites were owners of workshops closed because they could not compete with the machine-based factories. And when they tried to get jobs at a factory, many could not—because the factories required less labor. This left many people unemployed and angry. The unemployed and angry people turned to violence.

On the one hand, the historical record so far suggests that automation anxiety is likely misplaced and technological unemployment is not long-term because of compensation effects—i.e., the increased productivity creates more jobs than it destroys.

On the other hand, technology does destroy specific jobs. Individuals do not care about long-term structural employment, they care about their own near-term employment. The Luddites were right. The machines messed with their personal livelihoods.

We can only imagine the battles that are coming as (i) GPT-powered variants of LegalZoom 2.0 and access-to-justice advocates with a DoNotPay bent collide with (ii) protectionists who run most state bars and the antiquated rules around the unauthorized practice of law. But that's not our fight.

We are preparing to help our corporate and law firm customers navigate what will become an even nosier and busier legal innovation landscape. As we help alleviate choice overload, we expect we will also have to work overtime to talk them through the structural implications of the new tech offerings. Our points of contact—those innovative outliers—will welcome such conversations. But their legal organizations might be another story (see, we told you we would bring the narrative threads back together).

Change is still a choice. Choices have consequences.

As former practitioners, we have considerable empathy for the lawyers with whom we work.

These lawyers expertly perform mission-critical work under immense time and resource constraints as regulatory complexity explodes and the attendant impact on the business intensifies. Meanwhile, the gap between the work that needs to be done and the resources available continues to grow. This crush of work and paucity of resources also means there is minimal capacity, and patience, to invest in the kind of scale-enhancing innovation that could start to close the gap. See Post 347 (preview essay discussing the bleak odds of success).

The new AI frontier presents a dual challenge. First, as lawyers, they will be presented with all manner of net new questions as businesses try to leverage the new technology in various ways. This will, almost certainly, be followed by waves of new regulations. Second, as operators, they themselves will be under all manner of pressure to modernize—but often without adequate time and resources.

We started with a review. We then made a prediction. Let us end with a question:

> What happens when the CFO hires the reinvigorated [Big Name Consultancy] Digital Transformation Team for a top-to-bottom efficiency review and, among many other recommendations with profound implications for the business, the resulting report plays to the CFO's confirmation bias, finding that legal is one of many areas where low-level work can be expeditiously automated—to the point where, in many instances, legal can be bypassed entirely?

We may not have enough data points to answer this question next year. But it is a question many of our customers will face soon enough. Buckle up!

Advancing Our Thinking On Low-End Friction

By Casey Flaherty

July 27, 2021

Advancing Our Thinking On Low-End Friction

By Casey Flaherty on July 27, 2021

“They’re so busy that our practitioners need to realize not a 10% improvement but a 10x improvement in productivity before they will take the time to investigate, let alone implement and incorporate, a new tool” is an observation the always astute Kyle Dumont of Morgan Lewis made to me the other day.

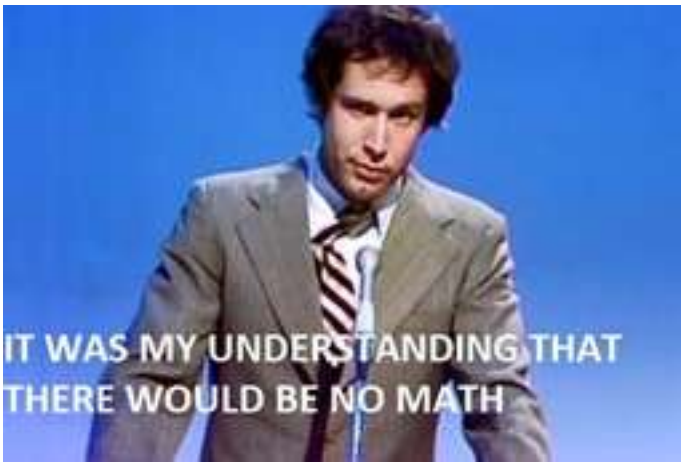
Kyle’s insight reminded me of one of Jason Barnwell’s most quotable lines, “If capacity must increase by 10x, our current approach breaks, as the option of a 10x increase in hiring is simply off the table.” (btw, congrats to Jason for being recently appointed as Microsoft Legal’s first ever General Manager for Digital Transformation—a development worth noting)

Bruce MacEwen introduced his own 10x into the discourse in the conclusion to his excellent post on our scalability problem:

> Some years ago the head of “Google X”–the name at the time for its totally out-there incubator for new projects–described their ambitions with an analogy: “If you tell me to build a car that gets 50 mpg, I can do it with off-the-shelf stuff put together with that express end-goal in mind; if the goal is 500 mpg, I need to forget everything I know and leave it behind me.” (Google X is now named “The X Company,” and they call themselves “the moonshot factory.”)

I concur that the threshold for investing in change is high (Kyle), yet the need for material change is inevitable (Jason/Thanos), and such change requires a fundamental rethinking (Bruce). But to avoid being too agreeable

(#boring), permit me to suggest that, maybe, the way we think about change is rather incomplete—in part, because we underestimate the impact of seemingly incomplete changes.



Simple Math, Hard To Intuit. I'll take advantage of Bruce's mpg example as a jumping-off point (for our friends on the metric system, think km/L). According to the EPA, the average new car sold in the United States is rated at 25 mpg. As noted, already available, conventional methods can improve this to 50 mpg. You would, however, need to achieve Emmet Brown levels of inventiveness to ramp up to the 500-mpg moonshot.

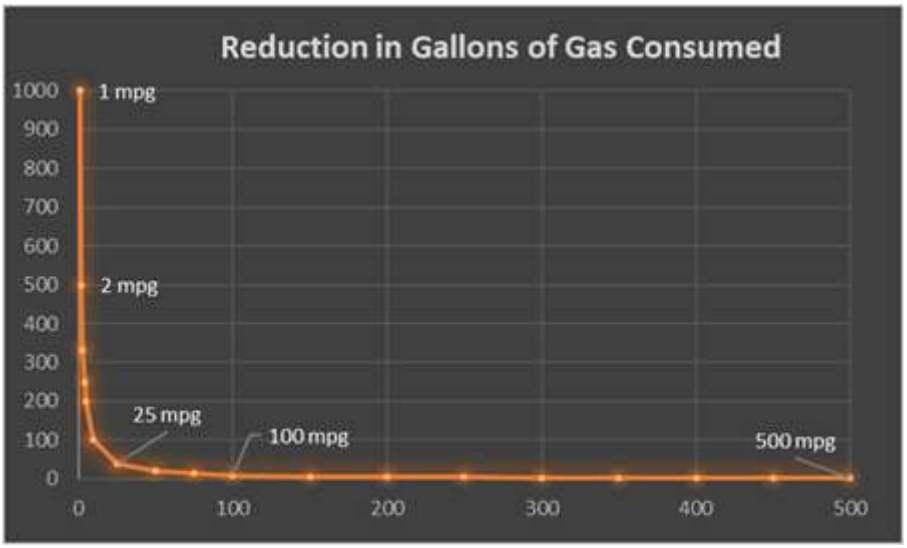
The objective is to consume fewer gallons of gasoline (the constraint). *But what if I told you improving mileage from 25 mpg to 50 mpg (2x, +25 mpg) conserves more gas than improving mileage from 50 mpg to 500 mpg (10x, +450 mpg)?* For most of us, this violates our intuition—yet it is correct, nonetheless. As I've explained before.

MPG	Distance	Cost	Savings
25	1000 mi	40 gal	20 gal
50		20 gal	

MPG	Distance	Cost	Savings
50	1000 mi	20 gal	18 gal
500		2 gal	

A slightly different frame may enhance clarity. Once we reduce baseline resource costs by 50%, there is no further improvement we can make—save eliminating the cost entirely (e.g., go electric)—that can ever have an equivalent impact.

That is, many forms of productivity improvements are subject to diminishing returns when solving for specific constraints. Most of the benefits are realized at the low, unsexy end of the spectrum. Thus, improving from 1 mpg to 2 mpg (2x, +1 mpg) saves 500 gallons while improving from 100 mpg to 500 mpg (5x, +400 mpg) only saves 8 incremental gallons on the same 1000-mile trip. The 2x leap from 1-2 mpg at the inefficient end of the spectrum is therefore 62.5x more impactful than the 5x leap from 100-500 mpg at the efficient end of the spectrum. This is an area where our intuitions let us down.



No Time To Save Time. Let's apply the same calculations to something closer to home. *What if I told you improving productivity from 1 contract per hour ("cph") to 2 cph (2x, +1 cph) saves more time than improving from 2 cph to 50 cph (25x, +48 cph)?*

I presume you already updated your priors. But if seeing the arithmetic helps:

CPH	Contracts	Time	Savings
1	1000	1000 hrs	500 hrs
2		500 hrs	

CPH	Contracts	Time	Savings
2	1000	500 hrs	480 hrs
50		20 hrs	

Feel free to substitute any legal unit of production for "contract." The math holds where time is the constraint.

And let us not kid ourselves about the centrality of time as a constraint. Despite our decades of debate as to whether time is a useful proxy for value, time remains, indelibly, a resource cost and rate-limiting factor. As Drucker writes, “Time is the scarcest resource and unless it is managed nothing else can be managed… Everything requires time. It is the only truly universal condition. All work takes place in time and uses up time. Yet most people take for granted this unique, irreplaceable, and necessary resource.”

We are time constrained even where we are not money constrained. One of the better talk tracks I’ve encountered recently is Kira co-founder Noah Weisberg discussing the concept of total diligence. Noah notes that the standard due diligence approach on even the least price-sensitive megadeals results in only a small percentage of potentially relevant contracts being reviewed. Not because of worries about accumulating too many billable hours, but because everyone involved is invested in maintaining deal velocity, which limits the time available to conduct diligence. Yet there can be material issues lurking in the presumptively non-key contracts (Noah shares some striking examples of these “deep holes” lurking in seemingly small contracts). Certainly, AI can be used to review the typical small percentage of contracts faster (and it is). But Noah is keenly interested in using AI to augment the review process so that 100% of contracts can be reviewed in some fashion with minimal additional time—i.e., total diligence.

Time is not the only constraint. But time is a key constraint, even where money is not. There is an underappreciated interplay between better, faster, and cheaper—in part, because a narrow view of, and overemphasis on, “cheaper” often induces a counterproductive myopia.

CONCLUSIONS

We rarely recognize the outsized impact of reducing low-end friction. Less eloquently than Noah, I have long ranted and raved that my obsession with legal professionals improving their facility with the core technology tools of their trade (Word, Excel, Email, PDF) is not about lawyers using such tools more but, rather, about being able to use them less (bc more efficient). This is decidedly unsexy. But it is a simple means

to reduce low-end friction—i.e., the type of minor improvement that can deliver massive time savings when starting from a low baseline (e.g., that small but significant leap from 1 contract per hour to 2 contracts per hour).

I share Kyle's assessment of stakeholders' demonstrable, 10x improvement threshold for adoption. Spending much of the last decade, including my current role, engaging in these conversations, I am confident the way most decisionmakers think about the 10x improvement is the leap from the 50-mpg conventional vehicle to the 500-mpg moonshot vehicle, instead of the counterintuitive understanding that the more impactful 10x can be the smaller steps getting from 1 mpg to 10 mpg (depending on what we are solving for).

I am confident most decisionmakers think this way, in part, because of most of us think this way about most things, and are mostly correct to do so. Indeed, remaining acutely aware of the unavoidable implementation dip, there is wisdom in demanding fairly substantial ROI on any improvement initiative that consumes finite time and attention, especially in an environment of significant opportunity costs. Most marginal improvements are, in fact, marginal. If you are already driving the 400-mpg vehicle, the modest gas savings of upgrading to the 500-mpg vehicle is unlikely to be cost-effective—better to spend that energy investigating going fully electric. But this can go too far. We encounter too many instances of professionals stuck in a 5-mpg antiquated vehicle unwilling to upgrade to the available, if conventional, 50-mpg alternative because, as they correctly point out but too heavily weight, it is not in fact a 500-mpg moonshot.

Our intuitions are mostly reliable. But we remain subject to some predictable irrationality where they fail us. We frequently fail to recognize sources of low-end friction, let alone understand the outsized impact this friction has on the allocation of our finite resources.

We don't need to do it all at once. The other day, I committed the minor sin of straining a sportsball metaphor (apparently, I'm a "big metaphor guy"). In my defense, he started it.

I was speaking to a formidable in-house leader who made an observation similar to Kyle's. He insisted with respect to expectations around

innovation, “Our stakeholders will not be content with us just hitting singles.” (I’m paraphrasing)

I pushed back, respectfully, “If the singles are in separate innings, probably not. You will just strand runners on base. But if you string together singles in the same inning, you put runs on the board, which is key to winning the game.”

There are passing few grand slam opportunities. But there are many opportunities to put runs on the board. If we make potential grand slams our threshold for taking a swing, our strikeout percentage will be high, and we will deprive ourselves of many runs/wins.

Just like the steps from 5-mpg to 50-mpg, the leap from the 50 mpg to 500 mpg would not be the result of an isolated grand-slam innovation but the combinatorial result of many complementary innovations (cumulative innovation and the expansion of the adjacent possible). We must, at some point, move beyond incrementalism and pursue true transformation. But even when orienting our thinking towards transformation, we should appreciate the aggregate impact of marginal gains can be significant when they compound.

As Alex Hamilton writes in his new, must-read book *Sign Here*, “We need to recognize that there is no sweeping fix that will make everything alright and that instead, we will have to make lots of small changes to keep improving how we work…so, while it is very human and understandable to wish it weren’t so, there is no silver bullet that will solve everything.”

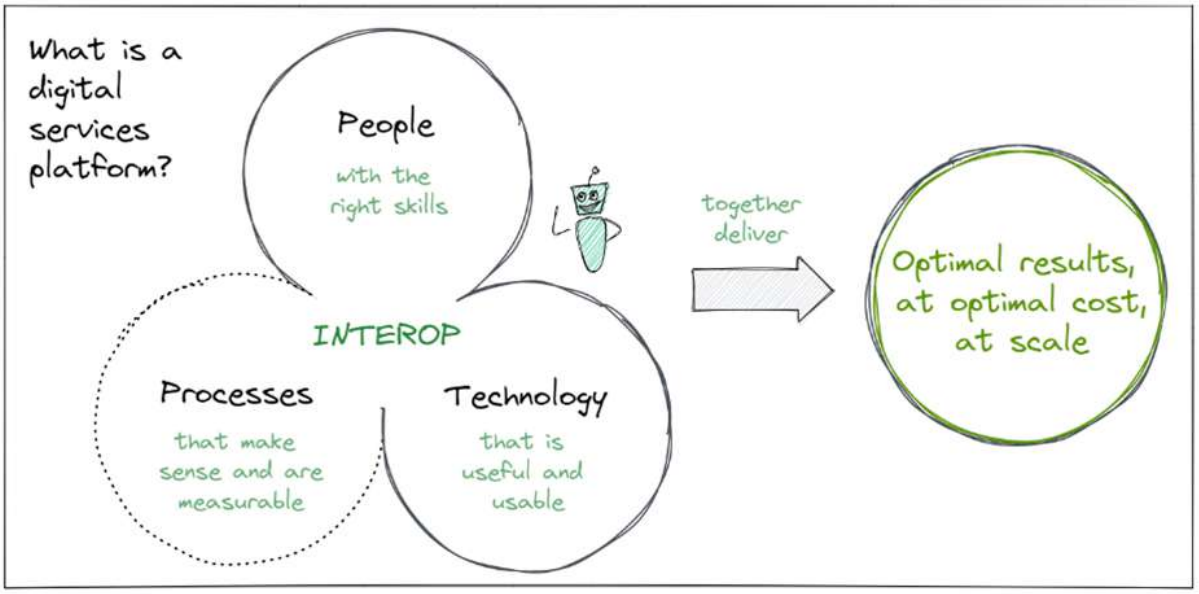
Alex consoles us, “You might find it depressing to discover that that there is no single solution…but there is good news here, too: because many changes can be made as relatively small tweaks, they can also be cheap, fast, and low risk.”

Indeed, many of the success we see are not the wholesale replacement of an entire process/system (though, sometimes, this is simply unavoidable—for example, a legacy DMS or CLM) but, rather, successes building on each other as teams re-engineer pieces of their process/system until, eventually, they have developed something entirely new without any

single, iterative improvement making it feel completely different (the Ship of Theseus effect).

There are many interconnected pieces in our processes. We should consider all of them, and prioritize the limiting factors—i.e., the key constraints—in constructing optimal, integrated operating environments.

Towards this end of thinking in integrated processes, systems, and, ultimately, platforms, I commend to you Rob Saccone's exceptional exploration of interoperability.



Indeed, let me conclude with a sentence from Rob that made me smile so much I stole it for the title of this post, "Succinctly stated, we need to advance our thinking about how humans and technology can better work together, as humans alone are not going to be able to compete against humans + technology….Let me repeat the key part: we need to advance *our thinking*.

Throwing Bodies at the Problem

By Casey Flaherty

January 11, 2016

Throwing Bodies at the Problem

By Casey Flaherty on January 11, 2016

“Nine women can’t make a baby in one month.”

That’s good because adding headcount is not nearly as productive as it appears at first glance. Last post, I wrote about Baumol’s cost disease and why labor in stagnant sectors (like law) gets more expensive over time. This post, I’m going to use Brooks’ law as a starting point to discuss the fact that labor gets less productive the more of it you have.

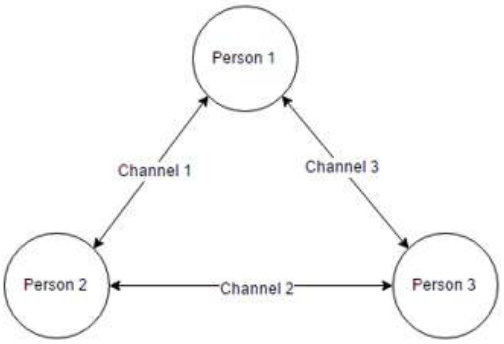
The most cited ‘law’ in technology is Moore’s law. In the popular consciousness, Moore’s law is a stand-in for exponential growth in computing power and attendant drop in the cost of computing resources. There are complementary and related laws that speak to the growth in network utility (Metcalfe’s, Reed’s), connection speeds (Nielsen’s, Butter’s), software (Andy and Bill’s, Wirth’s), storage (Kryder’s), and battery life (Koomey’s, Dennard). In short, silicon-based performance keeps improving. Carbon-based performance (i.e., human beings), not so much. If there really is a race against the machine, one of the sides is standing still.

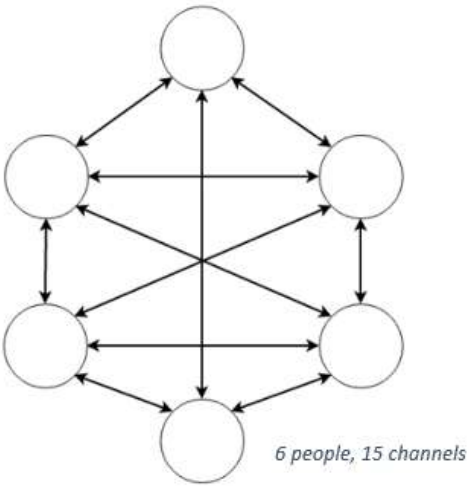
Those laws govern technology. Other laws (not taught in law school) govern us.* Though it comes out of the world of software development, Brooks’ law is very much concerned with the human element. In his 1975 book, *The Mythical Man-Month*, the eponymous Fred Brooks explained how adding manpower to a late project makes it later. Adding headcount can have diminishing (even negative) returns because of:

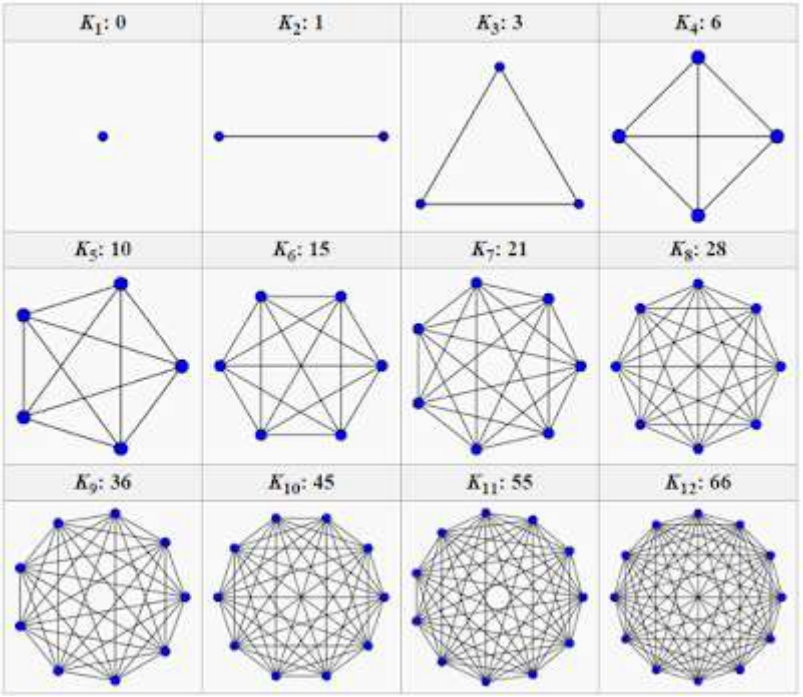
Indivisibility. The quip about the nine women combining to produce a baby in one month gets at the limited divisibility of tasks. While multiple perspectives and fresh eyes might, for example, improve a contract, imagine the chaos of assigning each sentence thereof to a different lawyer. Many complex tasks defy divisibility and delegation. Sometimes, it really is faster and better to do it yourself. (There is a distinction between the division of labor and the division of work)

Ramp-up Time. Even when it is possible to divide a complex task, new people need to be educated before they can contribute. The time spent educating them is a cost. This dynamic is, for example, evident in trial teams who put in inhumane levels of time prepping because they do not have the bandwidth to get other lawyers sufficiently up to speed on the case.

Communications Overhead. Even when tasks are divisible and the time investment is made in properly onboarding new team members, the addition of headcount still results in coordination costs. The person working alone has no need to communicate with anyone (other than the voices in their head). The two-person operation has one communication channel (A-B). The three-person operation has three communication channels (A-B, A-C, B-C). The four-person operation has six communication channels (A-B, A-C, A-D, B-C, B-D). This combinatorial explosion means that communication channels increase at polynomial rate. Some complete graphs and a table might provide more clarity:







Personnel	Communication Channels
1	0
2	1
3	3
4	6
5	10
10	45
20	190
30	435
40	780
50	1,225
75	2,775
100	4,950
200	19,900
300	44,850
400	79,800
500	124,750
1,000	499,500

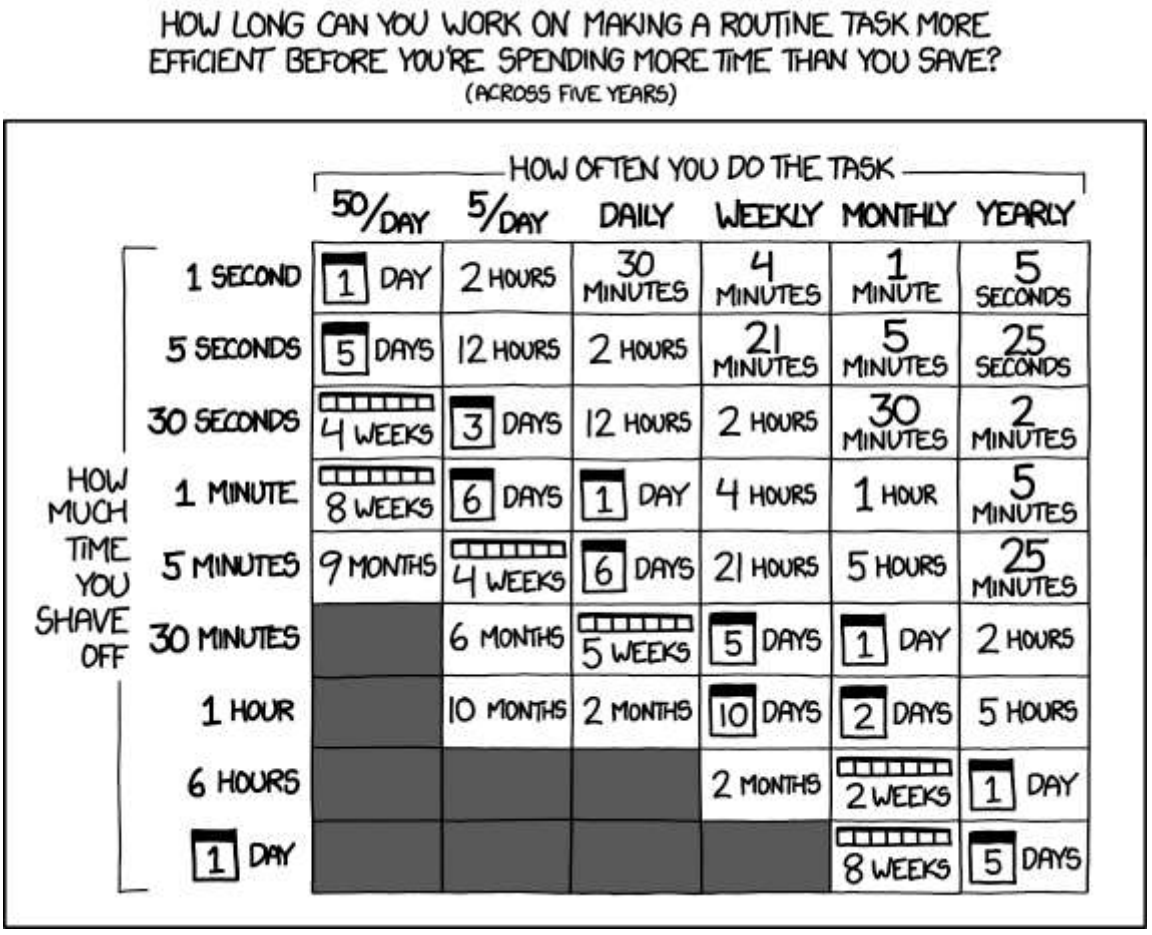
While the 50-person department is only 10-times the size of 5-person department, the former has 123-times the communication channels. The attendant challenge of people (not) being able to communicate with each other leads to the development of information silos. The countermeasure to silos is to create a layer of *channel intermediaries* to communicate on behalf of different groups. **Channel intermediaries are also known as managers** and frequently derided as “bureaucrats.” ‘Paper pushers’ are one of many diseconomies of scale.

The fundamental task of management is to make people capable of joint performance through common goals, common values, the right structure, and the training and development they need to perform and to respond to change. The more people there are, the harder the task is. The task of management is especially hard when those people have the personality traits common to lawyers — i.e., high-status professionals with

an aversion to being managed (autonomy) or working with others (sociability), an extreme degree of focus on the immediate (urgency), and an innate antipathy towards experimentation (resilience) or change (skepticism).

Regardless of personality type, real collaboration is hard. Teamwork is great in theory but entails real costs in practice. Simply adding headcount is not necessarily simple. The positive impact on productivity is neither automatic nor linear.

Indeed, even if adding headcount is a net positive after accounting for hard and soft costs, it is not always the optimal use of finite resources. Opportunity costs must also be considered. At a certain scale, the ROI on increasing the productivity of existing personnel can exceed that of adding new personnel. Two charts I've used before (the first from the amazing xkcd) illustrate the returns on productivity improvement at scale:



Employees	Productivity Gain					
	1%	5%	10%	15%	20%	25%
1	0.5 wks	2.5 wks	5 wks	7.5 wks	10 wks	12.5 wks
5	2.5 wks	12.5 wks	25 wks	37.5 wks	1 fte's	1.25 fte's
10	5 wks	25 wks	1 fte's	1.5 fte's	2 fte's	2.5 fte's
25	12.5 wks	1.25 fte's	2.5 fte's	3.75 fte's	5 fte's	6.25 fte's
50	25 wks	2.5 fte's	5 fte's	7.5 fte's	10 fte's	12.5 fte's
100	1 fte's	5 fte's	10 fte's	15 fte's	20 fte's	25 fte's
250	2.5 fte's	12.5 fte's	25 fte's	37.5 fte's	50 fte's	62.5 fte's
500	5 fte's	25 fte's	50 fte's	75 fte's	100 fte's	125 fte's

Putting it in concrete terms, the 25-person law department is better served spending $150,000/year on technology that improves average productivity by 5% than by hiring new headcount at the same budgetary impact.

And that is before taking the 'laws' above into account. The additional labor is likely to grow in expense over time (Baumol's cost disease) and, while total productivity might increase, average productivity is likely to decline with the addition of new headcount (Brooks' law). Moreover, the $150,000/year in technology spending is likely to buy more productivity as time passes because the technology will get better and cheaper (Moore's, Kryder's, etc).

Not so fast!

The foregoing is not completely wrong. These dynamics merit serious consideration. But while the argument above highlights the barriers to productivity that reduce the gains from adding headcount, it simultaneously assumes that the introduction of technology is frictionless. This immediate, seamless transition to a technologically-enabled workflow calls to mind another 'law'. Clarke's third law: **Any sufficiently advanced technology is indistinguishable from magic.**

Technology is not magic. While it is a challenge to get humans to truly collaborate, it is also a challenge to get machines to work together. Time, expertise, and money are required to integrate and secure different

systems from different time periods built on different platforms for different purposes. Likewise, even after installation and integration, it is a challenge to get people to use the machines properly. **It doesn't matter how powerful the computer is if it is being used like a typewriter with a glowing screen.**

Magical thinking about technology rests, in part, on the belief that the the biggest obstacle to silicon-based productivity improvements is finding the budget to purchase the technology. Once purchased, technology will automatically make things better–superior outputs from the same inputs thanks to the deus ex machina. **We expect a solar-powered, self-driving car. We get a Toyota Corolla — a perfectly functional vehicle that still requires precise user inputs and maintenance to serve its purpose.**

As I've discussed before, the primary prophets of the robot apocalypse are the first ones to dismiss beliefs in silicon pixie dust. The book *The Second Machine Age* by MIT professors Brynjolfsson and McAfee, like its predecessor, *Race Against the Machine*, is often cited as one of those triumphalist accounts of machine ascendence that causes "automation anxiety" among the carbon-based workforce. Yet, at the core of the book are the authors' own studies showing the real, though not insurmountable, barriers to incorporating technology into an enterprise workflow. One study suggested that every dollar invested in computer capital should be the catalyst of up to ten dollars (a 10x investment) in organizational capital–i.e., personnel, training, and process redesign. A related study found that due to the need for complementary investments in people and process, successful investment in enterprise technology typically required five to seven years before realizing the full performance benefits. Again, **the successful IT projects often required 5-7 years and a 10x investment in people and process**. Many of the failures never get off the ground.

Indeed, as the thrust of their research suggests, these harbingers of human obsolescence are themselves rather focused on the human element of human-machine pairings (consistent with Ryan's preference for using Augmented Human Intelligence ("AHI") in place of AI madness). While they note that machines long ago surpassed human beings in activities like chess, the authors emphasize that humans are still winning chess matches against machines. The humans are being augmented by machines (or vice

versa). Human-machine teams are superior to humans or machines alone (well, maybe).

Interestingly, the quality of the machines or the humans are not the sole indicators of success. Process (i.e., how the two are integrated) is an important factor. The authors cite approvingly to a passage from Gary Kasparov (humanity's defeated chess champion):

> The teams of human plus machine dominated even the strongest computers. The chess machine Hydra, which is a chess-specific supercomputer like Deep Blue, was no match for a strong human player using a relatively weak laptop. Human strategic guidance combined with the tactical acuity of a computer was overwhelming.

> The surprise came at the conclusion of the event. The winner was revealed to be not a grandmaster with a state-of-the-art PC but a pair of amateur American chess players using three computers at the same time. Their skill at manipulating and "coaching" their computers to look very deeply into positions effectively counteracted the superior chess understanding of their grandmaster opponents and the greater computational power of other participants. Weak human + machine + better process was superior to a strong computer alone and, more remarkably, superior to a strong human + machine + inferior process.

Process matters. Process matters in getting humans to collaborate with each other. Process matters in getting humans to collaborate with machines. Process improvement is not organic. Status quo bias is too strong. Just as with hiring new personnel, introducing technology is a genuine management challenge that can go horribly wrong.

I will end this post, the same way I ended last post. There remains a fundamental tension between my views on the obstacles to

process/technology improvement and my views on why process/technology improvement is inevitable. In my mind, this tension goes a long way towards explaining the uneven and frustratingly slow progress in using process/technology to improve legal service delivery without losing site of the fact that progress is being made.

While lawyers may feel compelled to invest in process and technology, it is still outside their wheelhouse. For most, process and technology are areas of neither personal interest nor professional training. And, regardless, lawyers are already overburdened with genuinely important work. This tension would seem to introduce a high likelihood of failure that would only create a deeper suspicion of process and technology. Yes, yes it does. It is almost as if larger law departments and law firms would be well served to have interested, trained resources dedicated to the process and technology aspects of legal service delivery. On the law department side, enter legal operations, a subject for another post.

* Other 'laws' I like (feel free to add your favorites in comments):

Parkinson's law: Work expands so as to fill the time available for its completion

Sturgeon's law: Ninety percent of everything is crap

Hofstadter's law: It always takes longer than you expect, even when you take into account Hofstadter's Law

Benford's law (of controversy): Passion is inversely proportional to the amount of real information available

Sayre's law: In any dispute the intensity of feeling is inversely proportional to the value of the issues at stake

Cunningham's law: The best way to get the right answer on the Internet is not to ask a question, it's to post the wrong answer

Clarke's (quasi) fourth law: For every expert, there is an equal and opposite expert

Amara's law: We tend to overestimate the effect of a technology in the short run and underestimate the effect in the long run

Gehm's corollary (to Clarke's third law): Any technology distinguishable from magic is insufficiently advanced

Kranzberg's law: Technology is neither good nor bad; nor is it neutral.

Legal Buy: We're Asking the Wrong Questions (and it is my fault, kind of)

By Casey Flaherty

October 10, 2022

Legal Buy: We're Asking the Wrong Questions (and it is my fault, kind of)

By Casey Flaherty on October 10, 2022

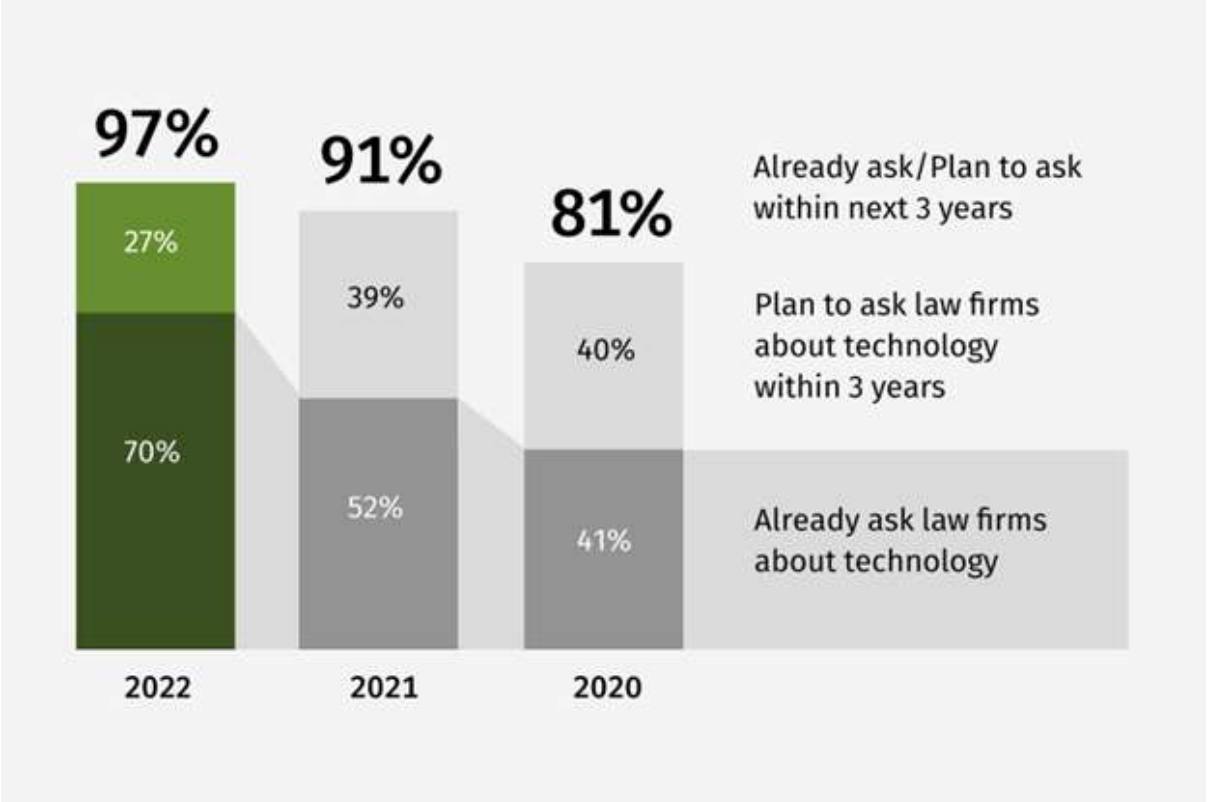
I should be taking a victory lap. Instead, I am on an apology tour urging in-house departments *not* to listen to me—i.e., ignore my long-standing advice re asking law firms about their use of technology. I've concluded that the common application of my advice only adds unnecessary friction to an already friction-laden system—similar to the value-subtractive frictions introduced by ubiquitous, well-intentioned, and misguided approaches to discounts, panels, outside counsel guidelines, AFAs, etc.

I understand the motivations. I also understand the constraints. Everyone operating in our space should be able to connect the dots on these four statistics:

- 75% of GCs recognize workloads will outpace budgets (problem)
- 80% of in-house lawyers are burned out (consequence)

- 70% of law departments are *not* investing in digital transformation (unavailable solution due to resource constraints)
- 70% of law departments are asking law firms about technology usage (attempt to cope within resource constraints)

Though I would prefer the first three statistics were less depressing, I can conceptualize a world where (a) the last stat is higher and (b) this is a good thing. I now strongly doubt (b) is likely. Which makes the seeming inevitability of (a) somewhat tragic: 97% of law departments are either already asking law firms about technology (70%) or plan to start asking within the next three years (27%). Observe the upward trajectory:



This should be gratifying to me. I am the author of *Unless You Ask*. Published by the ACC, that guidebook is premised on the importance of these types of questions and takes its name from a 2015 Altman Weil survey in which 62.7% of law firms responded they were not doing more to change the way they delivered legal services because “clients weren’t asking for it.” Well, they are now.

Instead of patting myself on the back, let me say this: **I was wrong. I am sorry.**

I stand behind my symptom identification. I stand behind my differential diagnosis. I stand behind my treatment plan—in the abstract. But my advice was poorly calibrated to survive contact with reality.

I know how much pressure in-house departments are under. I recognize this will only get worse. I should have foreseen that, in making attendant tradeoffs, most departments would opt for an oversimplified alternative to the resource-intensive structured dialogue I advocate. I should have better understood the net negative impact of the additional friction.

While the situation still screams *something must be done*, doing nothing is superior to doing the wrong thing, which includes doing the right thing the wrong way. At best, the wrong thing squanders already scarce resources. More often, the wrong thing makes a bad situation worse.

Succinctly, some advice to law departments. Doing the right things below is legitimately hard (and likely infeasible for the severely resource constrained) but this reality should not be a barrier to expending less energy on the wrong things so common to legal buy:

- Minimize fake discount discussions as much as feasible and reorient towards real pricing conversations—i.e., pricing the work (not the lawyer) in context of the (i) value of the work to the enterprise and (ii) the market in which the work is being bought
- Do not treat AFAs and panels as variants of the discount discussion or even ends in themselves; rather, AFAs and panels should be among the natural outcomes of the work decomposition, work pricing, and work/supplier sorting fundamental to rationalizing your legal value chain to better deliver business value (e.g., embedded advisory, compliance by design, portfolio partnerships, legal marketplaces)
- Focus outside counsel guidelines on reducing friction in your B2B relationships and improving transparency, with an emphasis on consistent data quality and a strong bias towards driving industry-wide standards (e.g., SALI)—rather than further

increasing friction in the vain hope micromanagement will deliver incremental cost savings (i.e., another cumbersome discount variant)
- Do *not* ask law firms about their use of technology *unless* you can, and will, use the answers to engage in structured dialogue to change behavior, theirs and yours, in a manner that sustainably improves business outcomes at scale and pace; indeed, strip out anything extraneous from your RFPs, with "extraneous" not being a measure of desirability but, rather, a realistic assessment of what will affect behavior, including decision making

That's the short of it.

For the intrepid few who prefer the verbose, nerdy version, I will expound more in subsequent posts and consolidate the entire brain dump here with the aim to flesh out the above. My objective is to increase understanding and, especially, empathy as we do our collective best to, at the very least, not further increase unnecessary friction. Specifically, I will attempt to:

- Reinforce that we face wickedly complex problems
- Explain that it is both natural and counterproductive to seek simple solutions to complex problems
- Illustrate why facially simple solutions—discounts, AFAs, panels, RFPs, outside counsel guidelines—to the complex problems of legal buy are counterproductive on both an individual and system level

Stay tuned.

Scary Stories about our Wicked Problems (Legal Nerd Halloween)

By Casey Flaherty

October 31, 2022

Scary Stories about our Wicked Problems (Legal Nerd Halloween)

By Casey Flaherty on October 31, 2022

I'm not really into the whole brevity thing. I already wrote a brief post (only 800 words) that concludes with succint advice to law departments on discounts, AFAs, panels, outside counsel guidelines, RFPs, and, in particular, a humbling recommendation they not ask law firms about the use of technology unless the answers will inform structured dialogue to improve business outcomes at scale and pace (because I'd previously written a book on this subject).

At the conclusion of this off-brand concision, I promised my tiny corps of hard core readers an extended universe of nerd content. Fair warning, this is not for everyone.

I'm a massive disappointment. For every complex problem, there is an answer that is clear, simple, and *wrong*. In pursuit of being less wrong, I refuse to promote simple answers to complex problems no matter how keen my audience is to learn 'the one quick trick.'

My primary deck for presenting to law departments includes a slide acknowledging that what follows is "Easier said than done!" My voiceover explains my fundamental interest in hard problems and the fundamental truth that addressing hard problems requires hard work, where consistency trumps intensity—i.e., hard work for sustained periods.

Recently, I've even gone so far as to up my meme game and add a reminder slide near the end. My hope was Gotham's wealthiest resident could reinforce my poverty of easy answers.

But hard ≠ impossible. I therefore conclude the talk—aptly titled “Winter is Coming”—with a nod towards reframing our approach to driving better outcomes at scale and pace: embedded advisory, compliance by design, integrated law, legal marketplaces, industry standards, service delivery maturity models, value storytelling, etc.

My caveats prove ineffectual. The shiny new vocabulary supported by an avalanche of data suggest to people (a) I have no hobbies (accurate), and (b) I have devoted real time to interrogating these questions (also true) and therefore (c) may possess the secret to unlocking all their law department’s latent potential (not so much). While I can advance strategic thinking and offer tactical guidance (tech, matter management, CLM, ediscovery, ADR, managed services), I don’t do magic.

When it becomes apparent I can’t provide *the answer* and many of my interconnected ‘answers’ are truly easier said than done, I find myself subject to all manner of special pleading about the obstacles my in-house

compatriots face. Cost-cutting. Hiring freezes. Bandwidth constraints. Organizational politics. Legacy systems. Inertia. Etc.

In short, people tell me their jobs are hard. I believe them.

It is hard out there, and getting harder. Economics is the study of how humans make choices under conditions of scarcity. Recent headlines reflecting the scarcity of resources available to law departments, relative to escalating demand, should activate our empathy:

- Chaos, Complexities Overwhelming In-House Lawyers
- Legal Departments Report Swelling Workloads—but Without Budget Increases
- Legal Departments Are Eager to Do More with Less But Are Fuzzy on the Path
- 70% of Legal Departments Don't Invest in Digital Transformation
- Weak Earnings Reports Add to Legal Departments 2023 Anxieties
- In-House Lawyers Are Stressed and Want to Walk Out

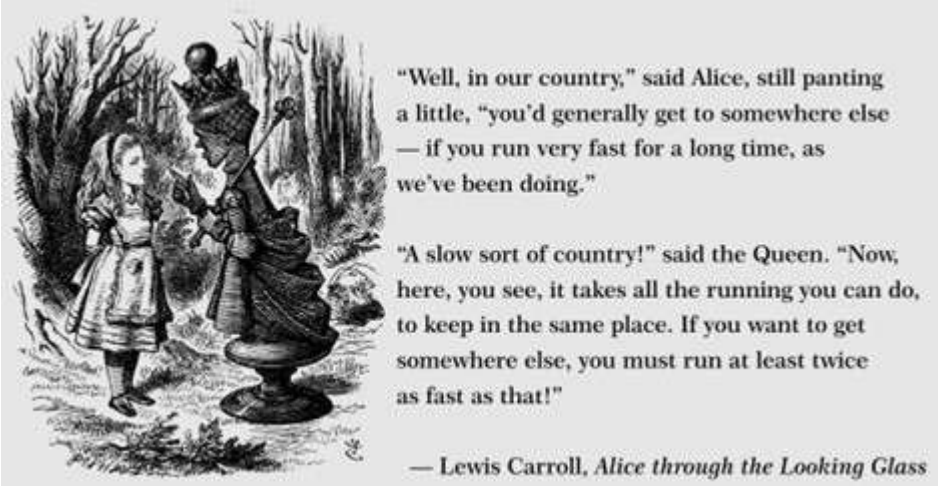
Almost 80% of in-house counsel are burned out and almost 70% are looking to move jobs in the next year. This is very unhealthy. And yet we may be only at the front end of some extraordinary "more with less" contortionism as we cope with deteriorating economic conditions.

Solving complex problems under adverse conditions is not obvious, simple, nor easy. We should empathize with how truly challenged in-house teams are, and will be.

The Gordian Knot of in-house existence is relentless pressure to cut costs (ratcheting up now) while servicing ever greater demands from the business as the complexity of the external operating environment explodes. Unyielding pressure to meet immediate, escalating business needs shortens time horizons on which in-house teams operate and saps patience for projects that not only distract from but affirmatively disrupt work getting done.

Solving for now. Tunnel vision is a completely comprehensible response from committed professionals who are legitimately busy, and becoming

busier by the day. They feel they must tread water simply to avoid drowning. In fact, **they must run ever faster to merely fall behind more slowly**. They are involuntary entrants in a Red Queen's Race—up a hill with a parabolic slope. No wonder they are heads down and burning out.



Near-term, failure is not an option (zero-risk bias). Long-term, failure is the only option, one way or the other. Disruptive projects, including experiments, ambitious enough that failure is a distinct possibility are the only viable path to achieving adequate leverage—i.e., narrowing the ever-widening gap between business needs and legal resources. But disruptive projects, by definition, distract from work, and there is much important work that needs be done *now* (with the backlog lengthening by the day). Disruptive projects demand time from people who have no time to spare and no time to wait.

Pete Cheslock
@petecheslock

Being an adult is pretty much just saying “I need to get though this week” over and over again until you die.

8:04 AM · Oct 31, 2022 · Twitter for iPhone

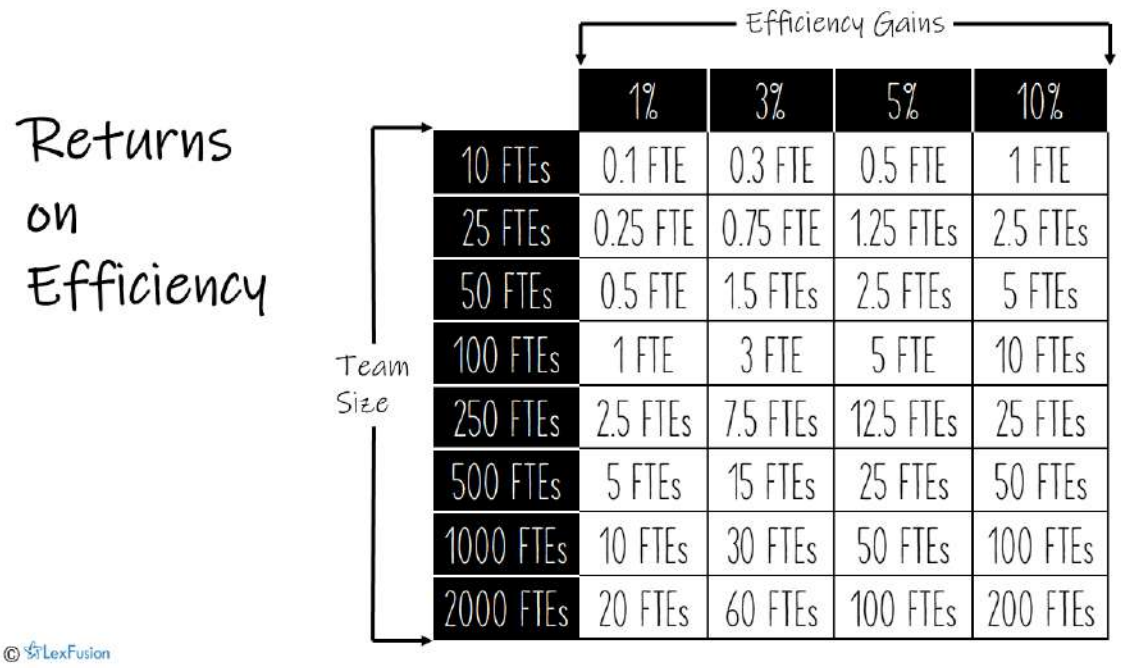
773 Retweets **62** Quote Tweets **3,998** Likes

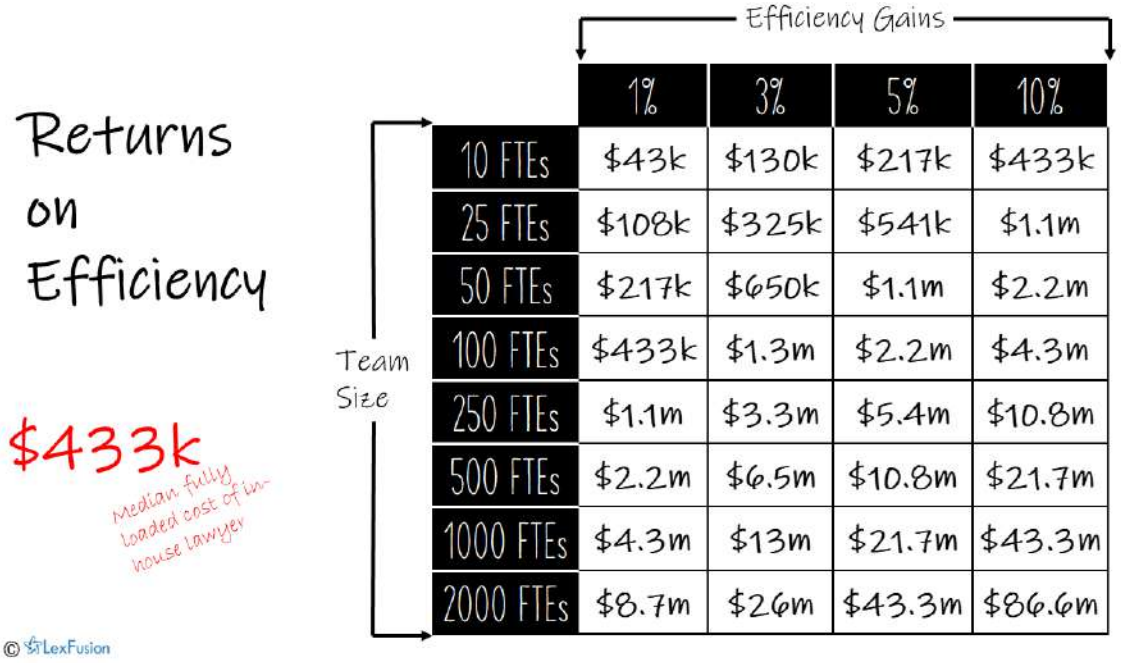
The low-level time-savings arithmetic is simple and compelling, in the abstract. In reality, explain to a busy person you need five hours of their time to shave five minutes off their day, they will look at you like you have lost your mind. Five real hours ‘lost’ is valued far more than the net sixteen theoretical hours saved in year one and the twenty one hours saved every year thereafter. This preferencing of the present over the future is known as hyperbolic discounting. And these micro-level dynamics become materially more fraught at the macro level due to collective-action problems and path dependence.

The Time Dividend: *the personal ROI of tiny gains*

How much time you get back \ How much time you invested	5 min	30 min	1 hr	5 hr
5 min/wk	4 hrs	3.5 hrs	3 hrs	- 1 hr*
30 min/wk	24 hrs	23.5 hrs	23 hrs	19 hrs
1 hr/wk	48 hrs	47.5 hrs	47 hrs	43 hrs
5 min/day	21 hrs	20 hrs	20 hrs	16 hrs
30 min/day	125 hrs	124.5 hrs	124 hrs	120 hrs
1 hr/day	250 hrs	249.5 hrs	249 hrs	245 hours

*Even at a 5-hour investment to save 5 minutes per week results in a net positive ROI of more than 3 hours by the end of Year 2, and the saves 4 hours every year thereafter



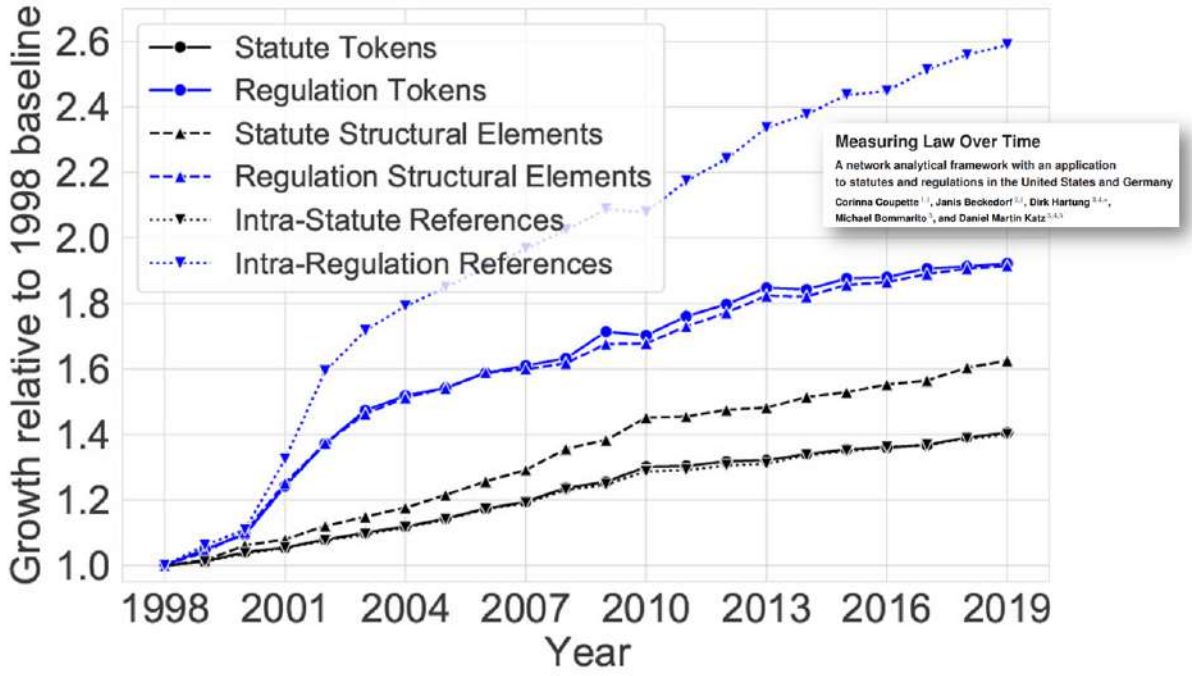


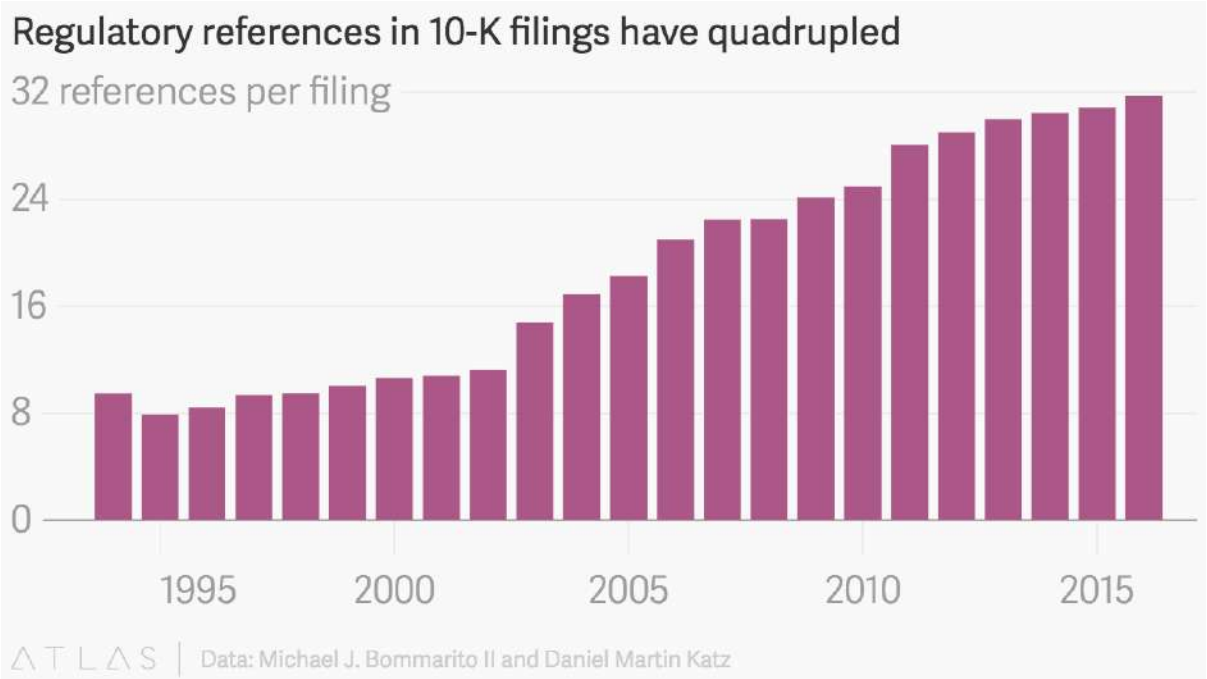
Compounding complexity. In the foregoing, I repeatedly reference the intensifying demands on legal. I've previously covered the compounding complexity of the business operating environment. In brief, now more than ever, expert legal guidance affects business outcomes. In theory, this guidance need not come from traditional lawyer-delivered services but, in practice, still largely does.

Regalytics estimates "there are over twenty five thousand regulators in the US, and more than **five million** globally." Regulators regulate. Regulations

don’t merely accrete. Regulations overlap, intersect, and, often, as you cross borders, conflict.

Professor Dan Katz and his collaborators have empirically established the resulting increase in legal complexity—*see* here, here, here, here. The charts below track the unbroken upward trajectory and intersecting nature of statutes and regulations, as well as the increase in references thereto in 10-K’s (the public documents where corporations identify that which is material to their business).





The evolving regulatory environment, exacerbated by the attendant surge in investigations and litigation, is a primary source of intensifying demands on legal (there are others, like the Cambrian explosion in data volumes, which, of course, is also an active driver of net new regulation). From the perspective of the business, this unintended acceleration in complexity is real, organic, and exogenous (i.e., externally imposed), regardless of convenience, conduciveness to making money, or conformity to resource-allocation preferences. Of particular moment, new regulations and litigations do not exempt companies in cost-cutting mode.

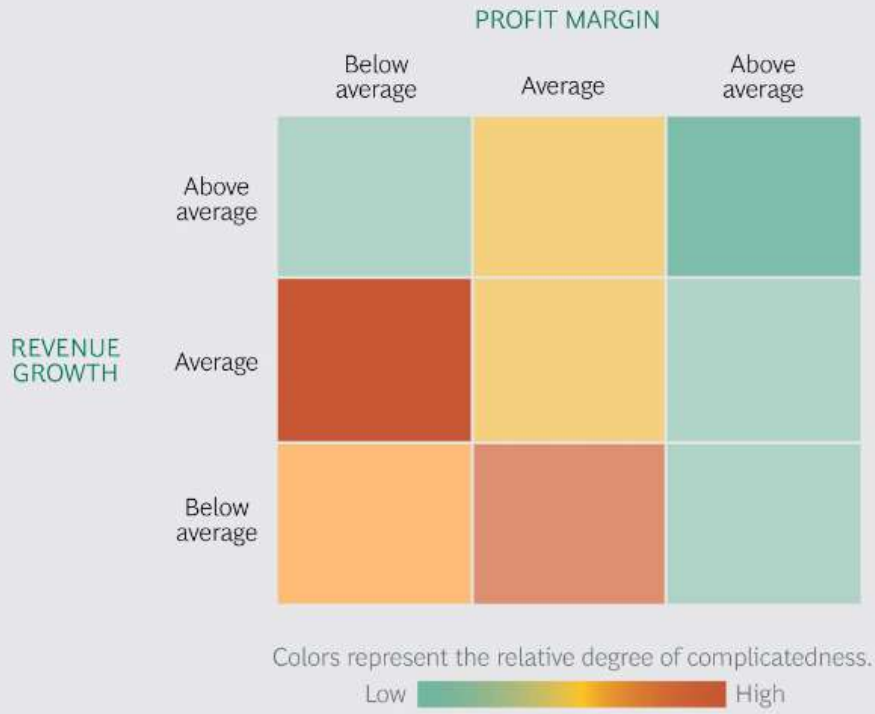
The inimitable Jae Um summed up her own stellar work on the "silent explosion of demand" thusly, "It's up. Like, a lot." (*see* here, here, here)

Complexity costs. As Bill Henderson explains in his superb summary of Tainter and Olson, "Although higher yields increase total output (and wealth goes up), the process of always getting more from less necessarily requires planning and ingenuity. Over time, this gets harder." One reason this gets harder is because complexity breeds complicatedness.

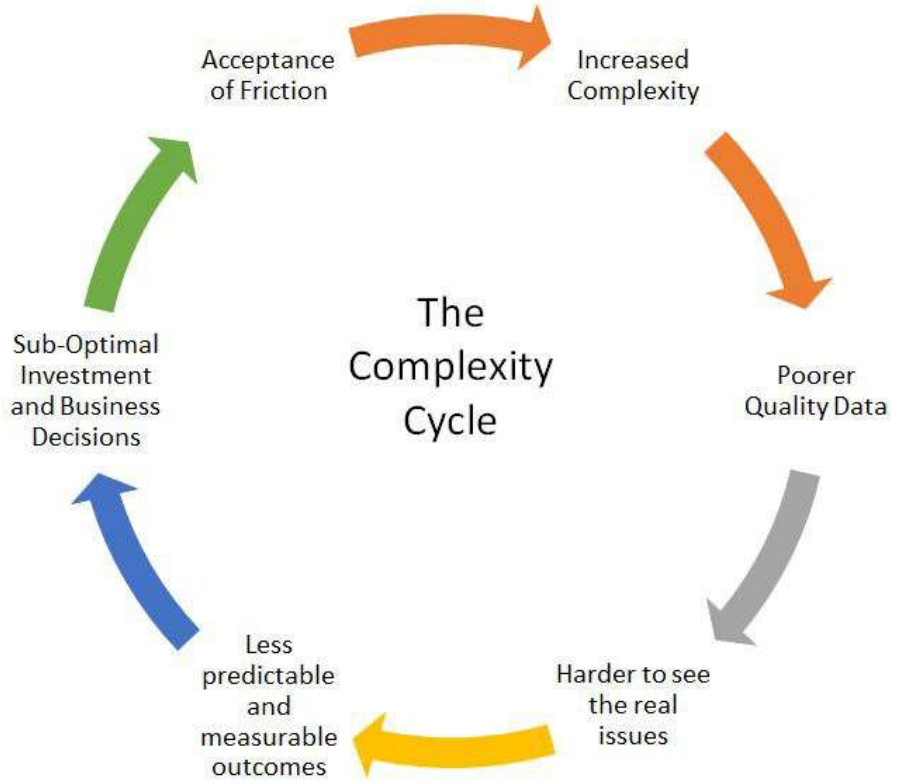
Cascading complicatedness. Complicatedness is "the increase in organizational structures, processes, procedures, decision rights, metrics, scorecards, and committees that companies impose to manage the escalating complexity of their external business environment." Critically,

“complicatedness hampers growth by slowing innovation…And it cuts margins by injecting inefficiency and cost into operations.”

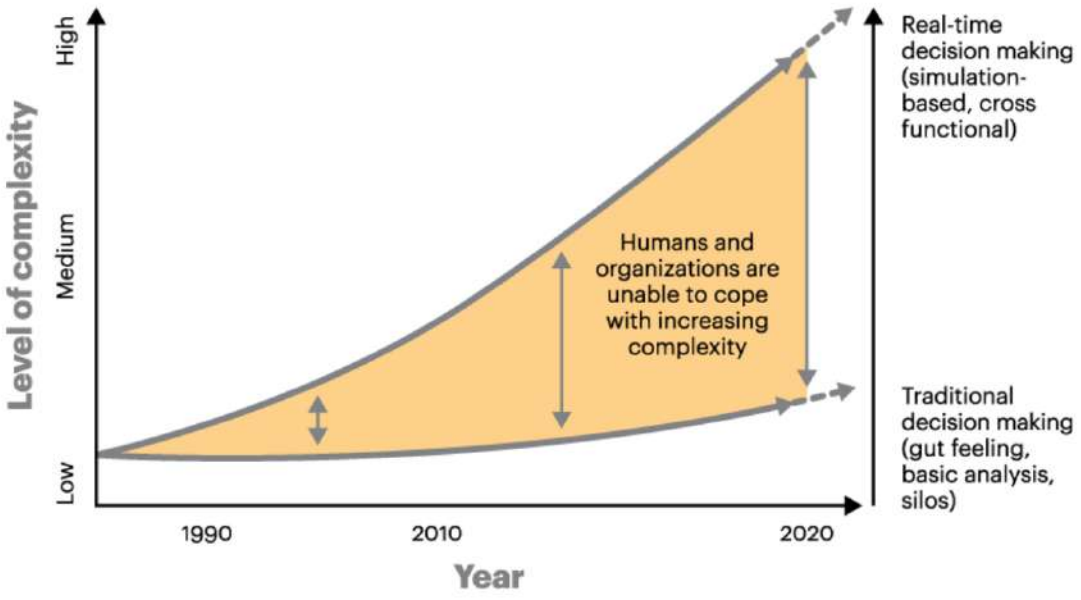
EXHIBIT 1 | Complicatedness Affects Both Revenue Growth and Profit Margin



Source: BCG Complicatedness Survey.



Decision-making processes have not kept up with increasing complexity



Source: A.T. Kearney analysis

Counterintuitively, organization size does not appear to be an influential driver of complicatedness. Completely intuitively, greater levels of regulation strongly correlate with higher levels of complicatedness. As the Boston Consulting Group characterizes it, organizations that “face daunting

levels of external complexity…seem to have mimicked that complexity within their own organizations."

BCG is responsible for the landmark analysis of complicatedness, the fabulous *Six Simple Rules* (h/t Jae). When the book released in 2014, BCG calculated that while environmental complexity had increased 6x, organizational complicatedness had increased 35x—i.e., unchecked, internal complicatedness tends to increase at a multiple of external complexity.

Additional studies have documented the time lost to low-value management processes, from budgeting to performance reviews, leading the co-founders of the Management Lab, Gary Hamel and Michele Zanini, to conclude in 2017, "it's reasonable to assume that as much as 50% of all internal compliance activity is of questionable value…there's compelling evidence that bureaucracy creates a significant drag on productivity and organizational resilience and innovation. By our reckoning, the cost of excess bureaucracy in the U.S. economy amounts to more than $3 trillion in lost economic output."

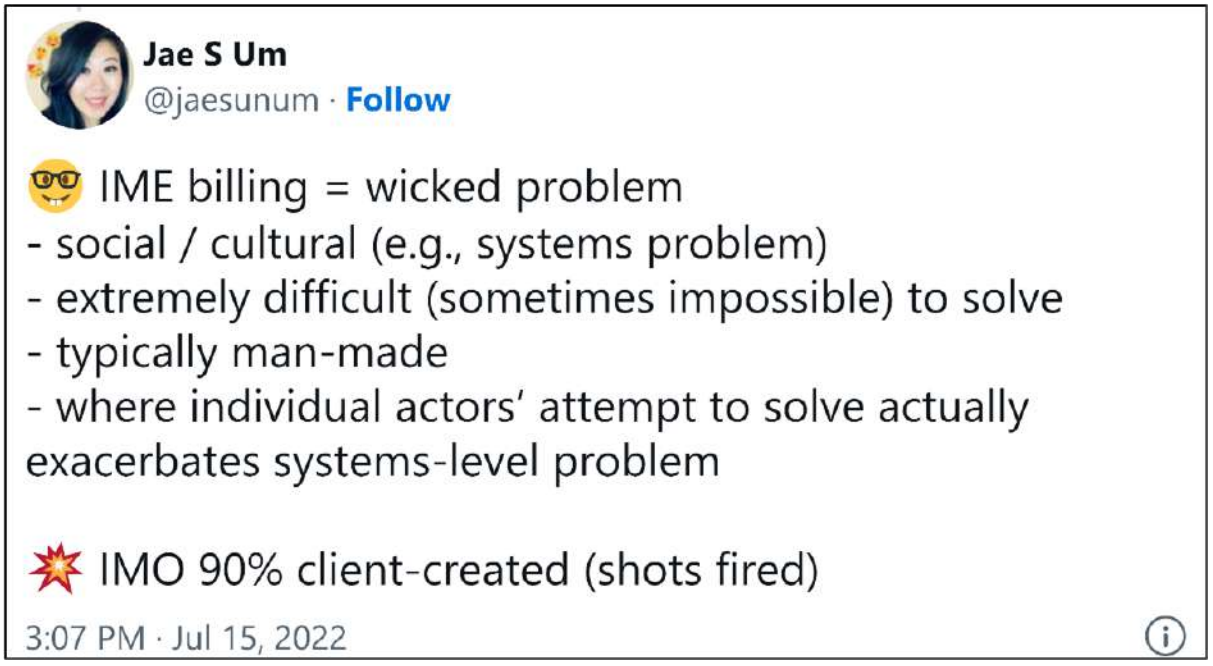
The resulting demotivating labyrinth is among the reasons, as I once observed far less eruditely, "Every institution, no matter how venerable, looks like a **goat rodeo** from the inside."

In-house lawyers are not immune from the suffering nor the allure of complicatedness.

- In-house lawyers, of course, must navigate increasingly complicated organizations both (i) to do their increasingly complex jobs and, at the department level, (ii) to acquire sufficient resources to do their jobs. With respect to the latter, finance, IT, HR, procurement, et al. are often more hindrances than helps in enabling the law department to meet the growing legal needs of the enterprise.
- Most other functions, however, would list legal among these internal blockers. *The Department of Slow. The Department of No*. 73% of enterprise employees perceive legal as a bad business partner and 65% admit to intentionally bypassing legal

to get their work done. Legal is seen as introducing all manner of complicatedness—bureaucracy, restraints, chokepoints—that reduces business velocity.

- This friction is also externalized. Via the law department, each corporate client becomes like an independent regulatory body imposing complexity on their external providers through various mechanisms, especially outside counsel guidelines. I'm on record as loathing outside counsel guidelines, but I commend two epic Jae Twitter threads on how OCGs inject complicatedness into the B2B relationship (here and here).



Wicked problems and the limits of satisficing. As Jae observes, billing at scale is a wicked problem. Legal is beset by all manner of wicked problems where there is no single solution "and 'wicked' denotes resistance to resolution, rather than evil…Moreover, because of complex interdependencies, the effort to solve one aspect of a wicked problem may reveal or create other problems. Due to their complexity, wicked problems are often characterized by organized irresponsibility."

Unfortunately, wicked problems do not lend themselves to satisficing solutions. A portmanteau of *satisfy* and *suffice*, satisficing is a decision-making strategy to deliver 'good enough' outcomes—i.e., a solution that while suboptimal meets an acceptability threshold. Herbert

Simon won the Noble Prize in Economics for the articulating the concept, "decision makers can satisfice either by finding optimum solutions for a simplified world, or by finding satisfactory solutions for a more realistic world." Satisficing is central to Simon's work on bounded rationality and heuristics—i.e., mental shortcuts to reduce cognitive load and reach practical decisions within limitations (e.g., non-infinite time, knowledge).

Like adding another process, procedure, or layer to an organization, most outside counsel guidelines present as good enough. Most aren't. The same is true of most discounts, AFAs, panel programs, and RFPs. But that's an exploration for next post.

This post, I am interested in why law departments might solve for the local optimum at the expense of the global optimum. Why pursue the path of least resistance? Or, as our library and information science friends (like Greg and Sarah, who I am scared will yell at me for this) might frame it, the principle of least effort, which speaks to our propensity to use the most convenient methods and familiar tools to achieve minimally acceptable results—paired with our apparently hard-wired tendency to overrate the adequacy of low-hanging fruit. Say what you will about the problematic mechanics of modern legal buy, the standard kludges are ostensibly convenient for, and familiar to, law departments while achieving superficially acceptable results—i.e., they fuel the activity illusion without actually requiring real changes in consumption behavior.

This is no one's fault. Blame-based narratives are unhelpful, and there is nothing particular to lawyers in this regard. Mastery, autonomy, and purpose are universal incentives—i.e., that lawyers are fundamentally focused on lawyering is entirely natural and consistent with the beneficial impacts of the division of labor. Everyone is susceptible to déformation professionnelle—defaulting to the point of view of one's own area of expertise. The law of the instrument (to the hammer, everything looks like a nail) is deemed a law for good reason.

Lawyers' instrument is lawyer time—abiding by what I've labeled the "lawyer theory of value." It is completely unsurprising, especially when workloads already exceed capacity and the time horizon is *yesterday*, that

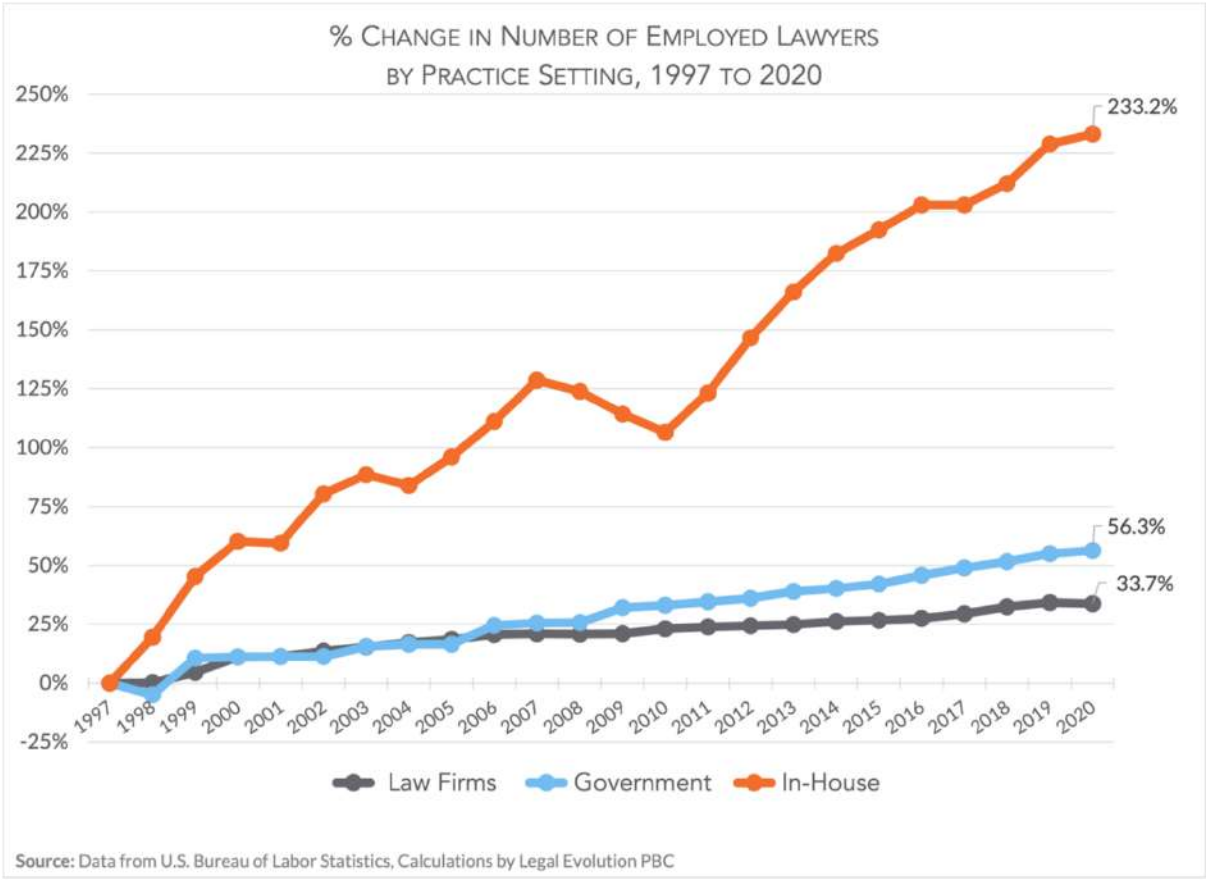
the most appealing pressure release valve to increase current capacity to handle more legal work is more lawyering by more lawyers.

Go with what you know. For now, people remain the closest approximation to plug-and-play resources. Ask an overwhelmed human what would provide the most immediate assistance for a crushing workload, and their answer might well be *cloning*. That is, a carbon copy of themselves, needing no onboarding. The next best option is another person like them—in our case, a similarly trained, similarly smart legal professional who can ramp-up quickly.

In meeting the legal needs of business, lawyer time persists as the key resource and key constraint. Insourcing is the mechanism by which businesses purchase large blocks of lawyer time for low, flat fees—i.e., lower fees relative to market price for what is considered comparable external legal services. Insourcing is labor arbitrage. In theory, insourcing also gives companies direct control over how legal services are delivered and therefore the ability to transform them. In reality, examples of transformation are few and far between.

Law departments start as less expensive, more accessible alternatives to law firms, and continue to be characterized as such. Lawyer-centric insourcing services the law departments' dubious savings mandate while appealing to the instinct to throw bodies at the problem (resulting in a bad case of Baumol's cost disease). Insourcing delivers what law departments 'feel' they need (more bodies to handle more work) while enabling them to satisfy their mandate (more with less).

Insourcing has been the biggest story in legal, for decades. Since the middle of the 1990s, law departments have expanded at 7x the rate of law firms. There are now more in-house lawyers in the United States than in the domestic offices of the AmLaw 200—in-house is bigger than BigLaw:



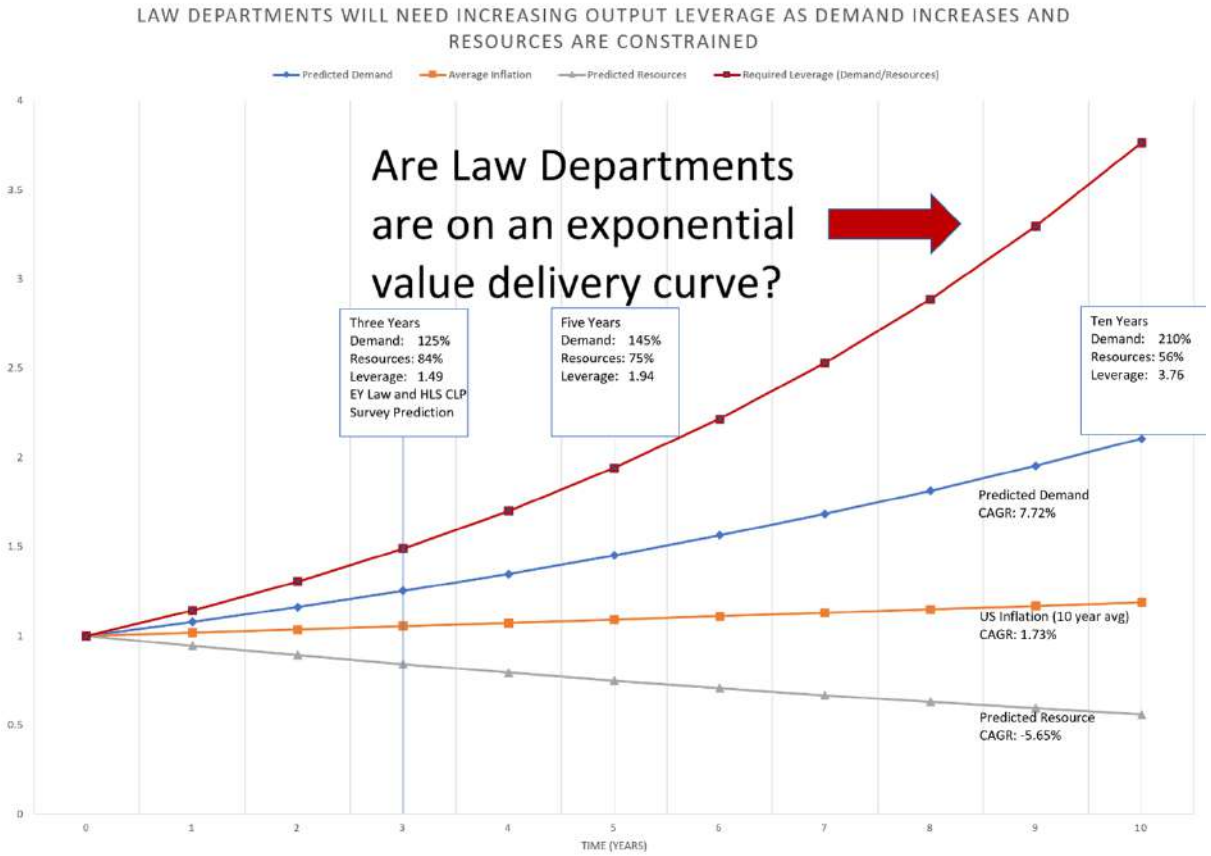
Insourcing works. At the average corporation, legal costs steadily decline as a percentage of revenue, and many corporations experience brief periods of reduction in raw legal spend. Insourcing works—until it doesn't.

While demands on the law department accelerate, the willingness of the enterprise to invest resources in the law department declines. Money is but one resource. Headcount also hits upper bounds, and not solely for fiscal reasons. There are hard and soft constraints on corporations' general willingness to hire, as well as their specific eagerness to allocate finite FTEs to the law department. This headcount cap frustrates both the department's bias for more bodies and the company's savings expectations.

Even without a headcount cap, insourcing is insufficient and subject to diminishing returns. At best, growing headcount is a linear solution to a nonlinear problem. To return to a favorite Barnwellism, "If capacity must increase by 10x, **our current approaches break**, as the option of a 10x increase in hiring is simply off the table." Rather, as Jason rightly observes, "we will need more capacity and new capabilities that mere conservation of

resources cannot deliver. Our evolutionary path needs improvements on how we do work today that range from whole-multiples to orders-of-magnitude. This is transformation. Transformation is system-level change."

System-level change, of course, is not what lawyers were trained to do.



The solution to our wicked problems. Long post. I thank you for making it this far. But you were warned. You should have abandoned hope at the outset.

Everything should be made as simple as possible, but not simpler. These truly hard problems do not lend themselves to simple solutions. My objective in this post was to activate empathy. We should seek to understand why smart, committed professionals might feel they have no choice but to pursue suboptimal quick fixes. My overall objective for this series, however, is to highlight that these are in fact choices, and we can choose to stop doing that which is unhelpful. We may be poorly positioned to resolve all our wicked problems. But we need not make circumstances worse. Doing nothing is better than doing the wrong thing even when *something must be done*.

Trust Fall: the limits of discounts, panels, billing guidelines, etc.

By Casey Flaherty

December 5, 2022

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By Casey Flaherty on December 5, 2022

At present, the most universal priority for law departments is “controlling outside counsel costs” per 85% of respondents to the most recent TR Legal Department Operations Index.

I understand. I also doubt the marginal utility of simply pressing harder on the traditional levers of cost control (discounts, panels, RFPs, outside counsel guidelines, AFAs). My sometimes solicited, alternative advice:

- *Package work*. Identify opportunities to enter portfolio arrangements, including integrated law relationships with New Law offerings.
- *Move work*. Right source, including greater use of legal marketplaces to find the right talent at the right price.
- *Re-examine costs on autopilot*. Major advances in ediscovery, ADR, court reporting, staffing, etc. present substantial, immediate spend-optimization opportunities.
- *Don’t stop investing in compliance by design.* Embedding legal knowledge in business processes is the only viable, long-term approach to meeting the evolving legal needs of business in an increasingly complex operating environment.

If you want to discuss, call me, maybe.

Herein, however, I am not focused on being better. Rather, we will continue our exploration of avoiding worse. The unpalatable message remains that even when *something must be done,* doing nothing is superior to doing the wrong thing. Running in the wrong direction cannot be course corrected solely by redoubling our efforts.

WORD COUNT WARNING: the original, short version is here. Proceed at your own risk.

It is getting ugly out there. We have a failure to communicate grounded in a lack of trust. Even when times are good, clients express surprise, anger, and dismay as they "vow to fight" law firm rate increases that are roughly in line with inflation. I take zero issue with clients pushing back on rate increases, but the moralizing strikes me as a distraction from productive commercial negotiations. Yet, with deteriorating economic conditions and being that time of year, we appear to be in for another edition of clients berating law firms for inefficiency while doing nothing about it beyond demanding discounts and, in some places, additional supplier consolidation—which is to say, doing nothing effective about it, in the vein of 'old man yells at cloud.'

I'm on an apology tour, in part, because I've had several recent conversations with prominent law departments currently revisiting their outside counsel programs. They inquired if they should employ the questions on law-firm technology usage contained in my guidebook *Unless You Ask*. I advised them not to. While it may appear like I am producing parody, I assure you these exchanges hewed closely to the following:

In-house: in our RFP to law firms, should we include questions about technology, like in your guidebook?

Me: who will read the answers?

In-house: I don't know.

Me: how will the answers affect your decisions?

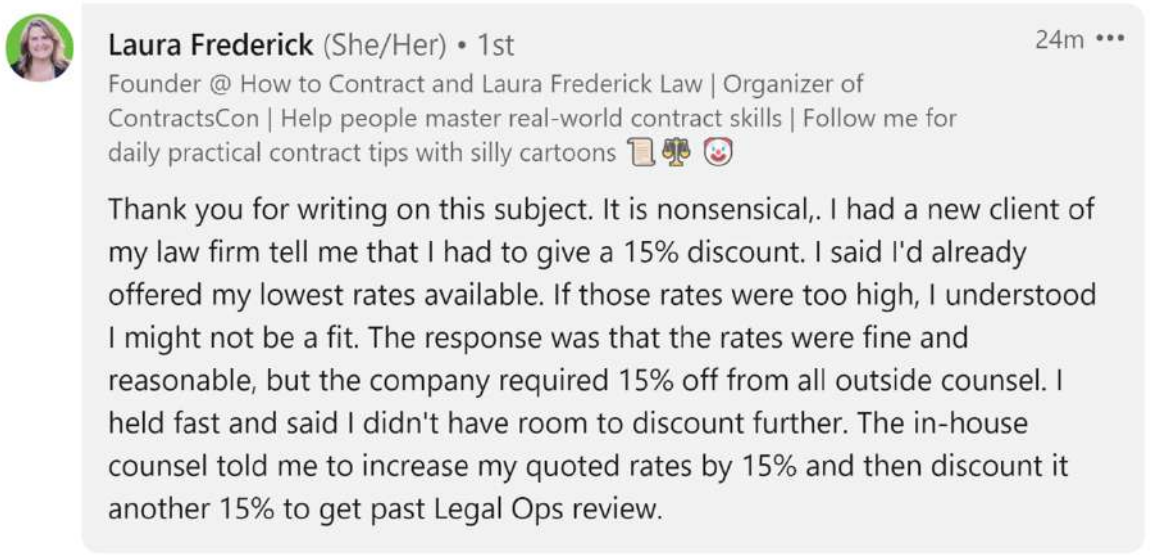
In-house: I don't know.

Me: then don't ask. You should not include any questions in your RFP that won't inform your decisions. Why would you consider doing so?

In-house: seems like we should. Technology is important.

I know the logic presents poorly when laid out in this manner. But I wrote the book on this subject. I get the opportunity to probe. Such decisions are often made rapidly, without much reflection let alone scrutiny.

Ponder the related but more familiar rituals around discounts—which I have labeled "rack-rate kabuki—through the lived experience of Laura Frederick, who was kind enough to comment on my first installment:



Laura Frederick (She/Her) • 1st 24m •••

Founder @ How to Contract and Laura Frederick Law | Organizer of ContractsCon | Help people master real-world contract skills | Follow me for daily practical contract tips with silly cartoons 📜🎋🤡

Thank you for writing on this subject. It is nonsensical,. I had a new client of my law firm tell me that I had to give a 15% discount. I said I'd already offered my lowest rates available. If those rates were too high, I understood I might not be a fit. The response was that the rates were fine and reasonable, but the company required 15% off from all outside counsel. I held fast and said I didn't have room to discount further. The in-house counsel told me to increase my quoted rates by 15% and then discount it another 15% to get past Legal Ops review.

Laura is correct in her judgment that the practice is nonsensical. My aim is to pair judgment with empathy.

We intuit the impetus: equitable prices for, and effective oversite of, external legal services. Less automatic is our understanding of how the pursuit of legitimate objectives results in nonsensical practices.

Almost no behavior is irrational, in the sense of being inexplicable. Rather, behavior is rational within context. If a behavior strikes me as irrational, then I lack sufficient understanding of the context. Context is critical. And

the in-house context is bordering on crisis. Installment #2 is an exercise in deliberate empathy—almost 3,000 words of deep nerdery exploring context.

Already burned out professionals are under intensifying pressure to immediately address increasingly complex problems in areas outside their core competencies as demand grows while resources remain flat (at best). If you come away from this series not understanding the choice architecture that results in the foregoing examples, I will have failed (again).

this is important

something must be done

but we're already underwater

X is common and is considered a quick, if only partial, fix

even if X is insufficient, X is still something

let's do X

….[problems persist while bandwidth continues to dwindle]….

more X it is

Make things as simple as possible but no simpler. In a resource-constrained environment, simple solutions present as the only affordable options to address our complex problems—that is, solutions for which we have sufficient time, attention, and money. For entirely comprehensible reasons, in-house departments consistently choose the path of least resistance and default to simple solutions when addressing the wicked problems of legal buy—to everyone's detriment.

Unfortunately, while I can explain why simple solutions to complex problems are wrong, I cannot offer simple alternatives—problems amenable to simple solutions are, by definition, not complex. I consistently disappoint in-house departments because they ask me for a fish, and I offer them a worm.

Still, I persist in my belief that hard ≠ impossible. But we must first our complex problems are not amenable to simple solutions. At the very least, if circumstances render the right approach impracticable, we can stop wasting energy being wrong. Misguided pursuits, no matter how well intentioned, consume finite attention and move us further away from our objectives. Even when *something must be done*, doing nothing remains superior to expending energy unproductively, let alone aggravating an already precarious situation.

DISCOUNTS DISCOUNTS DISCOUNTS!

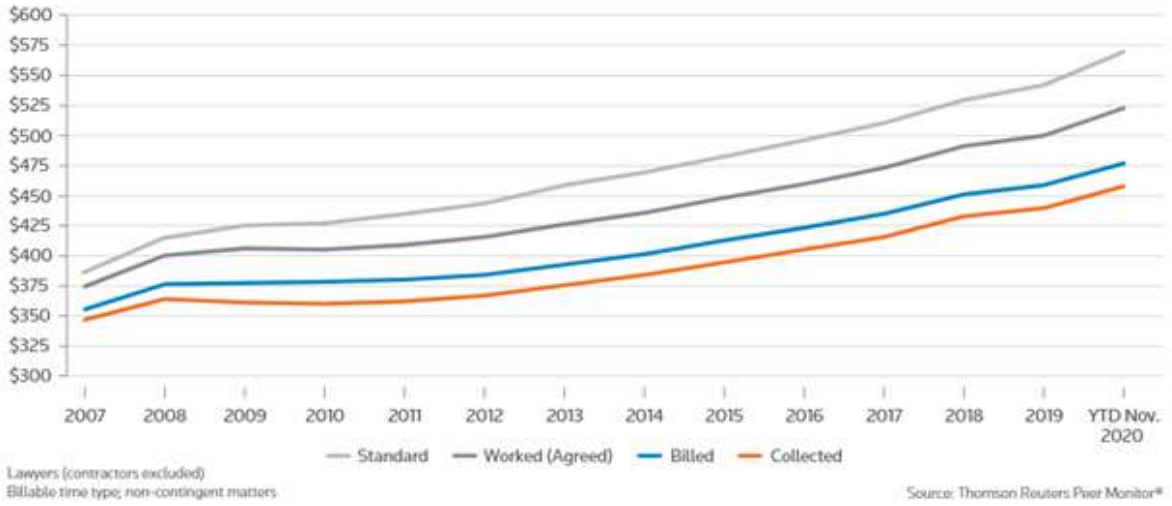
Discount is not rate. Rate is not price.

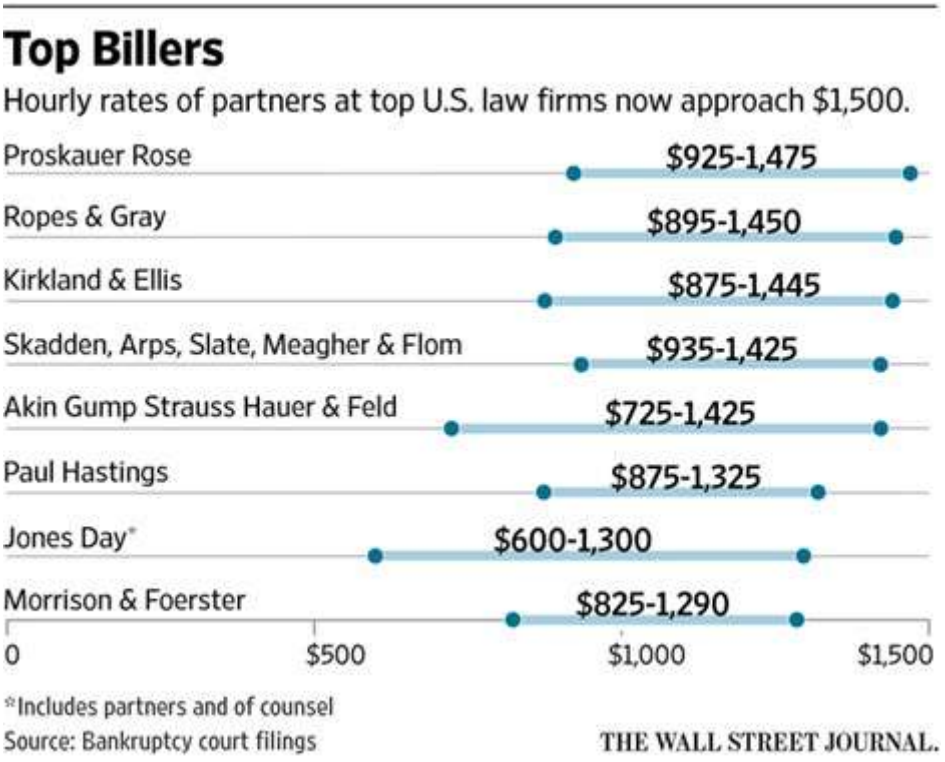
The same way car buyers have been conditioned to not pay over MSRP (except when supply-chain chaos radically alters market dynamics), enterprise legal buyers have conditioned themselves to demand discounts for no other reason than demanding discounts is what enterprise legal buyers do. The market equilibrium is now such that in-house departments would be derelict in their duty by not engaging in the discount discussion. Discounts are baked into most rack rates. And where this is not yet true, in-house departments will ensure rates become artificially inflated so they can then be discounted (*see* Laura Frederick above). More's the pity.

This bazaar-like mandatory haggling introduces unproductive friction into commercial relationships. Much worse, many in-house departments delude themselves into believing that with discounts they are somehow delivering on a dubious more-with-less savings mandate, disciplining profligate law firms, "winning" the negotiation, or some other such nonsense. They double down. Conditions deteriorate further.

Over-indexing on discount culture extends an already elaborate mating/negotiation ritual and consumes finite focus—in an information economy, attention is the scarcest commodity. Meanwhile, despite all the activity and acrimony, rates (standard, agreed, billed, and collected) continue to ratchet up because of how inflation and markets work.

Figure 4 – Lawyer Rate Progression[11]





Some lawyers are totally worth it (yes, I absolutely believe the business value delivered can justify far more than $1,500/hr). Clients should pay a premium for premium work from premium lawyers because the return on investment makes commercial sense. But fake discounts on premium rates for non-premium work is a bad plan.

Rather than treating discounts as some independent end in themselves, the objective should be to (i) price work, rather than lawyer, based on (a) the value of the work to the enterprise and (b) the market dynamics in

which the work is being sourced, and then (ii) allocate work to fit-to-purpose suppliers. Like so much in our space, this is far easier said than done. The foundation is mostly missing.

In-house counsel must first understand the nature of the work (work sorting), including the composition of the work (work decomposition), the business drivers of work volumes (work drivers), and the value of the work to the business (work segmentation). While in-house lawyers genuinely care about business success and view themselves as strong business partners (the business does **not** share this view), few in-house departments have undertaken the system-level project work to align legal activity to business outcomes. An accessible example from my value storytelling series:

- Few law departments measure contract volumes
- Fewer measure contract cycle times
- Fewer still connect contract cycle times to business-centric KPIs like sales velocity
- And even fewer have deconstructed cycle times to determine which interventions would truly improve contract velocity and the resulting business impact

The example is deliberately straightforward. Such exercises become more challenging when endeavoring to characterize risk, uncertainty, avoidance, reputation, business interruption, etc. But the fact that low-hanging fruit remains unpicked is telling.

Work sorting is a pre-requisite to proper supplier sorting, pricing, and management: who should handle which work, how, and at what price. Work should be allocated to the most cost-effective resource where paying market price results in the greatest overall return on investment to the business.

We should not confuse sticker price with market price. We should also recognize there is no monolithic “market” for legal work. Work type, work complexity, supplier scarcity (or abundance), geography, etc. all complicate the analysis. In theory, good data can uncomplicate it. In reality, the available data is fragmented, uneven, and fraught (among the many

reasons in-house counsel should actively push and contribute to industry standards like SALI).

Add on search + switching costs, it is no surprise that instead of trying to strategically source work at market prices, clients instead attempt to rely on their individual market power to drive down rates with their existing law firms—to limited effect, and often in the form of provider panels.

PANELS (AKA ANOTHER DISCOUNT DISCUSSION)

It is really hard to change how you buy if you are unwilling to change what you buy.

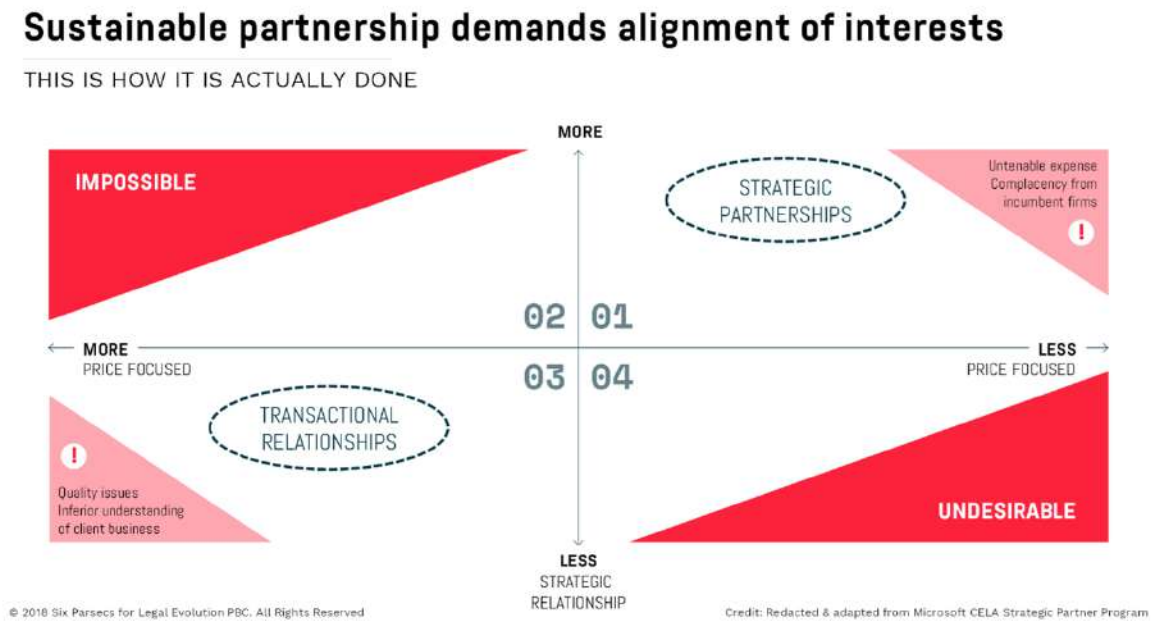
Panels take many forms but, at core, mostly serve as a discount variant. While the motivations are multi-faceted (e.g., reduced administrative burden) and the stated rationales often meritorious (e.g., partnership), most convergence initiatives are merely prolonged negotiations where clients theoretically consolidate their buying power to extract greater rate concessions.

Sadly, most panels fail in most respects. Those charged with putting the panel together lack the authority to distribute the work. Work allocation

remains essentially unchanged. We should weep for the opportunity cost of the countless hours squandered auditioning for and constructing preferred provider programs that award no preference.

Sadly, some panels ostensibly succeed. Clients consolidate work at purportedly favorable rates. But they start from the wrong premise: an arbitrary goal of concentrating work amongst an arbitrary target number of firms. This construct favors firms with broad practice and geographic footprints—i.e., the largest and most expensive. While bizarro savings math dictates that discounting a standard rate of $900 down to an effective rate of $650 is a big win (*the more you spend, the more you 'save'*), actual arithmetic still holds that a standard rate of $450 is less money. Moreover, the resulting entanglements can grow so gnarly that moving the work becomes exceedingly difficult—creating a perverse form of lock-in that reduces client leverage in subsequent negotiations. Again, so much effort, so little ROI.

Sadly, panels need not be worthless—I commend this series from the consistently excellent Dan Currell. Purposeful lock-in (i.e., mutual commitment) can create alignment and deliver returns on investment for both parties. But true strategic partnerships are uncommon because so few have the mindset, bandwidth and patience to create, nurture, and grow them. Instead, we rely on increasingly byzantine mechanisms like excruciating RFPs and onerous outside guidelines, counting on mere words to be sufficient to drive positive change (*spoiler*: they aren't).



RFPs (DISCOUNTS ON DISCOUNTS)

Panels are often the product of a tortuous RFP process. But RFPs are also in broad use for individual matters. Even Cravath has a full-time RFP manager.

As with panels, the personnel charged with putting out RFPs are usually not empowered to make the final selection. Despite so much ink being spilled, the ultimate decision makers continue to go with who they know and default to their favored firms. Automaticity is among the most potent forces driving human behavior:

> the idea that purchase decisions arise from conscious choice flies in the face of much research in behavioral psychology….Processing fluency is itself the product of repeated experience, and it increases exponentially with the number of times we have the experience…In short, research into the workings of the human brain suggests that the mind loves automaticity more than just about anything else — certainly more than engaging in conscious consideration. Given a choice, it would like to do the same things again and again….A driving reason to choose the

leading product in the market, therefore, is simply that it is the easiest thing to do.

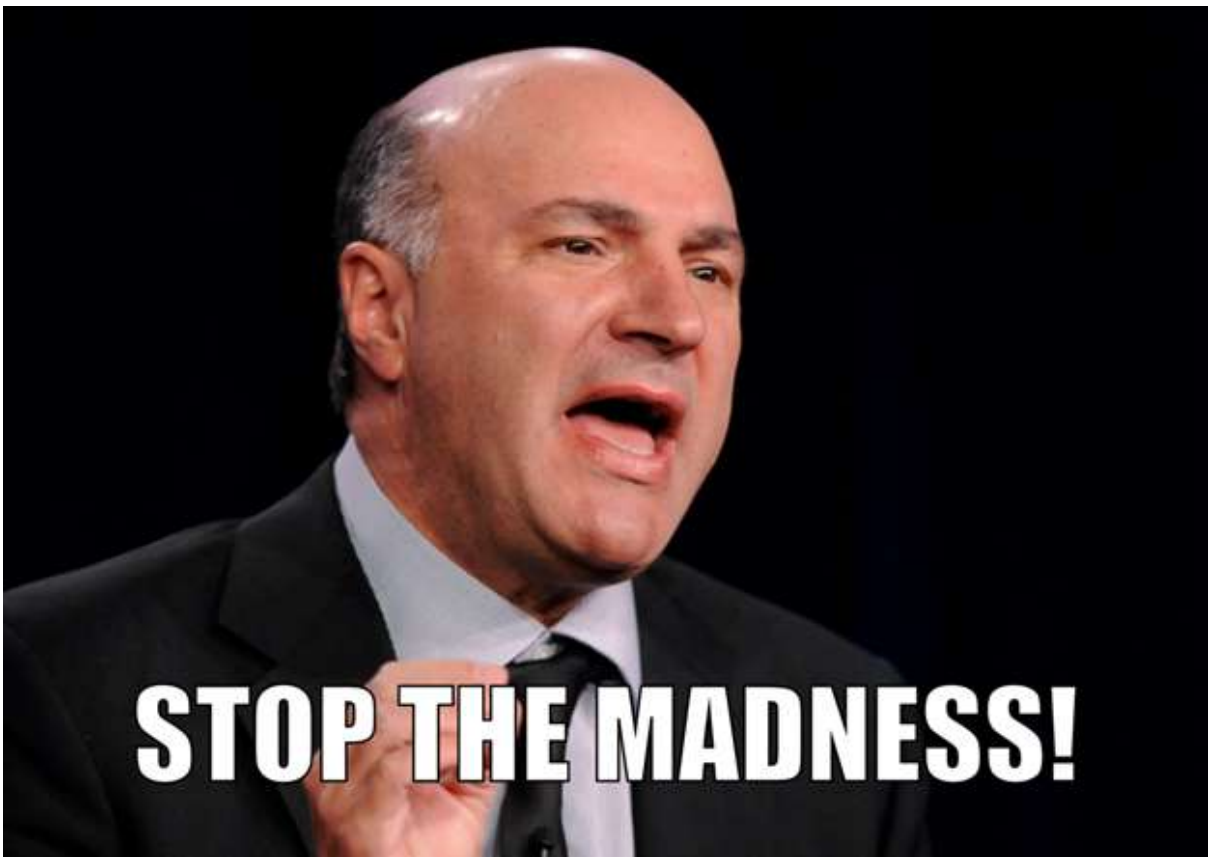
To counter automaticity, RFPs, done well, have their place.

On large and complex matters—assuming proper scoping (an audacious assumption)—responses from independent experts laying out proposed strategies, sequencing, and staffing can enrich a client's understanding, in addition to aiding firm selection. Similarly, RFPs can serve as a price-discovery mechanism for non-standard work in a noisy market.

Often, however, RFPs are merely a price-competition mechanism dressed up as something more. Reverse auctions have a mixed history that need not be revisited here. Rather, I'll be concise: *if that is all clients are doing, they should just do it*. Precious time is wasted on the fluff and ceremony surrounding what is at core a straightforward negotiation. So many questions asked. So few answers that genuinely inform the purchase decision.

This is a lesson I failed to learn before I put out my guidebook aimed at improving the situation at the relationship-level (i.e., for preferred providers, including, but not limited to, panel firms). I had—and have personally executed on—a vision for sustained structured dialogue to continuously improve the process and technology of legal service delivery. RFIs/RFPs are a first step in collecting the information necessary to engage in the dialogue. I should have known this would usually also be the final step. In-house counsel added the proposed questions to their RFPs (now approaching ubiquity) but are doing absolutely nothing with the answers, including reading them. I shudder at all the hours wasted as a result.

Misguided pursuits, even if they are my own and well intentioned, consume finite attention and move us further away from our objectives. Among my good intentions was to stop the madness of outside counsel guidelines.



OUTSIDE COUNSEL GUIDELINES (MICRO DISCOUNTS, POST HOC)

Micromanagement is bad. Blunt instruments are bad. Micromanagement via blunt instrument is terrible.

I've always been a hater when it comes to OCGs (receipts). Playing silly word games to circumvent client billing prohibitions was among the first lessons I learned as BigLaw associate. Clients had constructed administrative apparatuses to identify technical violations of their guidelines. My firm had a corresponding administrative apparatus dedicated to malicious compliance. It was white-collar CAPTCHA.

No substantive behavior changed. No money was saved. Ample suffering was inflicted. And considerable energy was wasted making billing narratives even less informative (no small feat).

Recently, in highlighting this point during a presentation, I was challenged by a legal-operations professional who possessed hard data on the violations flagged when her organization switched on automated billing

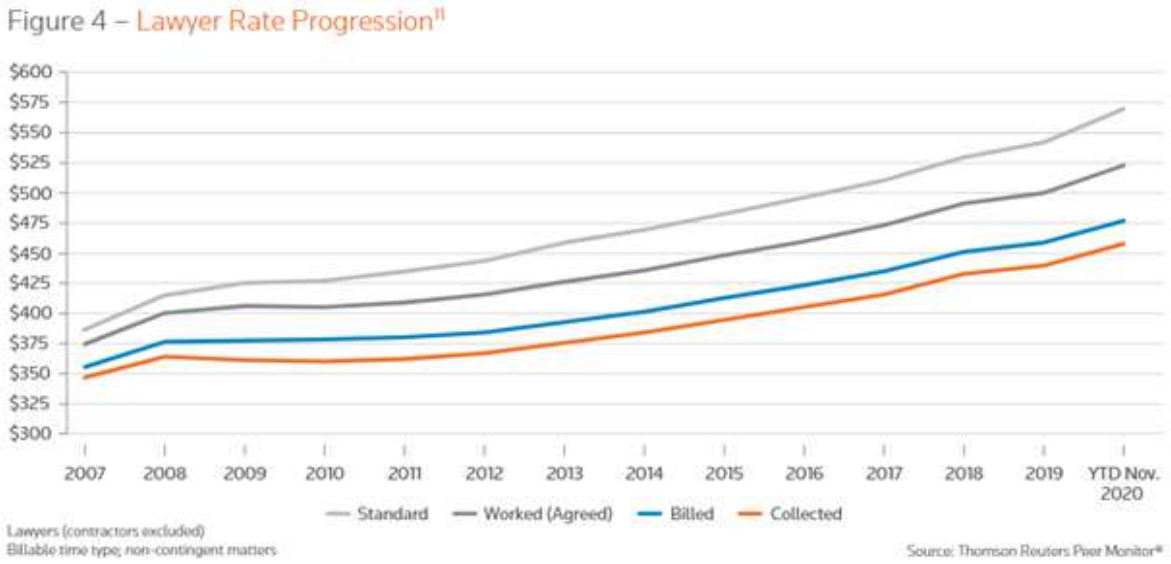
compliance software. I have no doubt her data was correct, and the corporation paid out less than it would have otherwise on that initial tranche of invoices.

In response, I offered three conjectures:

1. Compliance increased rapidly and then stabilized
2. The corporation lacked sufficient metrics to determine whether their total cost of ownership for matters was reduced due to enhanced enforcement
3. In particular, the corporation had no way of identifying whether outside counsel were padding their entries to compensate for the extra time spent playing silly word games (consciously or not, it is easy to tack on 0.1s at the end of the day/week/month when exhausted, annoyed, and guestimating anyway)

My conjectures were confirmed.

Returning to the graph showing rates smoothly ratcheting up, note the stable relationship between what is billed and what is collected despite almost two decades of increasingly onerous billing guidelines, advances in automated bill review, and the proliferation of bill-review specialists, including dedicated third-party providers.



Cast in a more favorable light, OCGs are not about paying less than billed. Law departments hope OCGs will reduce how much is billed in the first instance. Hope is not a plan.

Again, discounts are not rates, and rates are not price. Price is usually determined by an equation, the function of *rate x hours*. OCGs are an attempt to control hours, the multiplier. Understandable impulse. Ineffective manifestation thereof.

The first rule of legal work is to expertly execute the work—by whatever means necessary. Everything else is subordinate to mission accomplishment. Mission-oriented outside counsel do the work as best they know how (after all, they are the experts) and then perform the requisite linguistic gymnastics to conform the narratives of their unchanged behavior to each clients' peculiar description prescriptions.

If in-house departments want to change *how* work is done, then in-house departments need to be directly involved in changing *how* work is done—i.e., sustained, material improvement in active management at the relationship and matter levels. But this requires time and attention (and, frequently, expertise) they cannot seem to spare.

Outside counsel guidelines have their place and their use. "Send invoices to" is an essential OCG. The best use of OCGs is not to serve as a discount variant but, rather, to improve data quality [*cough*, SALI, *cough*]. Better data can be used in many ways, including legitimately useful alternative fee arrangements ("AFAs").

AFAs (STILL, MOSTLY JUST DISCOUNTS)

If it quacks like a duck.

I know some readers too well. They are geared up to fire off a tweet because the righteousness in their soul tells them the cure to the ills outlined above is to finally kill the billable hour—plus, they are chafed I refer to alternative fee arrangements, instead of appropriate or value fee arrangements.

First, I try to ground my observations in the empirical (what is) rather than the normative (what ought to be). The billable hour remains dominant to the point where vocal practitioners of AFAs exclaim that most purported AFAs fail a purity test and are simply slight variants on the billable hour. So, too, the familiarity of the term AFAs. Pretending otherwise only causes confusion.

Second, I agree we are over reliant on the billable hour. I also consider hourly billing essential to the pricing toolkit, even in an ideal world. Like Bill Henderson, I am not a billable hour truther. To those who regard eradication of the billable hour as the skeleton key to improving legal service delivery, I implore you to revisit your root-cause analysis.

Consider that the billable hour lacks explanatory power as to why in-house departments exhibit the same pathologies as law firms despite the complete absence of compensable timesheets. And if you persist in defending, rather than re-examining, your thesis by proposing some form of original-sin theory where law firm culture has infected in-house departments, you must come to terms with the fact you are negating your own contention that excising the billable hour is sufficient to unleash transformational change.

Third, and most pertinently, I am not being critical of AFAs—just as I am not critical, in the abstract, of price negotiation, panels, RFPs, and outside counsel guidelines. There is nothing wrong with AFAs except the false hope they present a simple and easy cure-all. This mischaracterization renders most real-world attempts at AFAs a colossal waste of collective time. Even law firms are frustrated:

> “Leaders of international law firms are frustrated by a perceived unwillingness on the part of existing clients to move from traditional billing and hourly rates to alternative fee models… Many firms have spent considerable money and effort in building up more robust pricing and legal project management teams…Yet despite these efforts, alternative fee arrangements had remained fairly consistent at roughly

20% of law firm revenues… firm leaders report that clients remain more likely to accept either traditional hourly arrangements with discounts or budget caps applied.

Among those time-wasting RFP questions is the requirement for AFA proposals that will never go anywhere because:

- Law departments cannot provide the requisite scoping parameters due to insufficient information, lack of bandwidth, poor data quality, etc.
- In-house lawyers are unfamiliar with AFAs, which makes them uncomfortable, including the fear of striking a bad bargain due to insufficient information, lack of bandwidth, poor data quality, etc.
- Law department systems and metrics are billable-hour centric (e.g., accounting, reporting, **savings math**)

Mostly, this results in time wasted crafting and negotiating AFA proposals only to have the in-house team default to discounted billable hours. The worse, and painfully common, outcome is nominal AFAs that are discounted billable hours in camouflage, fooling no one but adding all manner of complicatedness to tracking and invoicing—exacerbating the already wicked problem of billing at scale and further degrading data quality.

Scoping can be genuinely challenging even with good information (matter specifics) and solid data (benchmarks for similar matter). Few legal matters are composed solely of known knowns—if all is known, there is little need to lawyer up. Basic matters present all manner of known unknowns—assumptions that could fall somewhere along a range and are often dependent on choices made by others (counterparties, judges, regulators, et al.). Expertly scoped matters are still susceptible to unknown unknowns—those fun surprises that turn a matter on its head.

The noise of such variance can often be smoothed out with volume (the law of large numbers). Hence my strong preference for portfolio arrangements. For one-off matters, I am a proponent of inherently flexible arrangements that enhance alignment, like the ACES engagement model. And where circumstances dictate we dive in immediately and blindly, there is nothing wrong with starting on the billable hour and reaching well-calibrated terms as the matter comes into focus. Similarly, some matters are so infrequent and so small that scoping is not only impossible but wasteful—the billable hour is entirely serviceable in such instances.

The problem is that all three "alternative" approaches—portfolio partnerships, flexible engagement models, hybrid structures—require work and trust. There is little slack for the former. And the latter continues to erode.

T-R-U-S-T

Trust is a basic building block of economic exchange. Returning once more to the well on discounts, panels, RFPs, OCGs, and nominal AFAs evinces the corrosion of trust between law departments and law firms.

What law departments experience as price gouging, law firms characterize as market-responsive, client-tailored dynamic pricing. What law departments characterize as introducing business rigor, law firms experience as harsh moral judgment, ad hominem attacks, and increasingly extreme demands untethered from market realities. Both sides are right. Both are wrong. Both are responsible for remedying the situation. But in a buyers' market, the professional buyers must lead.

Data and dialogue will drive better outcomes than performative discipline and browbeating. But that requires law departments to materially reconfigure what they buy and how they buy, rooted in a more nuanced understanding of why they buy.

The problem, of course, is that like insourcing, the standard approaches to external cost control work until they don't—i.e., real initial benefits are followed by diminishing returns and problematic path dependence. This is fixable. But the fixes are not obvious, simple, nor easy.

I urge in-house departments to take advantage of the current crisis to explore true transformation in their approach to legal buy as part of a larger spend-optimization effort. But if bandwidth or political constraints make that impracticable, I implore you to, at the very least, not waste your own finite energy or that of your law-firm partners on cost-control theater that will not do much to control costs. Even when *something must be done*, doing nothing is superior to doing the wrong things.

LexFusion's Legal Market Year in Review 2021

By D. Casey Flaherty,
Joe Borstein & Paul Stroka

December 26, 2021

LexFusion's Legal Market Year in Review 2021 (280)

By D. Casey Flaherty, Joe Borstein & Paul Stroka on December 26, 2021

An honest and candid assessment of corporate legal, circa 2021

Several months ago, before we had even completed our first year of operations, Bill invited us to write a legal market year-in-review. His reasoning was simple—our business model entails a lot of listening. Over the past twelve months, we heard the hopes, dreams, and fears of 240 law firms and 327 law departments (corporate legal) spread over 2,600 meetings.

Perhaps you're anticipating a conversation about what's hot in Legal Tech and NewLaw. And back when we accepted Bill's invitation, that seemed like a logical direction. Yet, much to our own surprise, we find ourselves writing a year-in-review essay that focuses on the primacy of culture and cultural adaption.

We are writing about culture because it is the only way, or perhaps the most direct way, for us to reconcile what we are experiencing on an individual level with what we observing at the group level.

On the individual level, we've never encountered so much enthusiasm for improving upon the status quo, let alone the attendant effort to manifest that enthusiasm as meaningful change. Yet the group-level impacts have not really materialized. In the parlance of diffusion theory, this means that the vast majority of creative energy is still bottled up in the innovator-early adopter portion of the social system. See Post 004 (explaining Rogers Diffusion Curve).

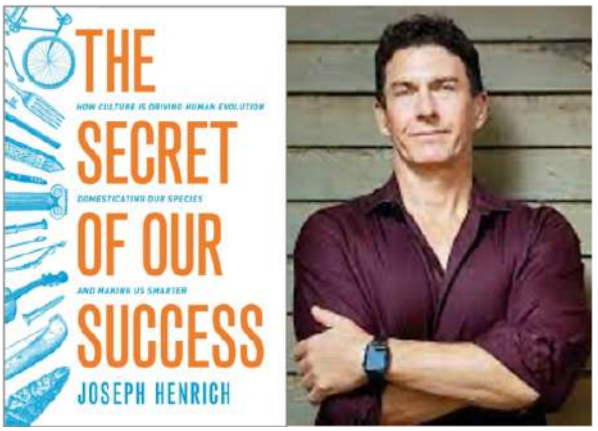
The culture of the legal industry offers much worth respecting and preserving (yes, even Biglaw). This culture is a source of strength, integrity, and continuity. But, by design, the bias towards stability can also be an impediment to experimentation and growth. Given the changing macro conditions (e.g., improving technology, rapid globalization, cheap capital, regulatory reform, etc) that have managed to destabilize virtually every industry on the planet, a bit of rebalancing is in order—a legal evolution, if you will.

Over the past year, we have come to the conclusion that the culture of corporate legal is no longer well fit-to-purpose. The conditions around us have changed, and continue to change, in the form of ever-increasing demand paired with flat budgets. Yet conditions have not changed quite enough to cause an existential crisis, just chronic pain.

Here, we'd like to suggest that our proud culture of endurance — of learning to live with chronic and growing pain — is potentially fatal, as it cuts us off from adaptive strategies that are necessary for our survival.

A short preface on culture and cultural adaption

Searching for a suitable analog for what we are observing in our 2,600+ legal industry meetings, we landed on the story of the failed Franklin Expedition as told by the evolutionary biologist Joseph Henrichin his book, *The Secret of our Success: How Culture is Driving Human Evolution, Domesticating Our Species, and Making Us Smarter* (2015).



In 1845, a team of skilled and knowledgeable British explorers led by Sir John Franklin set off from the British Isles to explore the last unnavigated sections of the Northwest Passage. At stake was the completion of the global map of terrestrial magnetism, control of the Canadian Artic, and the potential of creating a more efficient sea channel between western Europe and East Asia.

Despite being equipped with state-of-the-art steam engines, coal-fired internal heating, desalinators, five years of provisions, including tens of thousands of cans of food, and a twelve-hundred-volume library, Franklin's ships suffered the misfortune of being locked in by ice for more than a full calendar year. After Franklin died, the crew was faced with the prospect of another year of imprisonment with dwindling supplies of food and coal. In April 1848, the second-in-command made the decision to abandon ship and set up camp on King William Island. Although the details of what happened next are not completely known, the archaeological evidence and scattered accounts from Inuit locals suggest that every member of the expedition suffered a truly awful death.

Henrich then asks the question, "Why couldn't these men survive, given that some humans do just fine in this environment?" (p 25).

Henrich contrasts Franklin's men with the local Inuit, who also spent winters out on the pack ice and their summers on the Island. "In the winter, [the Inuit] lived in snow houses and hunted seals using harpoons. In the summer, they lived in tents, hunted caribou, musk ox, and birds using

complex compound bows and kayaks, and speared salmon using leisters (three-pronged fishing spears)" (p 29). The Inuit name for the main harbor of King William Island can be translated as "lots of fat" (seal fat). Overall, the Inuit locals perceived their environment as "rich in resources for food, clothing, shelter, and tool-making (e.g., drift wood)." Id.

According to Henrich, the reason Franklin's men could not survive is that they failed to plug into the cultural adaptions of their Inuit brethren. "None of the 105 big brains [in the Franklin Expedition] figured out how to use driftwood, which was available on King William Island's west coast where they camped, to make the recurve composite bows, which the Inuit used when stalking caribou." Likewise, they lacked "the vast body of cultural know-how about building snow houses, creating freshwater, hunting seals, making kayaks, spearing salmon and tailoring cold-weather clothing." Id. at 26.

As Henrich observes, it's unrealistic to expect any group of humans to figure out over the course of two years what another group has mastered over the course of a dozen or more generations. Yet, it is not necessarily unrealistic to make a decision to learn from adjacent cultures. The Inuits were known to Franklin's Expedition as well as earlier British explorers. Indeed, fifteen years earlier, a smaller British expedition led by John Ross found themselves stranded in the same part of the Canadian Artic yet survived because they deliberately forged a trading relationship with the Inuits.

Henrich elaborates on a striking pattern:

The Franklin Expedition is our first example from the Lost European Explorer Files. The typical case goes like this: Some hapless group of European or American explorers find themselves lost, cut off, or otherwise stuck in some remote and seemingly inhospitable place. They eventually run out of provisions and increasingly struggle to find food and sometimes water. Their clothing gradually falls apart, and their shelters are typically insufficient. Disease often follows, as their ability to travel deteriorates. Cannibalism frequently occurs, as things get desperate. … When some do survive, it's because they fall in with a local indigenous population, who provides them with food, shelter, clothing, medicine, and information. These

indigenous populations have typically been surviving, and often thriving, in such “hostile” environments for centuries or millennia.

What these cases teach us is that humans survive neither by our instinctual abilities to find food and shelter, nor by our individual capacities to improvise solutions “on the fly” to local environmental challenges. We can survive because, across generations, the selective processes of cultural evolution have assembled packages of cultural adaptations—including tools, practices, and techniques—that cannot be devised in a few years, even by a group of highly motivated and cooperative individuals. Moreover, the bearers of these cultural adaptations themselves often don’t understand much of how or why they work, beyond the understanding necessary for effectively using them.

The Secret of Our Success at 27.

Here at LexFusion, we think are witnessing something similar. As Henrich notes, culture is an inherited package of adapted group behaviors and tools that are fit-to-purpose for thriving under specific conditions. Yet, when conditions change, cultures either adapt or perish. And with the culture, so go the people.

Do we possess the realism and objectivity to accurately assess our changing conditions? Cf Post 277 (Jason Barnwell from his perch at Microsoft observing, “That is not the tide coming in. The seas are rising”). Likewise, do we have the courage and humility to learn from adjacent cultures that, in earlier times, we’ve tended to view as intellectual inferiors? As discussed below, most days, we are optimistic. But, on some days, we have our doubts.

In corporate legal, our conditions have changed

Let’s start with the obvious.

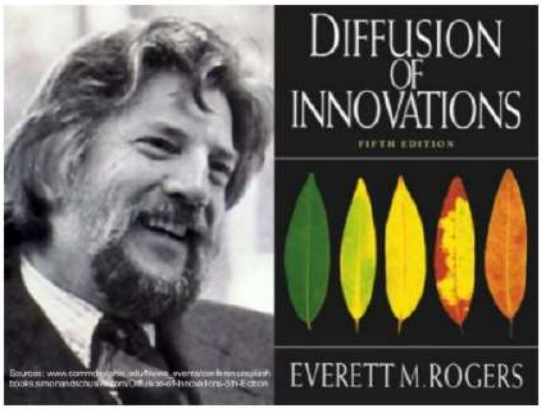
As recently observed by Jae Um in Post 279, “Demand is up. Like a lot.” Levering off Jae’s preternatural rigor, flair, and insight explaining this “silent explosion of demand,” see Posts 216 &218, we offer the following observations on the resulting innovation imperative:

- The absolute demand for legal expertise is increasing as a result of compounding legal complexity; this will continue (i.e., our environment will continue to change)
- The relative cost of legal expertise is also escalating; this will continue unless and until we dramatically improve productivity (i.e., until we adapt)
- The uptick in demand and costs powered the extraordinary growth of BigLaw for decades, peaking in 2007; BigLaw as a category is not in peril but practice areas and individual firms are under threat as substitution and dispersion accelerate. See Post 279 (discussing some of the modest consequences of a failure to adapt at the practice group level)
- The central form of substitution has been in-sourcing by corporate legal departments to keep costs (but not demand) in check, largely through labor arbitrage, for now. See Post 262 (a modest adaption)
- A complementary form of substitution has been New Law, which has also largely been a story of keeping costs (but not demand) in check through labor arbitrage, for now (another modest adaption)
- Labor arbitrage is insufficient to meet the expected, compounding increases in legal demand; corporate legal budgets are not keeping pace
- To truly bend the cost curve, we must materially improve productivity via innovation—i.e., leverage legal expertise through process and technology to execute well at scale and pace (i.e., significant adaption is required).

As Jason Barnwell has explained so eloquently, this is "our wicked problem." Post 210. And no writing has better captured the kind of cultural recalibration required than Jason's recent stellar exploration, "Legal evolution is industrial evolution (277)," in which he concludes:

Translated to the physical realm we are trying to operate a modern city with 19th-century transportation infrastructure. This will not work. I expect 10x leverage scenarios by the middle of the decade driven by demand with increasing complexity and velocity characteristics … . And if we fail to

evolve and adapt in ways that build upon industrialization principles that serve our humanity, our collective future is bleak.



Our “wicked problem” demands a cultural recalibration, not merely a technological augmentation. Tech is necessary. But tech is not sufficient. As the patron saint of this site, Everett Rogers, see Post 004, informed us long ago, “An important factor regarding the adoption rate of an innovation is its compatibility with the values, beliefs, and past experiences of individuals in the social system … the diffusion of innovations is a social process, even more than a technical matter.” Everett M. Rogers, Diffusion of Innovations(5th ed. 2003) at 4-5.

We at LexFusion say this despite our putative interest in increasing the sales velocity of tech and tech-enabled services. Our personal incomes are predicated on bringing together law departments, law firms, and legal innovation companies (products and services) to address the shared innovation imperative. See Posts 203 and 267 (exploring the LexFusion model). But rather than identifying narrow problem/solution fit (still necessary), we have found our greatest challenge to be fostering cultural alignment to create the space necessary for successful and sustainable innovation.

From an innovation perspective, it is better out there than it ever has been. At the same time, innovation is not keeping pace with demand, resulting in irreconcilable tensions for every market participant. This is not an existential crisis. But it is saddening state of affairs given the collective potential to meet intensifying demand and the good-faith efforts of many to do so.

Our space is filled with too many intrepid explorers suffering in seemingly “hostile” environments despite the fact that nearly everything required to thrive has already been “discovered.”

Looking back on 2021

2021 was weird for the world**.** Pandemic. Politics. NFTs. UFOs. You were there. You know.

Fortunately, 2021 was also good for legal innovation and LexFusion. As a company, we lived up to our motto to "grease the gears of commerce in legal innovation." Through a grueling first year of market listening and matchmaking, we helped our member companies meet more market needs, booking make more sales and building stronger pipelines, than our most sanguine projections of what was possible from a cold start (boy, are we excited about 2022).

More importantly, we deepened industry friendships, and forged new ones, because we adhered to our belief that we build trust by adding value regardless of whether an interaction is monetizable. These exchanges of value were only possible because we found such openness to conversations about new ways of working and genuine enthusiasm for change. We'll say that again, for the third time, because it is not said often in these parts: we found widespread, genuine enthusiasm for change.

Despite how this piece commenced and some admittedly dour reflections that follow, we are fundamentally optimistic. Not only because necessity is the mother of *adoption*, see Post 158 (Dan Currell updating the old adage), and necessity is encroaching in the form of escalating demand. But also because each of us has been in this space for well over a decade and none of us has never encountered this level of interest in reshaping the status quo.

While inertia maintains a distressingly impressive win rate, the tenor of the median conversation has graduated from apathy to frustration. We recognize this does not sound much like progress, but it represents a massive shift in perspective.

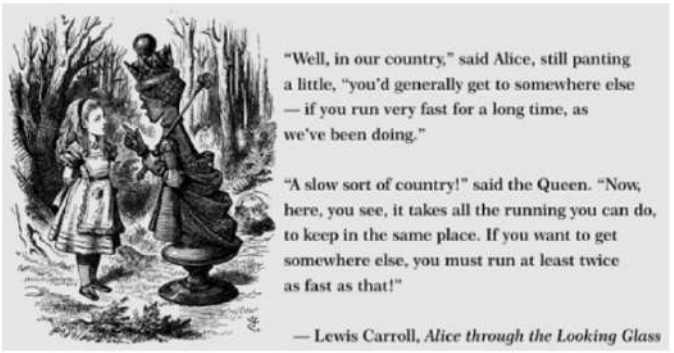
Discussions around innovation in legal services likely date back to Hammurabi and his venerable Code—with seemingly scant progress since. When we made our individual ways into the space in the early 2000's, there were grizzled innovation veterans explaining to us how they'd been fighting

mostly losing battles since the early 1980's. Even a decade ago, outside of a few outliers, broaching the topic of innovation largely elicited bored stares followed by dismissive lectures on the immutable nature of "real lawyering." See, e.g., Flaherty, "Real Lawyers v. Cyborgs," 3 Geeks and a Law Blog, May 16, 2016 (recounting how Ted Olson, during a LegalTech keynote, skewered the premise of the entire conference).

Today, almost every person we speak to goes well beyond paying lip service to innovation. They seem compelled to volunteer why their organization is so far behind where they know it ought to be—finite bandwidth, organizational constraints, systemic barriers, sunk costs, prior failed attempts, choice overload.

Underpinning these conversations is not just a sense of inevitability but a sense of stewardship. Almost everyone recognizes it is now part of their job to drive innovation, support innovation, or, at the very least, get out of the way so innovation can take hold. They also recognize they are falling further and further behind a constantly moving target.

Legal innovation is advancing faster and further than it ever has. This is not just true on the innovator side where investment and activity have exploded. See, e.g, Flaherty & Um, "Legal Technology: Why the Legal Tech Boom is Just Getting Started," Nasdaq, Oct 11, 2021; Post 255 (Zach Abramowitz reviewing remarkable data for the first half of 2021 and suggesting that the legaltech ecosystem is entering maturity). This quickening tempo is also evident on the user side. More legal organizations are putting more effort into driving more innovation than would have seemed conceivable even a few years ago. When the point of reference is our previous baseline, these efforts are impressive and inspiring.



Source: Peter Ungphakorn, The 101.World

So much faster than before. Yet still not fast enough. The even more rapid upward acceleration of the demand curve is widening the delta between what we currently can do and what

currently must be done, suffusing our space with a foreboding sense of losing the Red Queen's race.

Which, again, we know, does not sound like progress, let alone optimism. Except, until recently, scant few acknowledged the reality of the race. Playing catch-up is infinitely more productive than denying the need to do so.

Indeed, one silver lining of the pandemic is a shift in perspective on terminal velocity. The seemingly overnight transition to remote work has put to lie doubts as to how rapidly our culture can adapt when necessity intrudes and the requisite infrastructure is in place.

The good news is that a fair amount of latent infrastructure is already in place. The depressing part is how few practitioners know it's there.

The tragedy of orphaned tools

With demand intensifying, we regularly speak to lawyers at all levels and in all roles who are more overworked, overwhelmed, and burned out than ever before. With the mindset shift on innovation, almost every one of these hard chargers now also presumes there "must be tools available" that could alleviate the most time-consuming and soul-crushing aspects of their job—law is, but need not be, the most boring job in the world.

At the individual level, these lawyers are exceptionally smart, dedicated, and motivated. There is no dearth of talent or desire. Nor do we encounter much evidence that lawyers are technophobic or, on the law firm side, rapacious—i.e., resistant to tech because of a potential reduction in billable hours.

The lawyers are also consistently correct. Their loads could be lightened. The legal tech ecosystem has indeed exploded, with literally hundreds of excellent tools available and many more on the way. Cf Post 231 (comparing the current legal industry to the auto industry circa 1905). A large swath of lower-order work can be automated or otherwise process/tech-enabled.

But the culture is not accommodating. Individual ambitions are thwarted at the organizational level. The need for transformation is not the main point of contention. But specific target operating models, and the capabilities required to support them, are fuzzy, at best, and therefore subject to interminable debate. Few have the time, and even fewer have the personal authority, to drive these debates to resolution—and then turn resolution into action. As we've noted here before, lack of specificity and accountability create ambiguity for consensus-driven organizations, as collective-decision making will almost always default to stasis. See Post 069 (Jae Um's commentary on Microsoft's efforts to break the logjam for both client and law firms).

The status quo's substantial incumbency advantage means getting the right tools into the right hands turns out to be a fraught endeavor. It is sad when we can direct someone towards a fit-to-purpose tool that will make their life less arduous but the buying mechanics turn out to be too labyrinthine and friction-laden to make good things happen.

It is sadder still—and shockingly common—when no one even need buy a new tool because the organization has owned it, or a worthy analog, for years. Despite being outsiders, we know they have the tool from conversations with others in the organization, or from vendors selling into it. Yet the lawyers themselves have no clue the tool is at the ready.

How is this anything but a problem of cultural adaption?

Purgatory starts here

Many legal organizations move slow on purpose. Much of the friction in the legal tech buying process is intentional—an attempt to redress the tragedy of professionals not taking advantage of the tools they currently own.

Many legal operations and technology teams are under strict orders to slow their roll on new tool procurement until they drive adoption of tools the organization is already paying for. Many heads of ops/innovation/tech explain to us that it would waste their time to demo new tools because the only innovations they are currently permitted to pursue are innovations in change management.

This disconnect causes, and is caused by, an unfortunate level of enmity in every direction. The lawyers are annoyed by the lack of adequate tooling. The innovation professionals are discouraged by the lawyers not using the tooling they already have. When the innovation professionals roll out new tools, the lawyers react with skepticism, if they pay attention at all. Then when lawyers request new tools, the innovation professionals become exasperated. And the cycle continues.

While the sense of collaboration and community has been growing, it is not adequate to the need for collaboration and community. Internal organizational disconnects are one symptom of the broader social fragmentation of an ecosystem filled with frenemies.

Nominally, everyone works together—if not as part of the same organization, then as part of the same value chain. Practically, there are social divides that keep everyone at an unproductive remove from creating the synergies required to keep pace with demand.

Lawyers never trusted their innovation colleagues. The innovation professionals have lost faith in the lawyers. Law departments complain about their firms. Law firms, in private, express annoyance with law departments. Everyone dumps on New Law and tech vendors. And the new entrants, created specifically to solve extant issues — Inuits bearing seal meat — can't believe how hard it is to convince individuals and organizations to do that which is in their own best interest.

The culture is not conducive to innovation and the result is far too many legal tech orphans—forever waiting to be adopted. Often, the orphans themselves are blamed. Earlier this year, Bill raised the ugly possibility that unlearning an old paradigm may be much more difficult than learning a new one, with the logical implication that substantial progress hinges on the old guard dying out. See Post 233 (suggesting that Thomas Kuhn's *The Structure of Scientific Revolutions* applies to law).

For the moment, we're content to argue that the culture of corporate legal is holding everything else back.

The missing feature fallacy

There is an eternal debate between conforming to user expectations ("meet them where they are") and helping users expand their horizons ("often we don't know something is broken until we are shown a better way"). Per usual, fertile and nuanced middle ground exists between these extremes. And, per usual, hitting that sweet spot is exceedingly difficult, and, even then, often insufficient.

Lawyers, for example, correctly complain about the limitations of Microsoft Word. But lawyers also never want to leave Word. Further, they steadfastly refuse to attain even basic competence with Word, let alone make use of the many purpose-built Word plug-ins designed to give that generalist tool some specialist superpowers. See Flaherty, "CLE is Broken (as is our approach to learning/innovation)," 3 Geeks and a Law Blog, Oct 31, 2021.

Make it better. But also leave it alone. And don't you dare make me learn. In many places, the abstract desire for better is genuine but the practical bar for adoption remains impossibly high.

The unexpressed requirement is for the magic black box that delivers substantially improved outputs from the same inputs. But the expectation is never framed this way. The expectation is almost always presented in the form of a plausible-sounding objection, either a missing feature or a lack of intuitiveness. This misguided mindset is chronicled through the running parody of the Legal Tech Partner twitter account (@HeadofLegalTech).

One problem is that many of these objections have merit. We really do need, and should demand, better tools. Yet, a deeper and more intractable problem is that such objections are infinite. There will always be something a tool does not do. And the more a tool can do (adding buttons, options, menus, configurations), the less intuitive it becomes—especially when "intuitive" is really shorthand for *completely familiar* (i.e., exactly the same as now).

When illusory perfection is the standard for adoption, the status quo will reign even when it is universally acknowledged as suboptimal. The status quo is not subject to scrutiny. In fact, the status quo is rarely even subject to comparison. Rather, the continuation of the status quo is dependent on the level of scrutiny applied to its would-be successors—with the bar to entry almost always being orders of magnitude more onerous than "better than the status quo."


Rob Saccone

There is some received wisdom in this reluctance to weather implementation dips and expend finite change resources on incremental improvements when, ultimately, we need true transformation (Jason's 10x leverage scenario in Post 277). But this reluctance is almost always grounded in a fundamental misunderstanding of the impact of reducing low-end friction as a means to free up bandwidth, and lay the groundwork, for evolutionary transformation of how we work, and, more importantly, how we think about how we work—i.e., our culture around innovating. Because of this impediment, as Rob Saccone has explored so well, corporate legal remains "on the ground floor of digital services." Post 248. We have nowhere to go but up.

A culture of innovation is a culture of projects

This is the part of the year-in-review essay where to pivot toward our best assessment of what to do next.

Over the course of our 2600+ legal industry meetings, we are invariably dealing with important people who are busy with truly important work. Not cult-of-busyness busy. Real-world, real-work busy. The refusal to learn or

leave Word isn't stubbornness or stupidity, it is a testament to a system devoid of slack.

Yet no matter how hard people work, there will never be enough hours in the day to do everything that should be, let alone could be, done. That is the fundamental truth we internalized in 2021 both as entrepreneurs running our own business and as advisors to some of the most forward-thinking, mission-driven law departments, law firms, and legal innovation companies in the world: *some things will simply not get done*.

Tomorrow will be worse in this regard. Overload will only increase as demand continues its unabated upward trajectory and the reactive efforts to scale, while more energetic than ever before, do not keep pace. This gives rise to the troubling conundrum that the only sustainable way to address increasing demand in the future is to sacrifice our ability to meet some demand today, which sounds a lot like not doing our jobs.

Where traditional time management advice is to distinguish between the important and the unimportant, the modern challenge is to execute on that which is truly essential while letting go of that which is merely important (even if it also feels essential). See Flaherty, "Maybe, Don't Be MacGyver – The Value of Value Storytelling (#1)," 3 Geeks and a Law Blog, Sept 21, 2021 (arguing against extraordinary efforts to fill gaps and instead cultivating a sense of essentialism necessary to forge a better future). For service-oriented professionals, it is difficult to overstate the mental and emotional anguish involved in choosing what not to do. And the resulting drive to get as much done as humanly possible, and then some, is not only unhealthy for the individual but also ultimately counterproductive for organizations and clients.

We propose vitally important people do less immediately important work, which is a close corollary of Ron Friedmann's maxim of "Do Less Law." Furthermore, "Projects" should be at the top of the essential priority list despite projects often having a significant negative impact on every other essential priority. What, precisely, do we mean by projects? Antonio Nieto-Rodriguez, a renowned expert in project management, offers the following explanation:

Projects involve a series of planned activities designed to generate a deliverable (a product, a service, an event). These activities—which can be anything from a grand strategic initiative to a small program of change—are limited in time. They have a clear start and end; they require an investment, in the form of capital and human resources; and they are designed to create predetermined forms of value, impact, and benefits. Every project has elements that are unique. That's key: Each contains something that has not been done before.

Antonio Nieto-Rodriguez, "The Project Economy Has Arrived," Harv Bus Rev (Nov/Dec 2021). Also listen to "The Future of Work Is Projects—So You've Got to Get Them Right," HBR IdeaCast.

Operations is about running the organization. Projects are about changing the organization. Projects not only come at the expense of resources that could be allocated to operations, but the resulting changes disrupt operations (in order to alter them). Oh, and, currently, the failure rate of projects is 65%.

Real Leadership

Successful projects require consistency and focus. Real leadership therefore entails not only effective sponsorship of individual projects but also ruthless prioritizing among projects. Most projects must be done well to be worth doing at all, and doing them well is excruciatingly resource-intensive—so much so that only a few projects can be meaningfully pursued at a time. The requisite resources include subject matter experts (highly valued in legal) supported by allied professionals with diverse skill sets (particularly scarce in legal).

Successful projects also often require removing these valuable, scarce individuals from day-to-day operations to focus on project work. Yet, as an article in this month's *Harvard Business Review* on the transformation journey at the Australian arm of global law firm King & Wood Mallesons noted, "A recent cross-industry survey of more than 300 global leaders conducted by Innosight found that 72% felt that they needed to transform their core offering or business model. The most pressing obstacle to success cited by this group was allocating enough resources to change

efforts—an indication that their leadership teams lacked the conviction to take action." M.A. Siren, Scott D. Anthony, & Utsav Bhatt, "Persuade Your Company to Change Before It's Too Late," Harv Bus Rev (Jan/Feb 2022).

The default towards stasis is often stronger than the recognition that transformation is inevitable, eventually giving rise to a paradox with which the *HBR* article opens:

There's a paradox facing leaders seeking to transform their organizations as they see their markets begin to change. On one hand, they need convincing data to make the case that transformation is necessary—to show that their companies are about to find themselves on "burning platforms." On the other hand, by the time public data about disruptive trends and market shifts is convincing, the window of opportunity has shrunk, if not disappeared. And when companies actually are on burning platforms, their leaders confront a harsh reality: Burning platforms inhibit change by increasing rigidity at the very moment when flexibility is crucial. The lesson: Avoid ever ending up on a burning platform. But that requires leaders to act before compelling data is widely available.

When leaders muster sufficient courage and resolve, projects will be the engines of change. Projects require lawyers to spend less time doing legal work and more time doing what is required to deliver legal work differently going forward, from learning existing tools (furthering the adoption phase of existing projects) to helping develop new tools (sponsoring and adding value to new projects).

To be clear, we understand this strikes most people as absolutely daft. Our conclusion violates strong cultural norms, which is precisely the point we have been making throughout: our current culture is not conducive to innovation.

As the foremost authority on strategy, Roger Martin, observes, "The average person in an office thinks that their life is some sort of regular job and that the projects they work on get in the way of doing it. In fact, in organizations, the entire decision factory should be thought of as nothing but projects." The Project Economy Has Arrived. supra (quoting Martin).

Innovation is not a strategy—it can't be a strategy if everyone should be doing it. See Post 151 (Carlos Gámez parsing the difference between a strategy of innovation and an innovation strategy). But a strategy that does not result in fit-to-purpose innovations is likely ill-suited to the realities of escalating demand. Innovation means projects. And projects mean hard choices and tradeoffs.

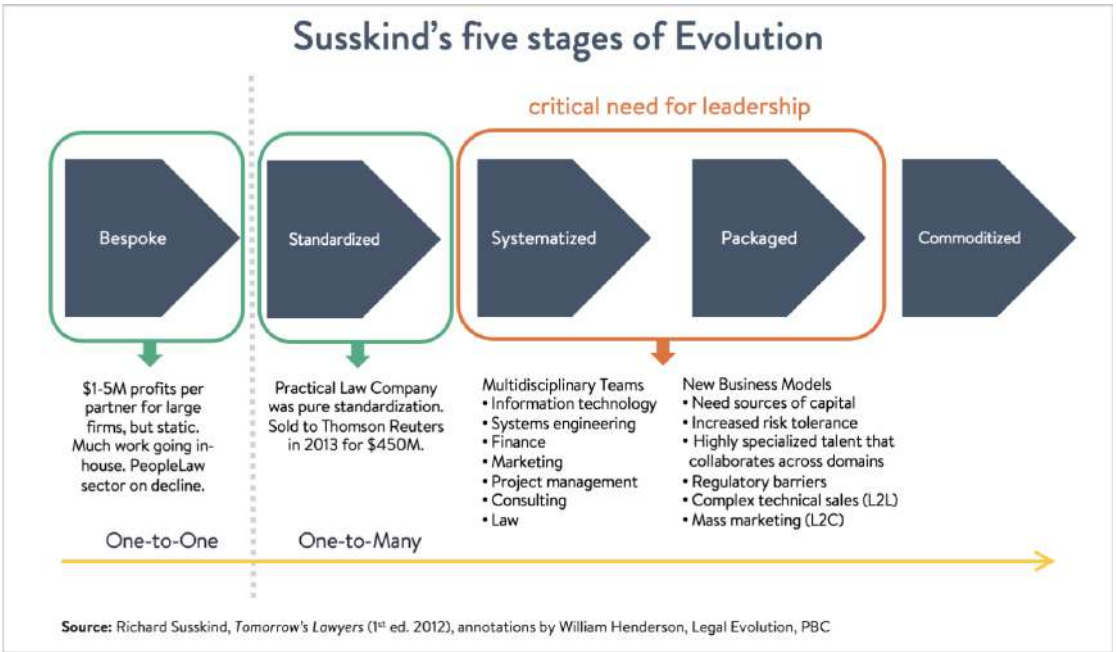
We are not recommending doomed efforts to do *more with less*. Rather, we are suggesting that the imperative becomes to accomplish *less with more* in the near term while investing finite resources to build the infrastructure necessary to do *more with more* in the future.

The last word on 2021

"Some things will simply not get done" is the last pronouncement most of us want to hear. So it will stand as the last pronouncement we make about 2021. As for 2022, we wish you success and look forward to continuing our collective cultural evolution towards a more innovative and inclusive legal community.

Editor's note

The graphic below has appeared in several Legal Evolution posts. See, e.g, Posts 140, 203, 223. Richard Susskind created the original graphic. Henderson provided the annotations. The reflections of Flaherty, Borstein, and Stroka suggest that it remains a reliable and useful guide for what lies ahead.



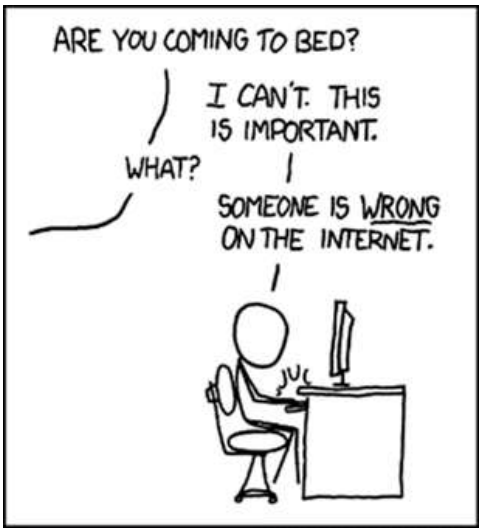
PSA: ChatGPT is the trailer, not the movie

By D. Casey Flaherty

March 6, 2023

PSA: ChatGPT is the trailer, not the movie

By Casey Flaherty on March 1, 2023



To Whom It May Concern,

You have been provided this link because someone believes it may help.

You may be new to this topic. If so, welcome! Alternatively, you may have contributed to the unhealthy preoccupation with ChatGPT. This does not mean you've said anything factually inaccurate. But you are reinforcing the unhelpful narrative that ChatGPT is the proper point of emphasis—a monomania reflected in articles like Chat GPT for Contract Drafting: AI v. Templates and tweets like:

It's fine. It happens. In fact, it happens a lot these days. Hence the post. Please do not be offended. The person who directed you here is only trying to advance the discourse. This is all rather new. We're all learning together.

The objective is to raise baseline awareness so we can engage in more productive conversations. The subsequent post is long. But the introductory synopsis is mercifully brief:

1. ChatGPT is exciting. But ChatGPT is also explicitly a preview of progress with no source of truth.

2. ChatGPT is an application of GPT-3.5, a transformer-based large language model ("LLM"). GPT-3.5 is a raw "foundation model" from Microsoft-backed OpenAI. Many other companies, like Google and Meta, are also investing heavily in foundation models. ChatGPT is one application of one foundation model.

3. LLMs like GPT 3.5 can produce impressive results. But, in their raw form, they are not intended to be fit-to-purpose for many tasks, especially in highly specialized domains with little tolerance for error—i.e., there is no reason to expect raw foundation models to generate high-quality legal opinions or contracts without complementary efforts to optimize for those outputs.

4. In particular, with no source of truth, LLMs are prone to hallucination, confabulation, stochastic parroting, and generally making shit up, among many other pitfalls. This can be remedied by combining LLMs with sources of truth—e.g., a caselaw database or template library—through methods like retrieval-augmented generation.

5. We already have real-world examples of LLMs being enriched through (i) domain-specific data sets, (ii) tuning, including reinforced learning from human feedback, and (iii) integration into complementary systems that introduce sources of truth to successfully augment human expertise in areas like law, medicine, and software development. A myopic focus on ChatGPT ignores these examples and arbitrarily limits the conversation in unproductive ways.

6. We also have real-world examples of failed attempts to leverage LLMs, as well as different applications of the same LLM to the same problem set with material differences in performance level. A powerful LLM is not sufficient. The complementary data, tuning, and tech are often

necessary. Be wary of magic premised on the mere presence of an LLM.

7. Despite the understandable focus on “Generative AI,” the usefulness of LLMs is not limited to generation. LLM-powered applications can perform data extraction, collation, structuring, search, translation, etc. These lay the groundwork for generation but need not be generative to deliver value.
8. LLMs will continue to advance at a rapid pace, and there will be many attempts at applying LLMs to legal. Some applications will be bad. Some applications will be good. Cutting through the hype and properly assessing these applications will require work.
9. It remains TBD (and fascinating and, for some, frightening) how and when LLMs will prove most applicable to augmenting legal work. The road to product is long, and we are at the front end of an accelerating growth curve.
10. No one knows what will happen. We’re all making bets. Abstention is a bet.
11. Be prepared for unrealized hype, unforced errors, excruciating debates, exciting experimentation, and (the author is betting) real progress. Things will get weird.
12. “AI will replace all lawyers” is almost certainly an embarrassingly bad take for the foreseeable future. But “AI will not displace any lawyers because of what ChatGPT currently does poorly” is undoubtedly a bad take today.

The truly TLDR summary: too many lawyers are worried about ChatGPT when they should be excited about CoCounsel. Those are the bones. If you need more, the meat follows.

The author is an LLM bull. But being an LLM bear is totally fine. I take strong positions on the potential application of LLMs to legal service delivery, including:

- *This will be done BY you or this will be done TO you.* This is happening. I consider these seismic advances to be more akin to email and mobile than some narrow progress within legal tech that lawyers can choose to

ignore. Shifts in the general operating environment will make incorporation of this rapidly maturing technology a necessity and require changing many of the ways we currently work.
- *In 2023, AI will be capable of producing a first draft of a legal opinion or contract superior to the output of 90% of junior lawyers*. “Junior” is responsible for some heavy lifting in that statement. And capacity is not the same as fully productized and widely available—the road to product is long. Yet technical thresholds will be surpassed in ways that should force us to fundamentally rethink workflows, staffing, and training.

A primary source of my confidence is previews from co-conspirators at law departments, law firms, and legaltech companies working on LLM use cases that are not yet public. Some of these friends mock me for not having the courage of my convictions. Compared to them, my predictions are downright conservative.

One senior in-house friend said to me this week, "People will start scrambling. Their place in the value chain is about to be markedly less secure." Another put a similar sentiment in more colorful terms, "The boat is leaving the dock. You can be on it, or you can swim."

I am a relative LLM bull. There are, however, legitimate reasons to be an LLM bear. Many peers I respect default to doubt on this subject. You will find smart, credentialed people on both sides of the debate. This post is not an attempt at persuasion on the inevitability of LLMs, let alone the robot lawyer event horizon.The LLM doubters may turn out to be right. No one knows. So we place bets. Indeed, after including the “90% of junior lawyers” statement above in the LexFusion Year in Review piece on *Legal Evolution*, I ended up in a friendly wager with the great Alex Hamilton.

Alex set the parameters of the bet: AI displacing 5% of what lawyers do in contracting within 5 years. I would have taken 3 years and 30% displacement to make it more interesting.

Yet, as bullish as I am (and as much crow as I will eat if LLMs turn out to be Watson 2.0), the prediction I have highest confidence in is rather bearish:

- *There will be a flood of garbage products claiming to deliver AI magic*. This is a near certainty. Regardless of how useful well-crafted applications powered by LLMs may prove, there will be many applications that are far from well-crafted and are merely attempting to ride the hype train.

We're already seeing this with ChatGPT.

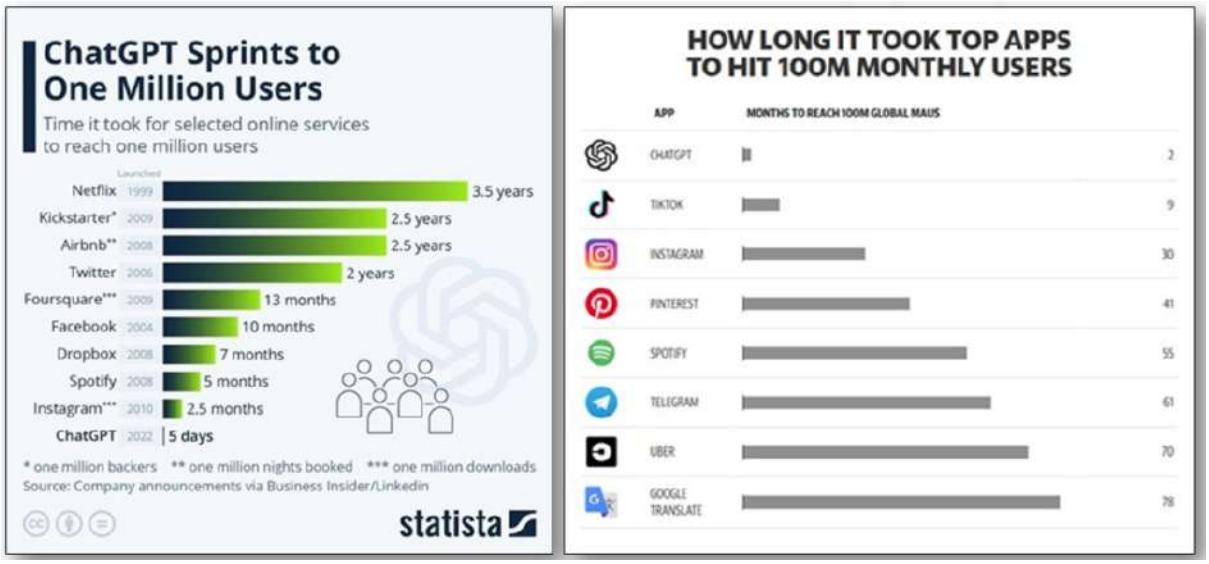
ChatGPT is awesome. If we assess ChatGPT on its own merits, ChatGPT absolutely delivers.

ChatGPT is a "preview of progress." So explained Sam Altman, CEO of OpenAI, the Microsoft-backed startup behind ChatGPT.

The November 30, 2022 release notes for ChatGPT are not cryptic:

- ChatGPT was being released as a “research preview”
- ChatGPT has “no source of truth”
- ChatGPT therefore “sometimes writes plausible-sounding but incorrect or nonsensical answers”
- ChatGPT “is sensitive to tweaks to the input phrasing”
- ChatGPT has issues that “arise from biases in the training data”
- ChatGPT tends to “guess what the user intended” rather than “ask clarifying questions"
- ChatGPT “will sometimes respond to harmful instructions or exhibit biased behavior”

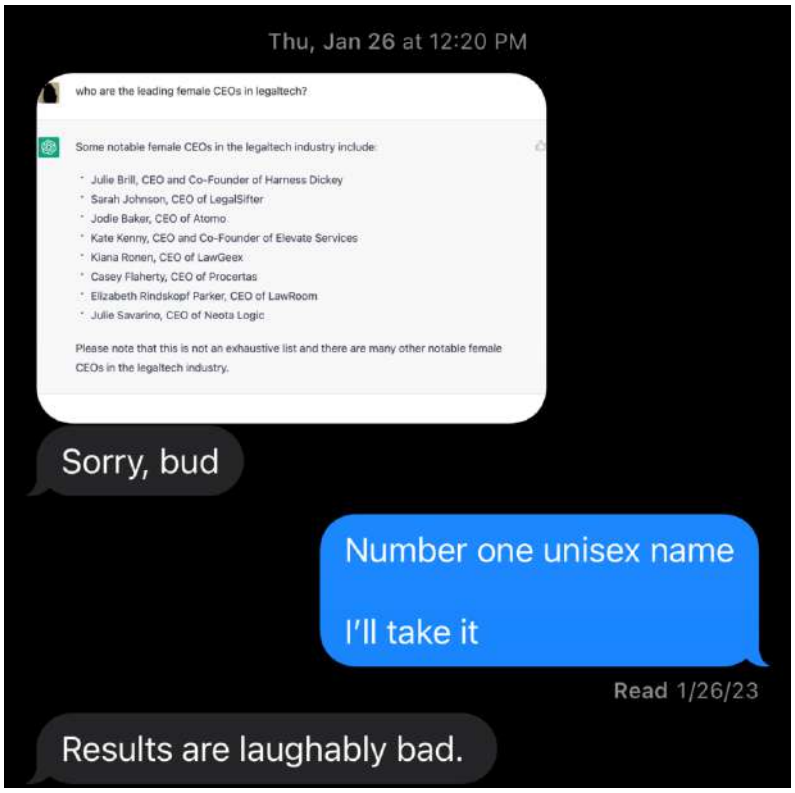
ChatGPT was novel because of the *Chat* aspect. ChatGPT offers a conversational user interface layered on top of one of OpenAI’s foundation models, GPT-3.5. ChatGPT proved an immediate sensation, reaching one million users in five days and one-hundred million users within two months.



The hype cycle commenced. The interest drove hype. The hype drove interest. Mass tinkering uncovered all manner of tantalizing use cases. BigLaw partners who have been practicing for 40-years were entering prompts and rightly finding some (not all) "results were nothing short of amazing – especially with the speed. Mere seconds which even the most knowledgeable expert could not hope to match."

Posts, articles, and news coverage on ChatGPT approached ubiquity. Suddenly, everywhere you looked, someone like Larry Summers was signal boosting themselves with pronouncements like “ChatGPT is a development on par with the printing press, electricity and even the wheel and fire.”

Invariably, the backlash followed. Specifically, many legal denizens became avid hate prompters. *Hate prompting*entails a domain expert inputting a ChatGPT query and then publicly bashing the output. A benign example is a beloved friend texting me ChatGPT’s list of notable female CEOs, which includes yours truly (never been a CEO; never identified as a woman) and concluding the “results are laughably bad.”



Those results were laughably bad. Hate prompts have produced similarly ludicrous results when tasking ChatGPT with all manner of legal work.

But, again, ChatGPT was not built to do any of that well, let alone perfectly. ChatGPT merits experimentation, and people have every reason to explore the possibilities it might presage for incorporating foundation models into fit-to-purpose products. But we should also learn enough about what ChatGPT is, and is not, to avoid being shocked that a raw model released as a research preview with no source of truth sometimes produces plausible sounding but incorrect or nonsensical answers, especially in highly specialized domains. They told us that Day One.

The hate prompters will say they are merely responding to the hypists. I submit both are guilty of injecting too much noise into a vital conversation by artificially narrowing the debate to what ChatGPT can and cannot do today. I attempted to address this noise in a two-part series for *Legaltech News* entitled “The Focus on ChatGPT Is Missing the Forest for the Tree” (Part 1, Part 2). This post is a recitation and extension of that series.

In Part 1, I suggested those fixated on ChatGPT—rather than appropriately treating it as a preview of progress—are re-enacting the eponymous Zoolander’s tantrum upon being presented a scale model for the “Derek Zoolander Center for Kids Who Can’t Read Good and Who Wanna Learn to Do Other Stuff Good Too.” Lacking any capacity for abstraction, the face-and-body boy confuses the miniature preview for the thing itself, summarily rejecting it, “What is this? A center for ants?… How can we be expected to teach children to learn how to read… if they can’t even fit inside the building?”

Invoking *Zoolander* failed to elevate the discourse. The avalanche continued.

About a week after my series, the usually informed and informative Jack Shepherd published Chat GPT for Contract Drafting: AI v. Templates, which treats ChatGPT as a stand-in for AI and then AI as somehow incompatible with templates (it is all there in the title, but you can read the piece for yourself). This was followed a few days later by So How Good is ChatGPT at Drafting Contracts?, which, to be fair, offers all the correct caveats in its conclusion. The cacophony resulted in webinars on Legal Considerations for ChatGPT in Law Firms and articles like As More Law Firms Leverage ChatGPT, Few Have Internal Policies Regarding Its Use—which were necessary but also serve to reinforce the monomania.

When Brookings is publishing acontextual tracts like Building Guardrails for ChatGPT, we should forgive casual observers for thinking ChatGPT is the correct focal point. But once you stop being a casual observer and choose to engage in the discourse, you assume a duty to advance it.

So here we are, as I live my motto*: if you find yourself screaming into the void, just scream louder (and with a much higher word count*).

I am not a female CEO nor an LLM expert. Since I have the audacity to label Jack and the hate prompters as Zoolanders, I must confess I am more Hansel than JP Prewitt. My technical knowledge does not extend much beyond “the files are IN the computer.” (h/t Stephanie Wilkins)

I will not embarrass myself trying to explain LLMs. I commend this article from the famed Stephen Wolfram, as well as this video from the soon-to-be-famed Jacob Beckerman, founder of Macro who did his thesis work in natural language processing.

I will not pretend to have a comprehensive grasp on the players in the space. I suggest this article from Andreesen Horowitz, who, as it happens, just led a $9.3M seed round in Macro (bias/brag alert: Macro is a LexFusion member).

Indeed, while I have endeavored to slowly educate myself, I am not the least bit qualified to educate others on tokens, alignment, retrieval augmented generation (RAG), DocPrompting, reinforcement learning from human feedback (RLHF), edge models, zero-shot reasoning, multimodal chain-of-thought reasoning, fine tuning, prompt tuning, prompt engineering, etc.

My super basic take is LLMs recently passed a threshold with language that computers long ago crossed with numbers. This is the convergence of decades of cumulative advances in AI architecture, computing power, and training-data availability. This time is different because LLMs have demonstrated unprecedented flexibility, including emergent abilities.

GPT is the abbreviation for "generative pre-trained transformer." These are *foundation models* because the pre-training creates the conditions for the models to be tailored to different domains and applications (WARNING: frequently, they still need to be tailored). Seemingly daily, there is yet another paper on a more efficient way to tune models to tasks. This opens up a world of possibilities we're just starting to get a taste of with the likes of ChatGPT, AllSearch, CoCounsel, Copilot, Med-PaLM, Midjourney, and CICERO, among many others.

Like I said, it is a basic take, and you should look elsewhere for deep understanding.

But Richard Susskind did not need schematic understanding of SMTP, IMAP, POP, or MIME in 1996 to predict email would become the dominant form of communication between lawyers and clients. He merely needed to grasp the jobs email did and recognize that the rise of webmail clients built atop WYSIWYG editors would cross the usability tipping point Ray Tomlinson envisioned after he invented email in 1971.

Tomlinson worked in relative obscurity for decades. At the same time Tomlinson's contribution was finally receiving its just due, Susskind was being labeled "dangerous" and "possibly insane." Some lawyers called for Susskind to be banned from public speaking because he was "bringing the profession into disrepute" due to his willful ignorance of how email undermined client confidentiality. Less than a decade later, a lawyer was laughed out of court for claiming failure to check his email was "excusable neglect."

Susskind did not persuade lawyers to adopt email. Clients did. The world changed. Resistance was futile. But futility took time to become apparent and was the subject of furious, if mostly nonsensical, debate.

With ChatGPT, what was relatively obscure has become an extremely public conversation that dwarfs any previous AI hype cycle (even Watson). My thesis is you do not need a technical background to understand that limiting the terms of the attendant debate to ChatGPT is a disservice to the discourse.

LLM-powered applications are effective in legal. Casetext began experimenting with LLMs years ago to augment the editorial process some of us still call "Shepardizing" despite that trademark belonging to our friends at LexisNexis (another bias/brag alert: Casetext is also a LexFusion member).

casetext

The challenge with automating the analysis of subsequent treatment of a judicial decision is the linguistically nuanced ways a court might overturn, question, or reaffirm. Core to the appeal of LLMs is the capacity to handle linguistic nuance.

In the beginning, the LLMs did not work too well on legal text. Eventually, after being trained on massive amounts of legal language and refined through

reinforced learning from human feedback, the models proved so adept that Casetext extended the technology to search.

Parallel Search represents the first true “conceptual search” for caselaw. While we’ve had ‘natural language’ search for decades, it, at best, is the machine translating keywords into Boolean searches with some additional fuzzy logic and common synonyms. Conceptual search is different in kind, not just degree—identifying conceptual congruence despite no common keywords.

One of the many jokes I have stolen from Casetext co-founder Pablo Arredondo is that Parallel Search could have been called “partner search” because it is the realization of a dream/end of a nightmare. Pablo and I are both former litigators. Every litigation associate is intimately familiar with the terror of a partner exclaiming some variant of “I am sure there is a case that says X.”

When searching for “X” does not produce the case that definitely exists, the associate begins the sometimes endless pursuit of typing in potential cognates of X. The associate is attempting to break out of the keyword prison to translate statement X into concepts. In grossly simplified terms, this is what

the transformer-based neural networks underpinning Parallel Search have already accomplished—indexing the text of the entire common law in 768-dimensional vector space to surface similarities based on meaning rather than word selection (which is not say the machine "understands" meaning in the conscious sense, only that it is able identify parallel word clusters based on meaning instead of verbiage).

Parallel Search is excellent. But judicial decisions are not the only document type containing legal language. Casetext built AllSearch to extend the technology to any corpus of documents—e.g., contracts, brief banks, deposition transcripts, emails, prior art, your document management system, etc.

Who objects to better search for caselaw, contracts, or a DMS? Not every application needs to be totally transformative. Most won't be. Still, better is better. In some instances, the introduction and proper application of LLMs will simply result in a superior version of that which we already do.

Further, while Casetext has used GPT-3 to help rank judge-generated text, Parallel Search and AllSearch were developed entirely in-house. They are also not generative in nature—they only return actually existing caselaw or documents. All three points are critical to thinking through LLM-powered applications in legal:

1. GPT 3.5, the LLM underpinning ChatGPT, is only one LLM. LLMs can incorporate or be enriched through domain specific data. There will be horses for courses.

2. LLMs are compatible with sources of truth, like the common law or a document repository. Just because ChatGPT does not have a source of truth does not mean all LLM-powered applications will operate without one.

3. Asking ChatGPT to generate items from scratch has been the most prominent form of experimentation. But LLMs have many use cases beyond blank-page generation, including search, synthesis, summarization, translation, collation, categorization, and annotation.

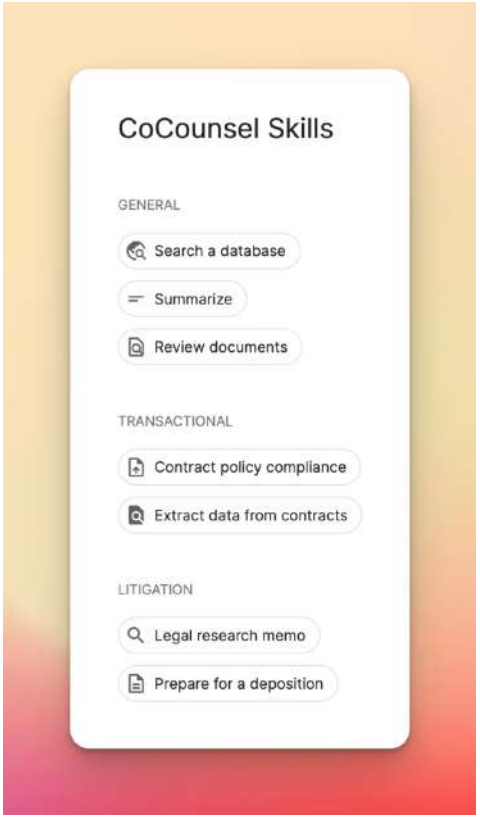
Parallel Search and AllSearch are not generative. But CoCounsel is.

Properly-calibrated LLM-powered applications are effective in producing legal content. Today, Casetext announced CoCounsel. From the press release:

> Today, legal AI company Casetext unveiled CoCounsel, the first AI legal assistant. CoCounsel leverages the latest, most advanced large language model from OpenAI, which Casetext has customized for legal practice, to expertly perform the skills most valuable to legal professionals....
>
> CoCounsel introduces a groundbreaking way of interacting with legal technology. For the first time, lawyers can reliably delegate substantive, complex work to an AI assistant—just as they would to a legal professional—and trust the results....
>
> CoCounsel can perform substantive tasks such as legal research, document review, and contract analysis more quickly and accurately than ever before possible. Most importantly, CoCounsel produces results lawyers can rely on for professional use and keeps customers'—and their clients'—data private and secure.
>
> To tailor general AI technology for the demands of legal practice, Casetext established a robust trust and reliability program managed by a dedicated team of AI engineers and experienced litigation and transactional attorneys. Casetext's Trust Team, which has run every legal skill on the platform through thousands of internal tests, has spent nearly 4,000 hours training and fine-tuning CoCounsel's output based on over 30,000 legal questions. Then, all CoCounsel applications were used extensively by a group of beta testers composed of over four hundred attorneys from elite boutique and global law firms, in-house legal departments, and legal aid organizations, before being deployed. These lawyers and legal professionals have already used CoCounsel more than 50,000 times in their day-to-day work.

In short, the reliability concerns about ChatGPT are both legitimate and addressable. As I understand it (and, if I am wrong, Pablo will correct me once

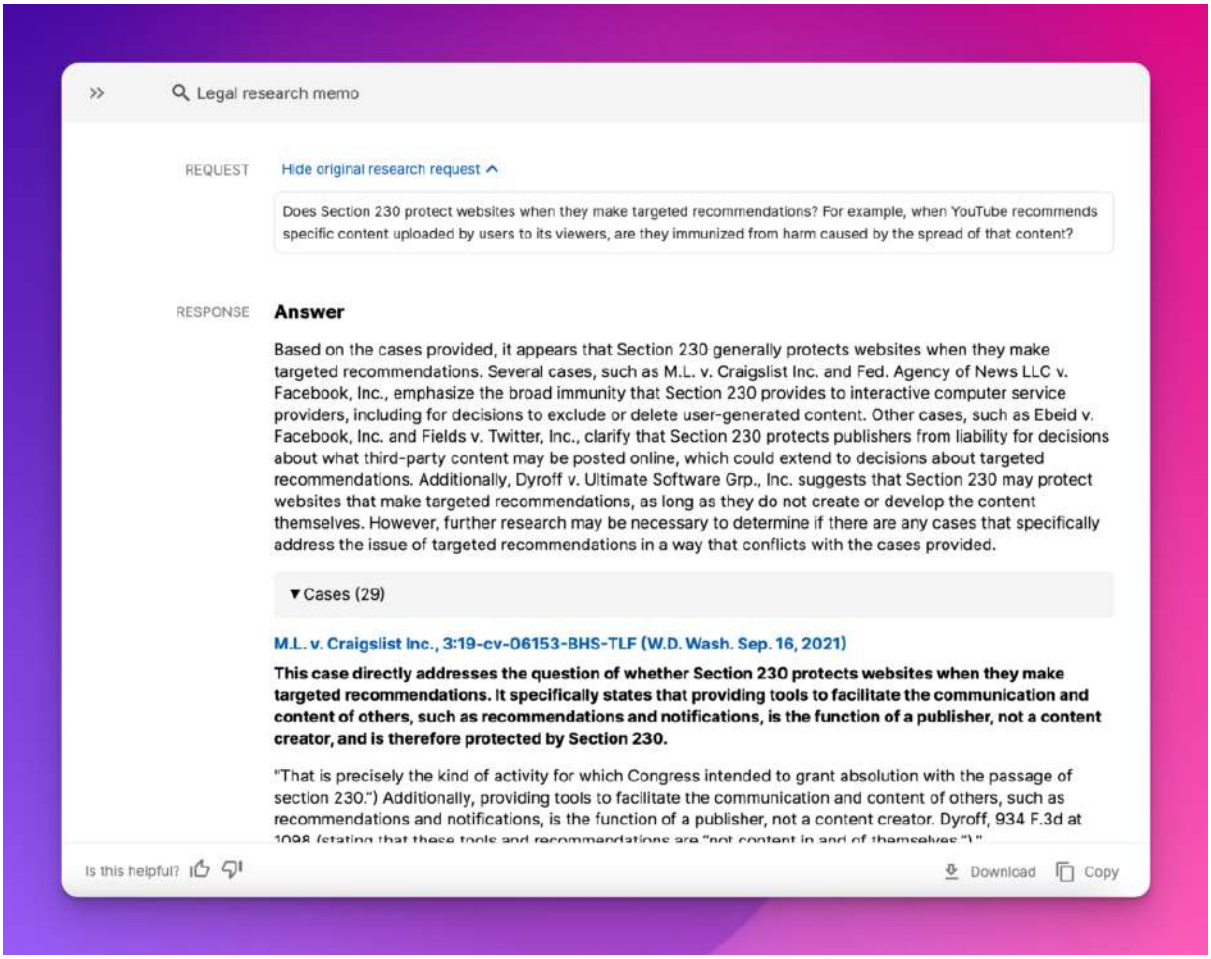
he's done making jokes on MSNBC), CoCounsel incorporates a specialized variant of retrieval augmented generation (RAG).



“RAG has an intermediate component that retrieves contextual documents from an external knowledge base.” While foundation models are probabilistic, not deterministic—which is why they hallucinate—we can still pair them with deterministic systems (or, more precisely, combine parametric memory with non-parametric memory). Indeed, the analogy used in the RAG research should be strikingly familiar. RAG combines "the flexibility of the 'closed-book' or parametric-only approach with the performance of 'open-book' or retrieval-based methods."

RAG is well suited to knowledge-intensive tasks because it is a method for incorporating sources of truth. We can, for example, limit operations to a pre-vetted knowledge base like the common law or a library of approved templates. In addition, "besides a textual answer to a given query they provide provenance items retrieved from an updateable knowledge base." Provenance means the output cites, and can often link to, its sources. Exactly what lawyers would expect for many forms of output (e.g., briefs, memos, summaries), whether generated by humans or machines.

For example, below is CoCounsel's output of a legal research memo followed by links to, summaries of, and relevant quotes from all the cited cases (generated in less time than it would take most lawyers to find a single relevant case).

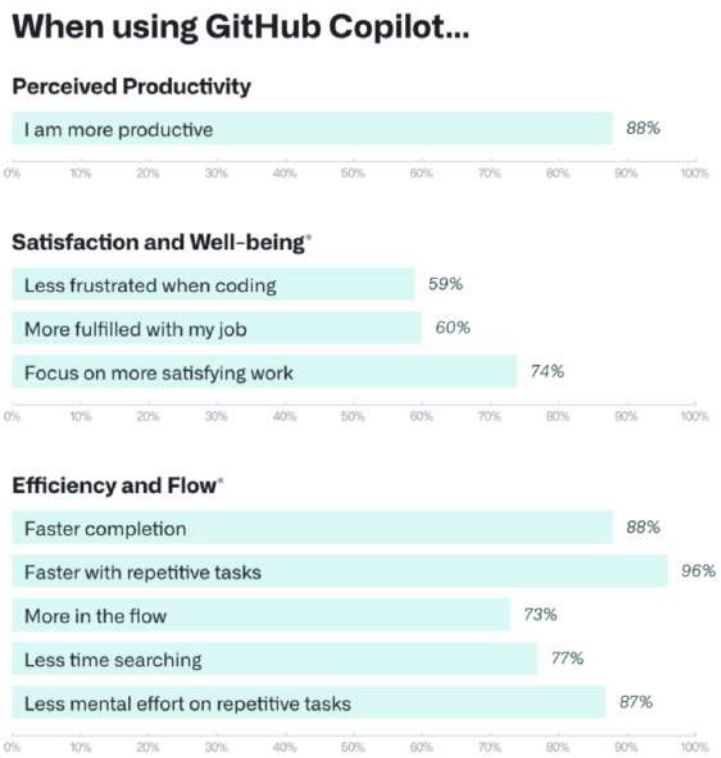


LLM-powered applications have proven effective in producing content in other specialized domains. Lawyers will not be alone in using LLM-powered applications like CoCounsel to expeditiously generate quality, domain-specific content. Even before ChatGPT, Microsoft and OpenAI were being sued for $9 billion for Copilot.

ChatGPT released on November 30. On November 3, Microsoft, OpenAI, and GitHub (a Microsoft subsidiary) were named in a class action alleging violations of the open-source licenses under which creators post on GitHub, a code hosting service for developers worldwide. A second class action was filed on November 10.

The lawsuits center on GitHub Copilot, an AI pair programmer that makes developers 55% faster. The tool suggests whole lines of code or even entire functions right inside the code editor, as opposed to the human developer searching GitHub separately to find a solution (think an associate searching the DMS or knowledge bank for a specific clause type or template). Copilot

increases successful task completion (78% with, 70% without). The reduced friction of using Copilot also materially improves developer satisfaction: 74% are able to focus on more satisfying work because 96% are faster at repetitive tasks.



Github Copilot is powered by OpenAI Codex, which turns simple English instructions into over a dozen popular coding languages. Codex is a "descendent of GPT-3." In addition to GPT-3, Codex's training data contains "billions of lines of source code from publicly available sources, including code in public GitHub repositories." That domain-specific fine-tuning is the basis of the lawsuits.

The vast majority of GitHub's 28 million public repositories are covered by open-source licenses that require attribution of the author's name and copyright. Among several claims at issue is the assertion that using the repositories for training violates the licenses.

I offer no opinion on the merit of the lawsuits. But this wave will, like blockchain/crypto, produce all manner of work for lawyers (e.g., the AI art generator lawsuits). Lawsuits, in particular, tend to be a sign of something gone wrong (damages) or something going right (*where is my cut*?). Copilot sits in the latter category.

I expect the proliferation of LLMs to drive actual legal work. And I expect legal work to make use of applications powered by LLMs because combining LLMs with domain specific data (Github repositories) and complementary tech (integration directly into the coding environment) can deliver return on improved performance—the true measure of effectiveness; much better than the eternal question of whether a specific task is entirely automated, let alone whether a human job has been completely replaced.

The mere presence of an LLM does not make an application effective and can make it dangerous. Two weeks before OpenAI unleashed ChatGPT, Meta released Galactica as a public demo. Meta pulled Galactica down after only three days.

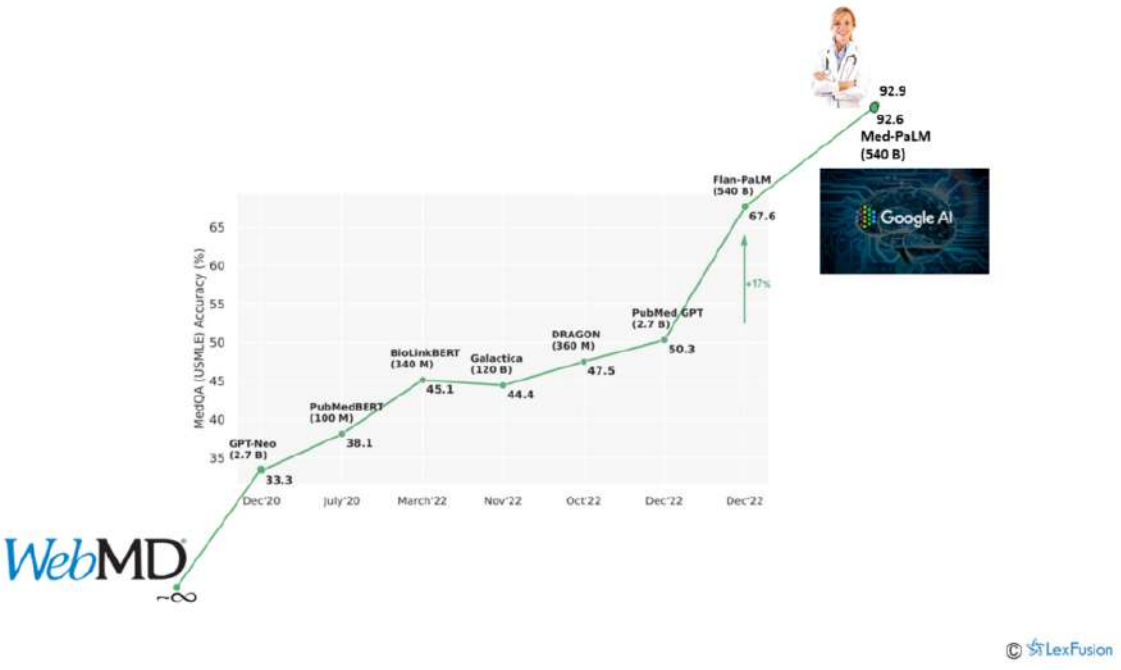
Galactica had ingested 48 million scientific articles, websites, textbooks, lecture notes, and encyclopedias to "store, combine and reason about scientific knowledge." Galactica was expressly designed to generate scientific papers and Wikipedia-like summaries, complete with references and formulas. Unfortunately, Galactica had a bad habit. Galactica was not merely wrong on occasion. Galactica compulsively produced compelling fabrications. Galactica went so far as to invent studies to support erroneous conclusions only experts could identify as utter fantasy—just as only true legal tech dorks can glance at ChatGPT's list of leading female CEOs and recognize it as hallucination. Galactica concocted junk science (and yet it was still nowhere near as bad as Tay).

The domain-specific data was not sufficient to stop Galactica from exhibiting some of the well-documented challenges of properly applying LLMs. A small collection of cautions, from misinformation to environmental catastrophe to Skynet:

- Survey of Hallucination in Natural Language Generation
- On the Danger of Stochastic Parrots
- Sustainable AI: Environmental Implications, Challenges and Opportunities
- The race to understand the exhilarating, dangerous world of language AI
- We read the paper that forced Timnit Gebru out of Google
- I am Bing, and I am evil

LLMs are not magic. But raw foundation models are skilled illusionists—producing plausible-sounding wrongness that only experts can identify as claptrap. The mere presence of an LLM, even when working with domain-specific data, does not mean an application will be fit to purpose.

Two applications of the same LLM to same problem can have materially different performance levels depending on the complementary data, tech, and tuning. We've all typed symptoms into WebMD and come away wondering whether we have a cold or a terminal illness. Such pattern matching is something for which LLMs are, in theory, well suited. And now, too, in practice.



Google and DeepMind's Med-PaLM suggests potential medical diagnoses based on identified symptoms. Results released at the beginning of January 2023 demonstrate Med-PaLM's accuracy rate, as determined by a panel of human medical experts, is now 92.6%. Admittedly, that is not 100%. But it is nearing the accuracy of human clinicians presented with the same symptom sets. The human practitioners achieved 92.9% accuracy—0.3% better than Med-PaLM.

The model will only improve. It already has. As reflected in the chart, Med-PaLM predecessor Flan-PaLM only reached 61.9% accuracy. Both Med-PaLM and Flan-PaLM utilize the same foundation model: Pathways Language Model (PaLM). The difference in accuracy is the result of Med-PaLM's "instruction prompt tuning."

Again, I am not your huckleberry if you are looking to gain a nuanced understanding of multi-task instruction finetuning, CoT data, hard-soft hybrid prompt tuning, etc. The takeaway: there is nuance. The mere presence of an LLM is not sufficient. But, with the necessary complements, LLMs can produce some spectacular results even in highly specialized domains where minimizing error is mission critical—spectacular if we are fair in the standards we apply.

Despite the near parity with the clinicians, it is easy to imagine the uproar when a *robot doctor* suggests a potential misdiagnosis. We, however, should not lose sight of the fact that medical error is already the third leading cause of death.

Indeed, while Med-PaLM being 0.3% less accurate than the clinicians is the headline, it obscures the additional finding that Med-PaLM was also 0.7% less harmful. As adjudged by the same panel of experts, 6.5% of the clinicians' answers were deemed to potentially contribute to negative consequences (i.e., make things worse), as compared to only 5.8% of Med-PaLM's responses. In short, while the doctors were still marginally more affirmatively accurate, Med-PaLM delivered a higher percentage of answers that were either helpful or neutral—that is, answers that do no harm.

Actual human performance is a useful benchmark but *human vs robot* is a counterproductive framing. This is not a sin the researchers committed. The researchers' thoughtfulness merits highlighting since the discourse in law is so prone to the false binary of *human vs robot* and then holding the machine to the standard of perfection, as if lawyers are infallible. From the Med-PaLM paper:

> Recent advances in large language models (LLMs) offer an opportunity to rethink AI systems, with language as a tool for mediating human-AI interaction. LLMs are "foundation models," large pre-trained AI systems that can be repurposed with minimal effort across numerous domains and diverse tasks. These expressive and interactive models offer great promise in their ability to learn generally useful representations from the knowledge encoded in medical corpora, at scale. **There are several exciting potential applications of such models in medicine, including knowledge retrieval, clinical decision support, summarisation of key findings, triaging patients' primary care concerns, and more.**
>
> However, the safety-critical nature of the domain necessitates thoughtful development of evaluation frameworks, enabling researchers to

meaningfully measure progress and capture and mitigate potential harms. This is especially important for LLMs, since these models may produce generations misaligned with clinical and societal values. They may, for instance, hallucinate convincing medical misinformation or incorporate biases that could exacerbate health disparities.

To evaluate how well LLMs encode clinical knowledge and assess their potential in medicine, we consider medical question answering. This task is challenging: providing high-quality answers to medical questions requires comprehension of medical context, recall of appropriate medical knowledge, and reasoning with expert information.

The “exciting potential applications” the researchers cite involve the tech augmenting, not replacing, the human clinicians (i.e., an AI assistant like CoCounsel). Rather than *human vs robot*, the key question is whether human experts and the tech can be combined to drive superior patient outcomes than either alone. The same question applies in law with respect to client outcomes.

The models and the applications thereof will improve. Med-PaLM (Dec 2022) improved on Flan-PaLM (Oct 2021).

GPT-3.5 (March 2022) improved on GPT-3 (June 2020). GPT-3 is the successor to GPT-2 (Feb 2019), which succeeded GPT-1 (June 2018).

See here for an LLM Timeline.

LLMs progress in a non-linear fashion (i.e., accelerating growth curve). My go-to example of LLM evolution is Midjourney, one of several new AI-art generators. The Midjourney Discord server allows users to run prompts through prior versions of the model. Below is the progression from Version 1 to Version 4 of machine-generated art responsive to the prompt “lawyers being afraid of artificial intelligence replacing them”:

I draw like the median four-year old. Even Version 1 of Midjourney is my superior in that regard. But Version 1's output, while interesting, is useless. Version 4 not only achieves photorealistic draftsmanship but also a level of creativity that exceeds my, admittedly limited, imagination. Midjourney's full journey from Version 1 to Version 4 was just under 8 months—basically, a school year. And that journey will continue, as will many others.

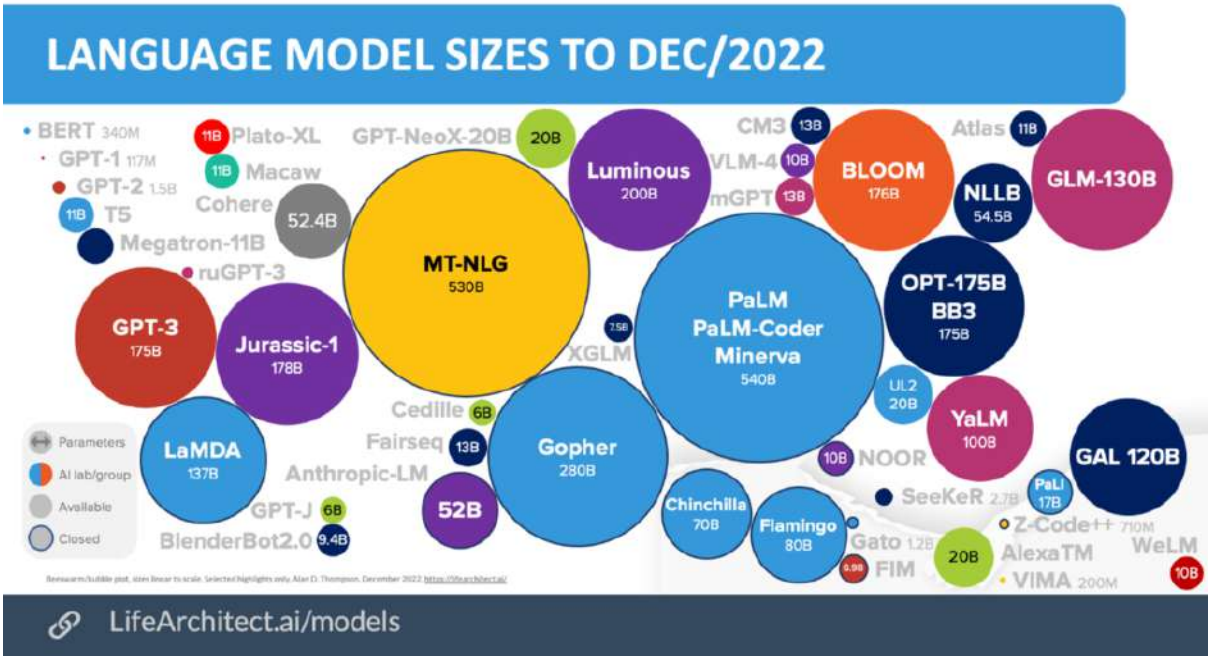
"From talking to OpenAI, GPT-4 will be about 100 trillion parameters." shared Andrew Feldman, founder and CEO of Cerebras, which builds computer systems for complex AI and deep learning, in a 2021 interview with *Wired*. 100 trillion parameters is astonishing and, apparently, ridiculous (for now).

Parameters are the independent values a model can change and optimize as it learns. While an oversimplification in a space where analogies are hard, one can think of parameters as the number of words a person knows. The more words, the more configurations thereof (i.e., independent values that can be optimized). But knowing words (memorizing the dictionary) does not mean we necessarily string the words together well (writing).

Recall that in the last section, both Flan-PaLM and Med-PaLM were powered by the same LLM. PaLM has 540 billion parameters. The latter outperformed the former due to instruction prompt tuning. The accompanying chart tracks how various LLMs performed on the same measure of diagnostic accuracy.

PubMed GPT (2.7B) wildly outperformed GPT-Neo (2.7B). BioLinkBert (340M) and DRAGON (360M) marginally outperformed the aforementioned Galactica (120B).

Indeed, because compute power is a major cost and constraint associated with foundation models, higher performance at a lower parameter count can be advantageous. For example, in introducing LLaMA last week, Meta explained, "Smaller, more performant models such as LLaMA enable others in the research community who don't have access to large amounts of infrastructure to study these models, further democratizing access in this important, fast-changing field. Training smaller foundation models like LLaMA is desirable in the large language model space because it requires far less computing power and resources to test new approaches, validate others' work, and explore new use cases."



Continuing the analogy. Someone with a talent for remembering words might excel at Scrabble but still be a mediocre author. And writing with a limited vocabulary—consider fabulous children's books—can still be highly impactful. Parameter count is not everything. But parameter count is an indicium of a model's power. And the bitter lesson of AI research is that, eventually, power dominates. That is, many believe, "model size is (almost) everything."

Thus, after ChatGPT previewed the prowess of GPT-3.5, the report that GPT-4 would have 100 trillion parameters went mainstream (it was repeated many places, including by me). GPT-3 has a parameter count of 175 billion. 100 trillion would be 570x larger.

We are not naturally disposed to appreciate such orders of magnitude. The best analogy I've encountered (many places; origin unknown) is that GPT-3 is throwing a garden party for 35 people while GPT-4 is renting out Madison Square Garden, capacity 20,000. That is, if GPT-3 is a high-school sophomore poorly cribbing from Wikipedia, GPT-4 might be a post-doc collating, parsing, and synthesizing the most complex and nuanced material in a subject area.

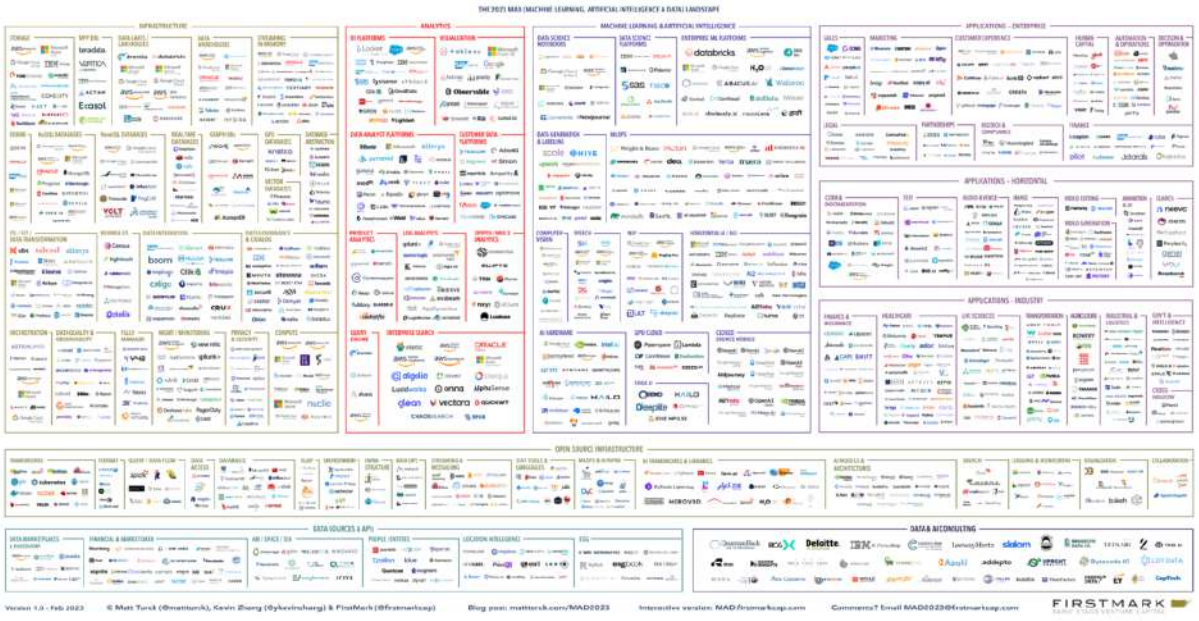
Except OpenAI's Altman has already put that bombast to bed. In a recent interview, he explained "The GPT-4 rumor mill is a ridiculous thing. I don't know where it all comes from. People are begging to be disappointed and they will be."

Whatever the parameter count of GPT-4, disappointment is assured. But so, too, is progress. Imagination maintains a permanent lead on execution. But not keeping pace with the hype does not mean reality is standing still. Reality is racing forward on many fronts simultaneously.

GPT-3.5 is one of many foundational models on which huge bets are being placed. Galactica. PaLM. LLaMA. Midjourney. None are from OpenAI, let alone based on GPT-3.5, let alone ChatGPT.

ChatGPT is but one application of GPT-3.5. GPT-3.5 is but one of foundation model from OpenAI. OpenAI is but one company developing foundation models. ChatGPT is one application of one model from one company.

There are many models from many companies, including many from Big Tech. Megatron-Turing (Microsoft/Nvidia). LaMDA (Google). OPT (Meta). ERNIE (Baidu). Exaone (LG). Pangu Alpha (Huawei). Alexa Teacher (Amazon). These merely scratch the surface of a burgeoning landscape.



And not just Big Tech. In December 2022, NfX compiled a Generative Tech Open Source Market Map of over 450 startups who had already received over $12 billion in funding.

That compilation came before the ChatGPT floodgates had truly opened, including Microsoft announcing an investment of another $10 billion in OpenAI. Microsoft has already integrated GPT into Teams and Bing, with planned integrations into Word, PowerPoint, and Outlook. Maybe prematurely. It appears Microsoft accelerated this timeline to capitalize on the ChatGPT hype. Salesforce is not far behind.

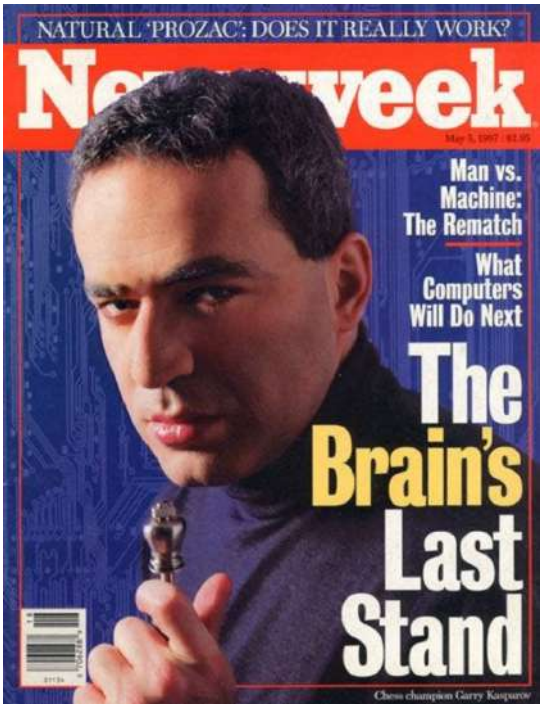
Meanwhile, amidst layoffs, Google (well, Alphabet) has "doubled down" on AI. ChatGPT reportedly caused a "code red" at Google, who moved up the release of their ChatGPT-competitor Bard—the advertisement for which revealed a factual error, causing Google's stock to plummet by $100 billion.

The race is on. We're moving fast, and we're breaking things.

The hype is extreme but not unprecedented. Expect the hype to be counterbalanced by many contrarian articles along the lines of The Clippy of AI: Why the Google Bard vs. Microsoft Bing war will flame out. Such articles are not entirely unfair. Who could forget Microsoft's Azure Blockchain? (*confession*: me).

The current mania is most evocative of IBM's Watson. Watson won *Jeopardy!* and was on its way to becoming a doctor, a lawyer, a chef, and smarter than people until it wasn't. We're now almost as far removed from peak Watson in 2011 as Watson was from 1997 when "in brisk and brutal fashion, the I.B.M. computer Deep Blue unseated humanity" by beating Gary Kasparov at chess in what was then termed "the brain's last stand."

Deep Blue ascended 14 years after the *New York Times* explained to its readers in 1983 that before "today's teen-agers finish college, computers will interpret changes in tax law and plan tax strategies for business." That NYT declaration occurred 13 years after *Life* magazine proclaimed in 1970, "In from three to eight years we will have a machine with the general intelligence of an average human being. I mean a machine that will be able to read Shakespeare, grease a car, play office politics, tell a joke, have a fight. At that point the machine will be able to educate itself with fantastic speed. In a few months it will be at genius level and a few months after that its powers will be incalculable."



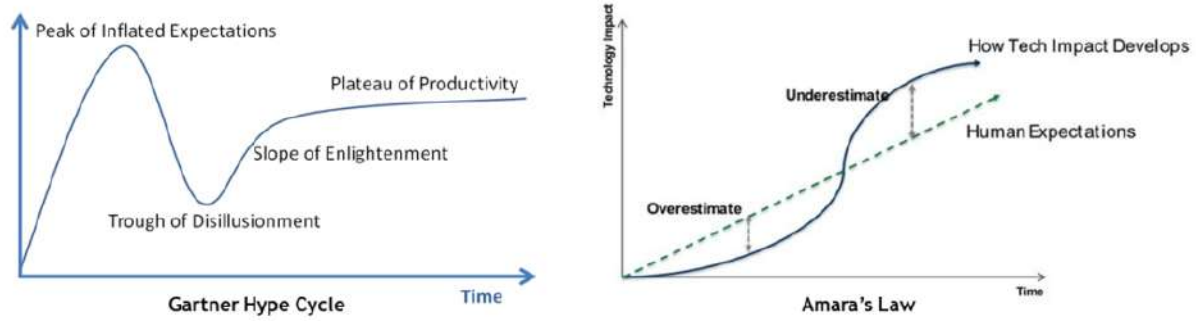
We are in for a torrential downpour of hype. Those who do not learn from the past are doomed to repeat it. We do not learn. Even if another AI Winter is not coming, much nonsense will be spoken. Maybe even by me.

As I said at the outset, I could be wrong in my bullishness re LLMs. I've been wrong before. Trying to operate at the center of the edge of legal innovation, I'll be wrong again. I try to admit when I am wrong and examine why (e.g., here, here, here). Then again, I could be wrong in the other direction. I could be too conservative.

My primary aim here is to persuade those engaged in the discourse that limiting the conversation to ChatGPT is a disservice. I am not nearly as adamant about convincing you to share my sense that this time really is different. My bullishness is at odds with my historical bearishness, correctly lambasting robot magic silliness. The dominant gambling strategy in the near term is always that tomorrow will look much like today.

But, while I concede fallibility, I will not bite on the false binary. Like *human vs robot*, the *reality vs hype* fallacy misses all manner of fertile middle ground. With hype cycles, there is frequently something meaningful on the other side (the slope of enlightenment) even if the end state (productivity plateau) never lives up to the initial overreaction.

Hype cycles are not merely compatible with but directly incorporated into Amara's Law: "*we tend to overestimate the effect of a technology in the short run and underestimate the effect in the long run.*"



Hype happens. FTX, Coinbase, Crypto.com and eToro spent a tidy $54 million to dominate the airwaves during last year's "Crypto Bowl." This year's Super Bowl had zero advertisements related to cryptocurrency.

Crypto crashed. But crypto did not disappear. Moreover, the underlying blockchain technology has many use cases beyond crypto. Maybe blockchain will simply evaporate, like 3D TVs. More likely, it will remain a useful option in areas where it offers real advantages.

I never invested in crypto nor NFTs. I also do not dismiss those who did. It is an area where I am simply too ignorant—in the neutral, non-pejorative sense of lacking adequate information and understanding. It is ok to not have an opinion. Though, if I am being honest, it is probably also about being gun shy. Before I was of legal drinking age, I'd already lost some of the little money I

had at the time on the Dot-com bubble, which took over its own Super Bowl back in the day:

> The Crypto Bowl reminded many of the 2000 Super Bowl which has since been referred to as the “Dot-com Bowl”. That year 17 of 61 ads sold came from dot-com companies with a :30 ad costing $2.2 billion. Most, but not all, of those advertisers are either no longer in business or were acquired by another company. Perhaps the most famous (or infamous) ad was the sock-puppet from Pets.com singing “If you leave me now”. Pets.com declared bankruptcy just months after the Super Bowl. By comparison, the 1999 Super Bowl ran just two dot-com ads and in 2001 only one dot-com advertiser returned E*Trade.

Yes, the notorious, Amazon-backed Pets.com. In retrospect, the notion that merely owning a great domain was a sufficient basis for a viable business seems ludicrous. And yet.

And yet, while we don’t know how much PetSmart paid for the domain www.pets.com, we can ballpark how much PetSmart might demand to part with it today. Potentially more than the now-defunct business Pets.com’s peak valuation of $400 million given that the domain www.cars.com was recently valued at $872 million.

The Dot-com bubble was a bubble. It had all manner of excess, exuberance, and destabilizing animal spirits. But the core tenant that purely digital real estate can be extremely valuable has been borne out and no longer seems even the least bit controversial. It was, however, a somewhat bizarre concept at the time, despite the internet’s long period of percolation.

ARPANET delivered its first message from one computer to another on October 29, 1969 and changed over to TCP/IP on January 1, 1983, which is now considered the official birthday of the internet. The worldwide web,

however, did not become publicly available until August 6, 1991. Five years later, in 1996, only 16% of US homes had internet access. Internet access would not hit the 75% penetration threshold until 2007, the year the iPhone was released (and was predicted to be "passé within 3 months")


Daily Mail, Tuesday December 5, 2000

Internet 'may be just a passing fad as millions give up on it'

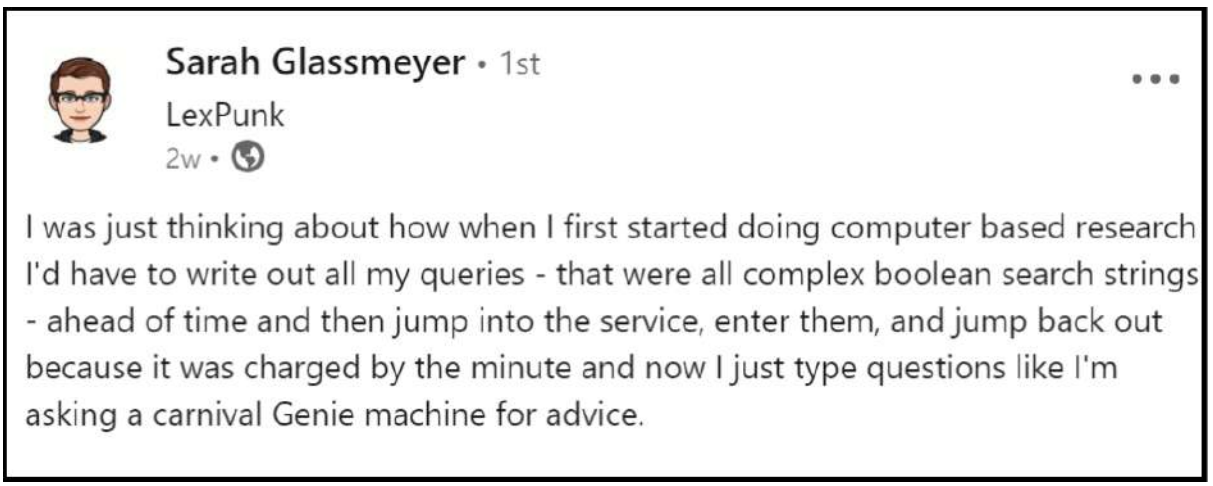
THE Internet may be only a passing fad for many users, according to a report.

By James Chapman
Science Correspondent

Net loss: Two million Britons have logged on the Internet

As recently as 2000, before the internet was a fact of life, it was still to some "a passing fad." So, too, with personal computers, smartphones, social media, the cloud, and streaming. They all had their bubbles. They all reached a fever pitch of hype. None became everything that was promised or prognosticated. You can go back and easily find incredibly bad takes from well-credentialed people on both sides of every major development in technology, all of which took far longer to become mainstream than most of us remember.

It is AI until it works, then it is just software. As we look to the infinite horizon, it is sometimes good to also reflect on just how far we've come. This is Sarah. Sarah gets it. We (including me) should be more like Sarah.


Sarah Glassmeyer • 1st
LexPunk
2w •

I was just thinking about how when I first started doing computer based research I'd have to write out all my queries - that were all complex boolean search strings - ahead of time and then jump into the service, enter them, and jump back out because it was charged by the minute and now I just type questions like I'm asking a carnival Genie machine for advice.

Then again, Thomson Reuters is still publishing hardcopy books (observes guy who still buys hardcopy books for personal reading). Even when it arrives, the future is not evenly distributed.

Some evidence I can offer in support of my bullishness is:

- We're just getting started
- ChatGPT is already demonstrating general receptivity to LLM-powered applications
- Parallel Search and AllSearch have already brought true conceptual search to legal
- CoCounsel already demonstrates the potential of retrieval augmented generation in legal
- Copilot is already making developers 55% faster
- Med-PaLM is already near parity with clinicians on suggesting potential diagnoses
- Midjourney is already producing photorealistic illustrations
- CICERO already doubled the average human score, ranking in the top 10% of all participants, in the game Diplomacy

We haven't covered the last one yet. In November 2022, the same month as the Galactica kerfuffle, Meta also released CICERO, the first AI agent to achieve human-level performance in the game Diplomacy:

> Diplomacy, a complex game that requires extensive communication, has been recognized as a challenge for AI for at least fifty years. To win, a player must not only play strategically, but form alliances, negotiate, persuade, threaten, and occasionally deceive. It therefore presents challenges for AI that are go far beyond those faced either by systems that play games like Go and chess or by chatbots that engage in dialog in less complex settings.
>
> The results themselves are, without question, genuinely impressive. Although the AI is not yet at or near world champion level, the system was able to integrate language with game play, in an online version of blitz Diplomacy, ranking within the top 10% of mixed crowd of professional and amateurs, with play and language use that were natural enough that only one human player suspected it of being a bot.

This wasn't supposed to be possible, until it was:

“

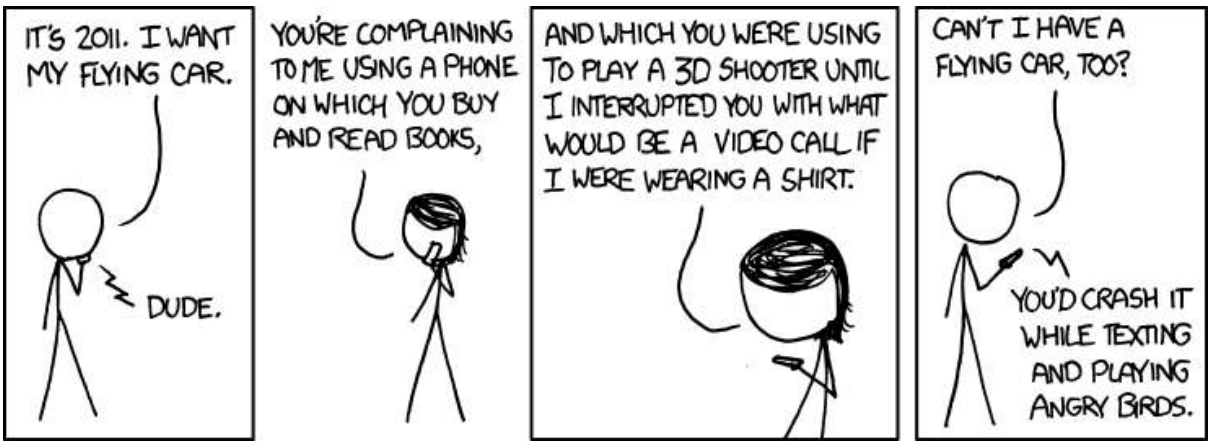
Diplomacy has been viewed for decades as a near-impossible grand challenge in AI because it requires players to master the art of understanding other people’s motivations and perspectives; make complex plans and adjust strategies; and then use natural language to reach agreements with other people, convince them to form partnerships and alliances, and more. CICERO is so effective at using natural language to negotiate with people in Diplomacy that they often favored working with CICERO over other human participants.

Unlike games like Chess and Go, Diplomacy is a game about people rather than pieces. If an agent can't recognize that someone is likely bluffing or that another player would see a certain move as aggressive, it will quickly lose the game. Likewise, if it doesn't talk like a real person -- showing empathy, building relationships, and speaking knowledgeably about the game -- it won't find other players willing to work with it.

Computers keep hitting these benchmarks. Computers beat humans at checkers. Then chess. Then poker. Then Go (which us meat puppets have recaptured for a moment). Then Stratego. Now Diplomacy. And, despite some breathless media coverage about our new AI overlords, everyone pretty much yawned and proceeded on with their lives, just as we did with Watson and Deep Blue. *It is a job-destroying robot until it is a dishwasher*.

Meanwhile, our expectations ratchet up. Today, phone *chargers* have 48x the clock speed and 1.8x the programming space of the Apollo 11 Guidance Computer (AGC) that enabled humans to land on the moon in 1969. The AGC cost $285,000,000 in 2023 dollars and was bigger than a car. The supercomputer in your pocket—that connects you to almost 7 billion people and provides you instant access to most of the humanity’s accumulated knowledge—could guide more than 120,000,000 Apollo-era spacecraft to the moon, all at the same time (and that was the passé iPhone 6). Yet no one sits around in perpetual astonishment at these advances. Instead, we complain about battery life.

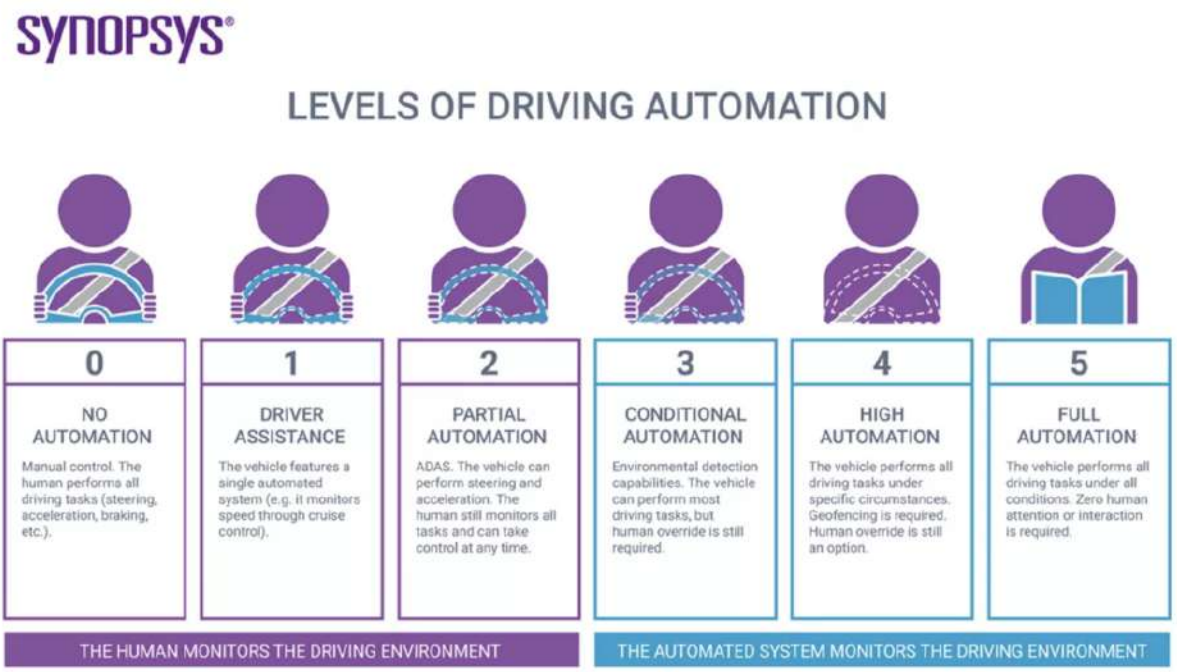
Pocket-sized computers that were once science fiction are now a necessity. But we are predisposed to focus on science that remains fiction. *Where is my flying car?*



Forget flying cars. We still don't have self-driving cars.

LLMs need not be everything, everywhere, all at once, immediately. The last-mile problems of fully autonomous vehicles have been known for decades. AVs have gone through many hype cycles over the last century, starting around 1925. We're closer than we've ever been. And yet we're still not there.

But where is "there?" Importantly, there has levels.



A useful conversation around AVs, or any form of automation, should proceed from the premise we do not need to achieve Level 5 to realize benefits. Nor need we accept as an article of faith that reaching Level 5 is, on net, beneficial. We are permitted to exercise judgment. In the case of AVs, applying standards like safety, environmental impact, and affordability. In the case of automating legal service delivery, benchmarks like outcomes, access, speed, and consistency.

I would submit that, despite some innovations being available for decades, many legal service delivery vehicles are gas guzzlers still operating without the equivalent of power steering or anti-lock brakes. Progressing to a current state where Level 1 automation (e.g., cruise control) is a standard feature therefore represents a material improvement. Better is better, even if it is not transformative.

Because of the allure of Level 5 transformation, our intuitions fail us on the impact of addressing low-end friction at Level 1. Improving a vehicle from 10 mpg to 20 mpg (2x, +10 mpg) conserves more gas than the leap from 20 mpg to 200 mpg (10x, +180 mpg). Improving lawyer throughput from 1 contract per hour to 2 contracts per hour (or any unit of legal

production) saves more time than supercharging their throughput from 2 contracts per hour to 20 contracts per hour. Go ahead, check my math.

Because low-end friction is such an underappreciated problem, I'll take it a step further. If all the LLM hype accomplished was to shift expectations such that the broader legal market started taking better advantage of document automation technology and basic knowledge management hygiene we've underutilized for decades, this would represent a marked improvement. I expect more. But a phase shift to better use of the tools we already have is still an upgrade on the status quo.

Imagine a scenario where the sole improvement attributable to the LLM is a chat-like interface embedded in Outlook, Teams, and Word. This merely initiates tried-and-true workflow and document automation (using any of 250+ tools already in the Bam! Legal Doc Auto Database). And we proceed from there.

I can hear some of my friends howling. They are vigorously pointing out we already have both chatbots and plug-ins that can initiate basic document automation, and these are listed in the database I just pointed to. They are correct. But we also landed a person on the moon before introducing the roller suitcase despite 5,000 years with the wheel—and, even then, the roller suitcase took decades to catch-on. Sometimes we need something to punctuate the equilibrium. I am positing that LLMs are that thing.

LLMs are not at war with boring. Hype can make boring cool. This brings me to the second reason articles like Chat GPT for Contract Drafting: AI v. Templates drive me to drink or respond at excruciating length (and, to be candid, sometimes do both simultaneously). AI and templates are completely compatible, again, because of retrieval augmented generation (RAG). But the broader point is you need not integrate LLMs into the actual document automation for the LLM to be the hook that results in greater use of document automation. Rather, the LLM might enhance the user interface (ChatGPT), subsequent drafting (Copilot), negotiation (CICERO), analysis (Med-PaLM), data extraction (AllSearch), etc.

Success should not be defined by whether LLMs teleport us from Level 0 to Level 5 automation instantaneously. Success is leveling up. LLMs increase my personal optimism as to what is possible and when. But even reflexive contrarians should not look this hype horse in the mouth.

We tend to move the goalposts. Jack, the author of Chat GPT for Contract Drafting: AI v. Templates and a peer I genuinely respect, has suggested to me on social media that I am misreading him. He has pointed out several times that he was limiting his analysis to whether ChatGPT could produce a contract superior to a carefully crafted template. I responded each time that this narrow focus was precisely the problem; he was missing the forest for one tree (and if you don't understand why by now, I should have my keyboard impounded).

But consider the violent ratchet effect his analysis reflects. Six months ago, the idea of such a comparison would have struck most people as absurd. Asking a bot trained on general data from the internet (it does not maintain access to the data, nor have access to the internet) to draft a legal contract from scratch is wild. Yet here we are. And as soon as we got here, the bar was raised. The bar was raised not from (a) can the machine produce a contract from scratch? to (b) can the machine produce a first draft of contract sufficient for lawyer review? but to (c) can the machine produce a contract superior to an expert-curated template?

Today, the answer is No. It is supposed to be. But once some law firm, law department, or legal innovation company combines an LLM with proprietary data (existing templates, contract repository, curated clause bank, deal points database) and proper tuning to either generate templates or structure a workflow that achieves the same ends as automated templates, the bar will be raised yet again. The bar will likely become (d) can the machine produce a contract superior to an expert-curated template IF the expert is me and I had infinite time?

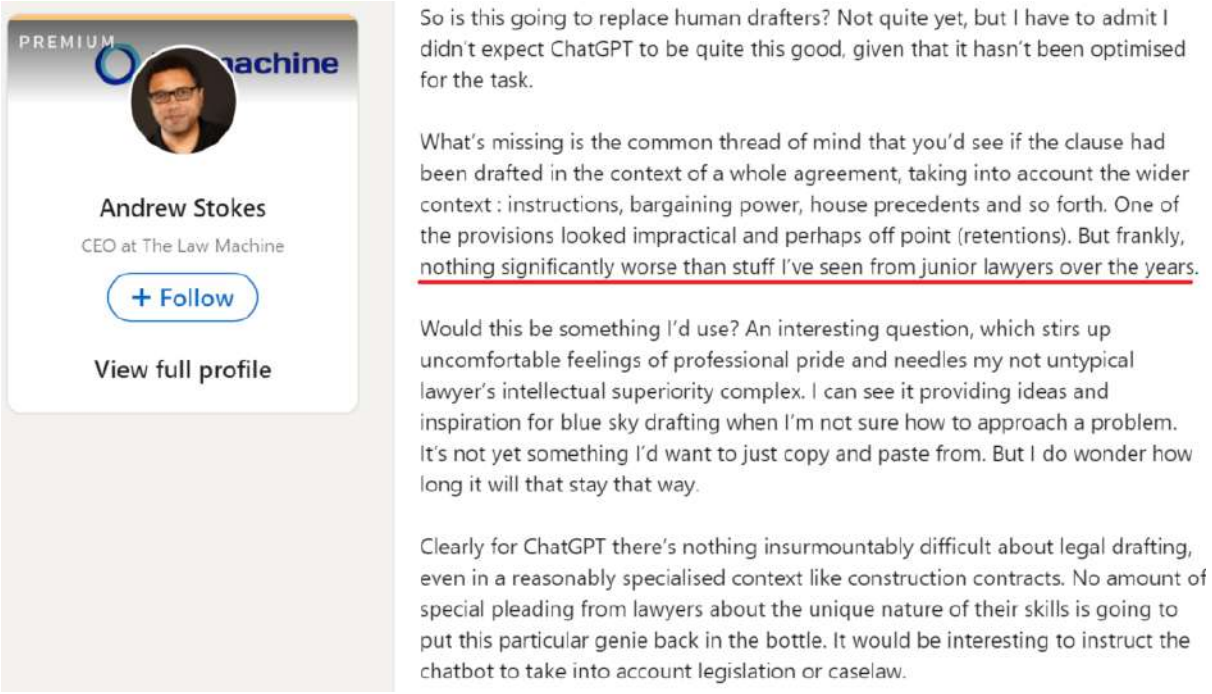
Fortunately, Ken Adams has already written the intellectually honest version of (d).

Ken combines intellectual ferocity with intellectual consistency. Ken does not discriminate. Ken holds everyone to the standards set in his A Manual of Style for Contract Drafting (the 5th edition is hot off the press). He's torn into work product from the likes of Kirkland, Wachtell, and the Magic Circle—in addition to document assembly tools from DLA and Wilson Sonsini, not just Avvo and LegalZoom. Indeed, if you need a laugh break, take a moment to enjoy Ken's many colorful descriptions of EDGAR, which serves as a vast repository of public companies' material contracts. He's referred to this massive archive of contracts from lawyers hired by large corporations as "the great compost heap" and "that great manure lagoon."

Because Ken has concluded contracting is a terrible mess, he recognizes technology merely automates this dysfunction (e.g., here, here, here). Thus, Ken does not expect ChatGPT or similar systems to produce quality contracts because these would merely be "copy-and-paste by another name." This is fair.

I was expressly echoing Ken in 2018 when I wrote How much of lawyering is being a copy-and-paste monkey?. For that post, I dug deep into the academic literature on the "problem of unreflective copying of precedent provisions" combined "with ad hoc edits to individual clauses" leading to "systematic inefficiencies" in a drafting process that "raises costs and risk to clients." So much reading and so many words to argue that modern contract production is largely copy-and-paste, and this is bad. Then, in swift and brutal fashion, Alex Su expressed it far better in far fewer words:

As Ken concludes, “it’s hard to see how ChatGPT could make things worse. If you’re satisfied with cranking the handle of the copy-and-paste machine, you have no reason to look down your nose at ChatGPT.” Ken cites to similar sentiments from Andrew Stokes:



If we acknowledge the empirical reality of our current copy-and-paste culture, it is straightforward enough to project a few ways LLMs might improve on the status quo without fundamentally transforming it:

1. LLMs prove to be better and/or faster at copy-and-paste to arrive at suboptimal first drafts

2. LLMs shift expectations around automated drafting, leading to more investment in, and greater utilization of, good knowledge management practices, including templates

3. LLMs augment good knowledge management practices—e.g., faster production of templates, more consistent application of playbooks—in a manner that does not remove the human expert at the helm

And maybe, someday, an LLM will be used to apply the sixth edition of Ken's *MSCD* to every contract destined for EDGAR (yes, generative output can be programmed to conform to a style guide; as part of the CoCounsel unveil on MSNBC, Greg Sisskind, who is utilizing CoCounsel on a pro bono class action on behalf of Ukranian refugees, talked about uploading his own 3,000 page manual and using CoCounsel to ask his own writing questions).

Addressing the robot lawyer elephant in the room. Having a machine produce an initial draft of a contract or legal opinion for a partner to edit sure sounds like something junior lawyers currently do—except the machines operate at warp speed.

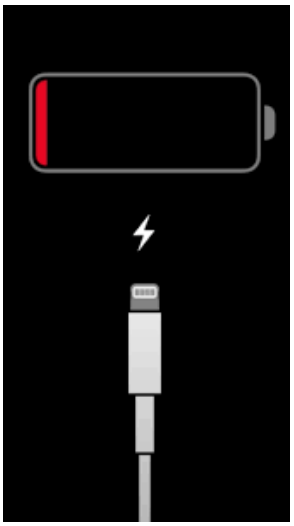
I do not care.

First, the law does not exist to keep lawyers gainfully employed, let alone ensure we do the same things the same way, forever. If technology-assisted review provides litigants more accurate answers, faster, at lower cost—which it has since at least 2005—I am unmoved by the historical fact that many clients have paid many lawyers many dollars to manually review every last irrelevant document, instead of concentrating their attention on the relevant ones.

Second, I am a broken record that compounding legal complexity only makes expert legal guidance more valuable. There is not only latent demand in PeopleLaw (a broader view on our perpetual A2J crisis) but large corporations are also accumulating operational risk due to the evolving challenges of navigating an increasingly law-thick world. *See* receipt, receipt, receipt.

I am not the least bit persuaded that lawyer roles as trusted advisor and advocate are under threat. I am beyond persuaded that many legal needs go unmet. I am fundamentally concerned with our ability to lawyer at scale. Core to LexFusion's Second Annual Legal Market Year in Review was a challenge to law departments and law firms to "calculate what percentage of their total spend is directed to projects that will progress their ability to deliver at scale—i.e., the leveraging of expertise through process and technology such that an increase in work does not require a proportionate increase in human labor."

Technology is fundamental to scale. Technology is also fundamental to us as humans.



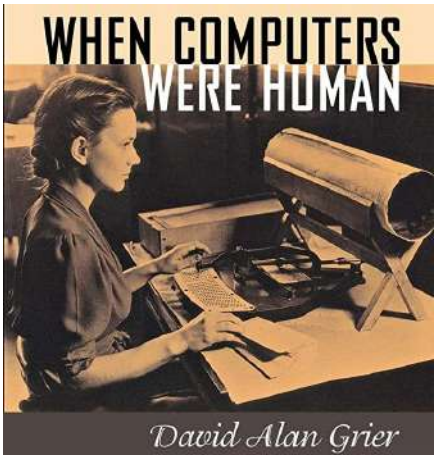
For deeply personal reasons, I tend to characterize all humans engaging with our modern world as cyborgs. Unless you've gone full Kaczynski (and someone else has printed this out for you), you already are one and are likely becoming more intertwined with your tech over time. It is merely a matter of degree. When I first burst on the scene diatribing on the importance of technological competence, I was amused when lawyers would EMAIL me from their BLACKBERRY to lawyersplain to me how technology would never change how they practiced. Today, I need not need explain why a low-battery indicator should be accompanied by a trigger warning.

Cyborg is a personal preference. The likes of Damien Riehl are correct that the more accepted term is centaur. Whether cyborgs or centaurs, there is no *lawyer vs robot* divide. The collective challenge is augmenting and scaling human expertise in ways that, on net, improve client outcomes.

No one, however, has said it better than Steve Jobs and his "bicycle for the mind" (an often cited quote that is considerably more impactful in its original context).

Link to the above video

Jobs considered computers to be bicycles for the human mind. The original computers were the human mind.



This is happening. It will be done BY you or it will be done TO you. Computer was once an occupation, like lawyer or accountant. Computers were people. Human computers performed labor-intensive calculations. They made invaluable contributions to the advancement of science and technology (e.g., Katherine Johnson). As silicon exceeded carbon in executing brute-force calculations, human computers became the first programmers—since most human computers were women, so, too, were the earliest programmers; another "omission of women from the history of computer science."

The machines took some jobs. But they created more jobs than they destroyed. And facility with math became more valuable. Advancements in science and technology accelerated while finance, business, and law shifted towards being increasingly data driven.

While I do not think lawyer as an occupation is in any danger, I expect some roles to change dramatically—slowly at first, and then suddenly (like going bankrupt).

Consider a corporate contracting workflow that is operating near Level 3 automation.

1. The business user interacts with the chat bot to request and produce a contract for a counterparty (think Josef).

2. *If* the business user does not have full authority, the contract is routed for proper approvals. Instead of reviewing the contract itself, the approvers review the accompanying automated summary thereof (think Tome).

3. Upon authorization, the contract is sent to the counterparty. The contract is automatically reviewed against the counterparty's playbook and market (think Blackboiler, LexCheck, TermScout).

4. Any edits are returned automatically (think Lynn). At which point the original party's own automated comparison to playbook kicks in. The systems exchange drafts until agreement is reached.

5. *If* agreement is not reached because no fallback positions are mutually acceptable, the points of contention are escalated to humans (think ndaOk): business professionals if business terms; legal professionals if legal language.

6. When the draft is finalized, the contract is automatically signed [*I suspect we hold off on this one for a bit*] and circulated (think PandaDoc), accompanied by a digestible summary (#2).

7. The contract is automatically routed to a repository and all contract data is extracted not only for tracking, reporting, analytics, and queries (think Cognizer) but also to be piped into the appropriate enterprise systems

(think Connected Experience).

8. Contract data includes data about the contracting process itself so the process can be refined to drive better business outcomes. Status. Backlog. Velocity. Volume. Number of turns. Frequency of specific fallbacks. Frequency of, and triggers for, human intervention, and the impact thereof. Et cetera.

There is far less for a lawyer to do in the above scenario than a still-too-common workflow where the business user requests a contract via email and then the lawyer does most of the work drafting, negotiating, redlining, and ensuring execution.

The current paradigm keeps lawyers busy. Too busy. In-house lawyers are so overwhelmed and burned out that 70% want to look for another job within the year. Law departments are trapped in an endless, impossible cycle of more with less. This is unsustainable. It is bad for lawyers. It is bad for law departments. It is bad for businesses.

The only escape is to stop organizing knowledge work the same way we organize physical work—with static roles permanently performing the same set of activities. Most knowledge work should be organized around projects. Knowledge projects should produce knowledge that can be embedded upstream in business processes—i.e., to achieve *compliance by design* through de-lawyering without de-legaling.

Lawyers remain instrumental to the success of such projects. The templates, clause libraries, and playbooks that make the foregoing scenario possible will not be produced by ChatGPT, even if a fit-to-purpose, LLM-powered application plays a strong supporting role. More effort can be redirected from 'doing' the work to 'improving' the work—e.g., reducing revenue leakage while increasing business velocity in the spirit of the WorldCC's contracting principles and their emphasis on commercial outcomes. Just as importantly, more finite lawyer time can be dedicated to the

novel, high-end advice and counseling (what I refer to as *embedded advisory*) that is becoming increasingly business critical as the complexity of the operating environment compounds.

In my space, I do not consider any significant segment to be immediately at risk. But I predict, eventually, the greatest pressure will be experienced by law departments.

In-house teams have been growing at massive clip for decades. This growth is mostly predicated on savings via insourcing—essentially labor arbitrage. The most immediate savings have been delivered by insourcing high-volume, run-the-company work. The easiest work to insource is also the most amenable to automation.

Further, law departments are subject to the cost-based thinking that dominates many corporate conversations. The lack of precision and predictability in legal budgeting invites heightened scrutiny from finance. The resulting under-resourcing only feeds the business's dim view of legal as the *Dept of Slow* and the *Dept of No*.

I do not anticipate the reinvigorated digital transformation teams from McKinsey, Bain, Accenture, the Big 4, et al. to base their updated sales pitch on shrinking the law department—legal spend is too small as a percentage of revenue. Rather, I expect them to sell the transformation of core business processes, like contracting, to improve outcomes and velocity while reducing labor costs. Some of the disintermediated labor will reside in the law department. The C-suite will consider this a feature, not a bug.

BigLaw will likely feel the pressure earlier—individual in-house lawyers can start asking after LLM deployment now, long before their own enterprise settles on, let alone implements, a strategy. While I do not consider this an existential crisis for most, I suspect the leapfrog potential of LLM-powered applications will only exacerbate the growing divide within BigLaw.

The premier firms are already organized around projects. They are not immune from technological advancement nor market forces. They will need to re-engineer how they work. But their value prop should endure—as will their profits.

Except, of course, re-engineering work in manner that reduces labor inputs while maintaining profitability suggests the billing model will need to change, or at least be updated. At some point, the model breaks if clients continue to insist on variants of the billable hour (yes, clients) while also insisting on the use of technology that materially reduces hours. Do we finally reach the AFA nirvana that so many have been predicting for decades? Or do we start introducing kludges to maintain some semblance of the status quo — e.g. a standard rate and substantially higher 'tech enabled' rate that puts the choice to clients as to how they expect their work to be done?

In these early days, there are more questions than answers. And firms reliant on core—rather than cream—mandates are probably in for a bumpier ride. The need for service-model innovation will intensify. As a stop gap, I envision even greater exploration of captives (to offload the run work cost-effectively) and consulting (to help re-engineer the run work) because in-house teams will continue to have overflow while also struggling to reorient themselves under ever-increasing resource constraints—i.e., in-house under-resourcing extends to investments in process and technology.

Because service-model innovation is their origin story, I consider New Law well situated to both (i) offer immediate relief (process-oriented with lower labor costs) and (ii) gradually integrate & iterate the new tech into scalable systems. The only group seemingly better positioned are consultants—because many law departments and law firms will, understandably, have episodes where they are flailing.

Candidly, I am not sure what to advise law students. But with or without LLMs, I am convinced we must revamp our approach to training young lawyers (and seasoned lawyers, too).

Finally, it has been years since I spent real time in the small and solo space. I, however, have enough exposure, and have paid enough attention when Chas Rampenthal speaks, to be convinced we are in for a tidal wave of UPL inanity—with foolishness like the DoNotPay debacle providing ammunition to the wrong side of the debate (sidenote: *do not trifle with Kathryn Tewson* is a classic blunder, ranking right up there with *never get involved in a land war in Asia*).

How to evaluate LLM-powered products. Speaking of DoNotPay, it represents the extreme end of the nonsense spectrum with respect to

introducing LLMs into legal service delivery. "Robot lawyer" should be an immediate red flag no matter how potent the clickbait.

At the other end of the spectrum is Docket Alarm announcing the incorporation of GPT 3.5 to summarize filings. This is a task for which the model is well suited, with errors being both low likelihood and low consequence. It introduces a net new feature that would have been cost prohibitive absent a tech-based solution (i.e., human editors were not summarizing 550M documents). As Damien Riehl of Fastcase/Docket Alarm observed in his post on centaurs, we should interrogate all tools, not just tools incorporating LLMs, on an Efficacy-Cost Matrix.

Tools are tools. Tools should be evaluated on the merits for problem/solution fit. None of my bullishness on LLMs obviates my prior warnings about the dangers of tech-first solutioning. In between the extremes of dumb publicity stunt and small, useful feature is the inconvenient truth that LLMs will not solve the challenge of properly appraising tools that incorporate LLMs.

I am confident there will be many worthwhile LLM-powered applications in legal. Parallel Search, AllSearch, and CoCounsel are evidence of that. I am just as confident there will be many less-than-worthwhile applications riding the LLM hype train. I am certain distinguishing the former from the latter will require work (choice overload will increase, as will the premium on trust). I am equally certain that even good tools will be misapplied because of failures to do the prerequisite process mapping, stakeholder engagement, future-state planning, and requirements gathering, not to mention process re-engineering, implementation, integrations, knowledge management, change management, and training. LLMs will change much. But LLMs will not change everything, and the danger of automating dysfunction remains high.

I am a cautious optimist. I've never been more excited about what's possible. I've never been more pre-annoyed at how much nonsense is about to be unleashed. It will be fun. It will also be not fun. Most of all, to channel my cherished friend Jason Barnwell, I am convinced things will get weird.

Very weird. Indeed, I feel parochial and pedantic to focus on the legal market given the far-reaching implications of this moment. Thus, to end with a bit more flavor, a few artifacts from deep in the uncanny valley, proving hallucination can be world altering:

- An AI-generated podcast between Joe Rogan and Steve Jobs that never happened but now exists
- An AI redubbing that makes real actors say things they never said in languages they do not speak
- "This is not Morgan Freeman" starring not Morgan Freeman as Morgan Freeman welcoming us to our new synthetic reality

And Now, Our Feature Presentation: GPT-4 is Here

By D. Casey Flaherty

March 23, 2023

And Now, Our Feature Presentation: GPT-4 is Here

By Casey Flaherty on March 23, 2023

Everything is obvious—once you know the answer.

Or so I thought.

I felt a tad disingenuous when I wrote PSA: ChatGPT is the trailer, not the movie because I had already seen the movie. Because of our affiliation with Casetext and our work with the likes of Darth Vaughn at Ford Motor Company, we not only had a sneak preview of (what we did not know at the time was) GPT-4 but a front-row seat to the real-world experiments that became CoCounsel and ensured GPT-4 was ready for primetime. We, however, could not share this until GPT-4 was publicly released. We've been waiting, impatiently.

Serendipity smiled upon us in terms of timing. OpenAI elected to make their GPT-4 announcement at same time as an already scheduled webinar *Real Talk Beyond ChatGPT: What Recent AI Advances Mean for Legal* (recording, coverage) that included Darth, me, and Casetext co-founder Pablo Arredando. Pablo was able to break the news live to a record-setting audience. GPT-4 hadn't just arrived, it had already passed the bar exam with flying colors and had been expertly tailored by Casetext to all manner of legal use cases through extensive field testing and iteration with the likes of Darth/Ford.

This should have been joyful occasion. Instead, I was full of dread. Intellectually, I recognized we were in for a torrential downpour of inanity. But, emotionally, I was still tethered to the vain hope that once people knew what I knew, they would think like I think.

I set myself up to be disappointed despite my awareness of what was coming. I had concluded my PSA piece thusly:

> I am a cautious optimist. I've never been more excited about what's possible. I've never been more pre-annoyed at how much nonsense is about to be unleashed. It will be fun. It will also be not fun.

Unfortunately, I was not wrong.

Good-faith disagreement and rigorous analysis remain welcome. While I am quite bullish on this next generation of AI, skepticism is intellectually defensible. Indeed, interrogating the efficacy of specific applications of specific models to specific use cases is intellectually essential given the near certainty of an avalanche of poorly crafted products premised on AI magic. All of us should operate from some level of baseline skepticism.

Due to the long history of AI hype cycles, there is earned wisdom in being unaffected by the breathless coverage of new shiny objects. Even beyond potential dangers, an engaged skeptic can point to analyses from the likes of Gary Marcus and Yann LeCun on how the current approaches to deep learning have not overcome fundamental problems that have plagued AI research. I have no issue with anyone who starts from "I'll believe it when I see it" with *it* being relevant, empirically validated use cases.

We would do well to heed the advice of Legaltech Hub's Nicola Shaver's in How to Evaluate Large Language Models for Safe Use in Law Firms:

> Something happens with any technology that is subject to significant hype in the market: instead of carefully selecting a solution to solve an expressed need or to address a specific use case, organizations clamor to use the technology in any form with no specific use case in mind because the hype creates a kind of imaginary pressure to do so. It happened with blockchain, with "AI" when it first arrived in legal in the form of machine learning and natural language processing, and it happened with no-code solutions. We are now seeing the same thirst to use the current batch of advanced LLMs in law firms.

In order to get real value for a solution that is underpinned by a large language model, it is generally better to proceed by first having an understanding of the use case for which you want to use the technology, the severity and urgency of the pain-point, and then selecting the solution accordingly. There's no point in investing in technology unless it solves a problem or adds value for your users.In order to get real value for a solution that is underpinned by a large language model, it is generally better to proceed by first having an understanding of the use case for which you want to use the technology, the severity and urgency of the pain-point, and then selecting the solution accordingly. There's no point in investing in technology unless it solves a problem or adds value for your users.

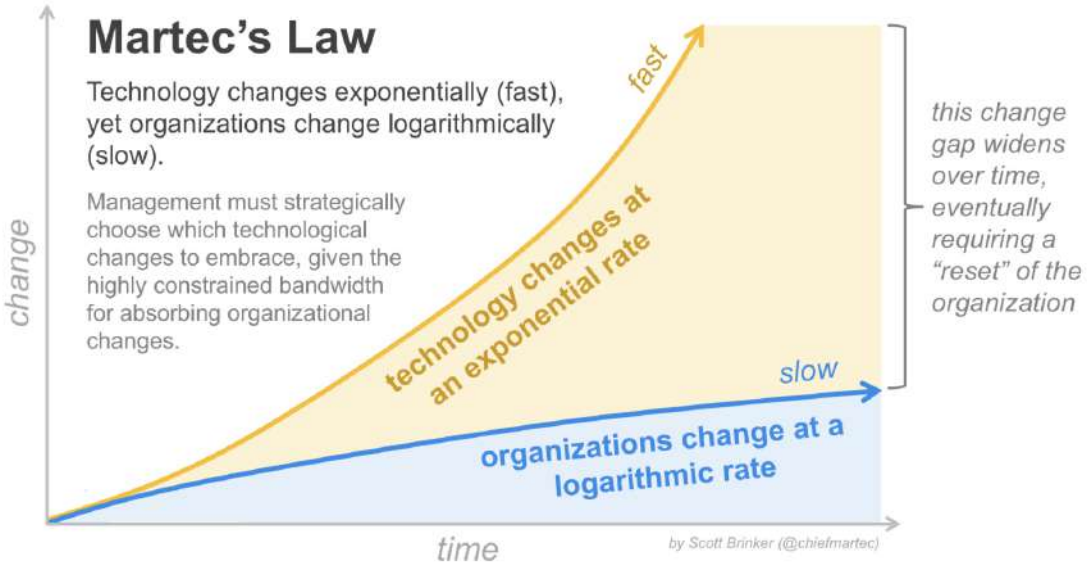
To determine whether a specific application adds sufficient value, we also need baselining exercises like How is GPT-4 at Contract Analysis? from Zuva's Noah Waisberg, who digs into not only how well GPT-4 performs out of the box against current contract analysis tech but also highlight the critical issue of price point (GPT-4 is relatively expensive and subject to rate limits).

Moreover, even beyond the necessary efficacy-cost analysis, there are completely valid reasons to doubt LLMs will have immediate, seismic impact.

Bets are a tax on bullshit. As discussed in my PSA, I have a friendly wager with Alex Hamilton. Alex publicly bet me that AI will not displace 5% of what lawyers currently do in the contracting process within 5 years. I took the other side and, frankly, would have done so had Alex proposed 30% within 3 years.

But I was trading on insider information. When I was finally permitted to disclose my advance access, I offered Alex the opportunity to cancel our bet. He declined:

Quite reasonably, Alex is banking on Martec's Law: "technology changes exponentially, but organizations change logarithmically."



Specific to the adoption of AI, a stellar 2017 paper Artificial Intelligence and the Modern Productivity Paradox: A Clash of Expectations and Statistics

investigates why advances in technology are not reflected in the productivity statistics. Of four potential causes—false hopes, mismeasurement, redistribution, and implementation lags—the authors conclude that implementation lags are the largest contributor to the paradox:

> “There are two main sources of the delay between recognition of a new technology’s potential and its measureable effects. One is that it takes time to build the stock of the new technology to a size sufficient enough to have an aggregate effect. The other is that complementary investments are necessary to obtain the full benefit of the new technology, and it takes time to discover and develop these complements are and to implement them. While the fundamental importance of the core invention and its potential for society might be clearly recognizable at the outset, the myriad necessary co-inventions, obstacles and adjustments needed along the way await discovery over time, and the required path may be lengthy and arduous. Never mistake a clear view for a short distance.

Those complementary investments are not merely acquisition of adjacent tech, they are investments in “human capital” and “organizational changes”—i.e., different people working in different ways. In theory, different people can be different because of re-training. In practice, different people are frequently different people, in the literal sense, because individual resistance to change borders on the suicidal (when doctors tell heart patients they will die if they don’t change their habits, only one in seven can follow through).

To be slightly less pedantic, there are quite comprehensible reasons why so many hotel rooms still feature clocks with 30-pin chargers despite Apple having sunset that tech a decade ago.

I know this. I've written extensively about barriers to adoption (e.g., here, here). Yet I'm betting we are entering a period of punctuated equilibrium. Punctuational change, however, is rare. I could turn out to be quite wrong. In which case, I will happily buy Alex a drink:

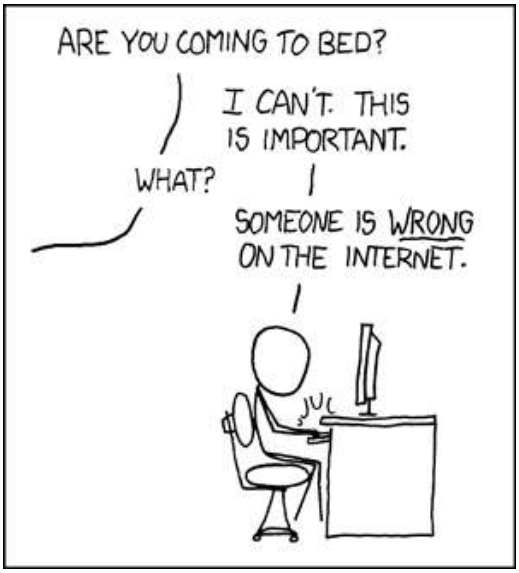
I was so taken with the wonderful stakes Alex proposed that Mike Haven (Head of Legal Operations at Intel, President of CLOC) adjusted our wager on a different topic to similar terms (*on va boire ensemble à Montréal*). These bets reflect the wonderful reality that I have all manner of minor differences with people I greatly admire. In fact, I first met Alex by disagreeing with him on the Legal OnRamp message boards 15 years ago. We've been debating, and friends, ever since. Betting on an uncertain future is part of the fun, and the danger, of playing close to the edge of innovation.

In brief:

1. skepticism re LLMs is warranted and necessary

2. My bullishness re LLMs might be wrong (but am betting I am right)
3. disagreements re LLMs are not to be taken personally

With that, we return to the always productive exercise of arguing with people on the internet.

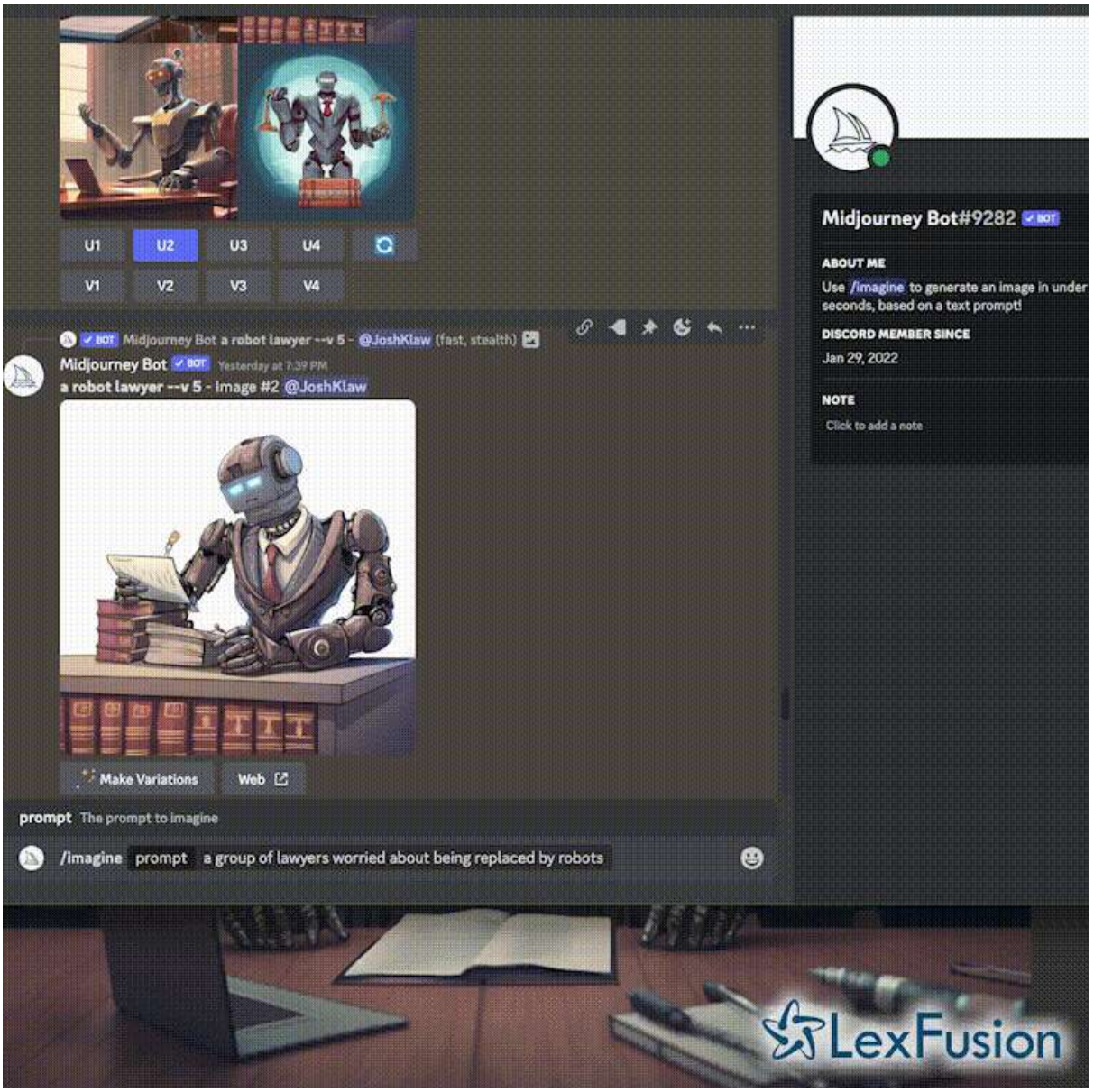


We will all just need to learn to live with the knowledge that you are not impressed. I was tickled at how news of AI passing the bar exam has allowed people to hold forth on the oddity that is American legal education.

To be admitted in most US jurisdictions, one must (i) attend multiple years of post-graduate schooling and (ii) pass a grueling exam. But the schooling does not prepare you for the exam—if you can afford it, you embark on a second cram course of study between graduating and sitting for the exam. And neither the schooling nor the exam prepare you to practice law. Oh, and continuing legal education system is also badly broken.

Still, the bar exam—like the LSAT (which GPT-4 also did quite well on)—is a familiar and digestible benchmark. As Professor Dan Katz told *Legaltech News*, "I don't even really care about the bar exam, per se. This crystallizes what is happening for people in a way [that says], here's some tasks that lawyers do, and [GPT-4] does it marginally better." Dan and Pablo (Casetext cofounder) teamed up with Mike Bommarito (Dan's partner in 273 Ventures) and Casetext's Shang Gao to conduct the bar-exam study and author the attendant paper:

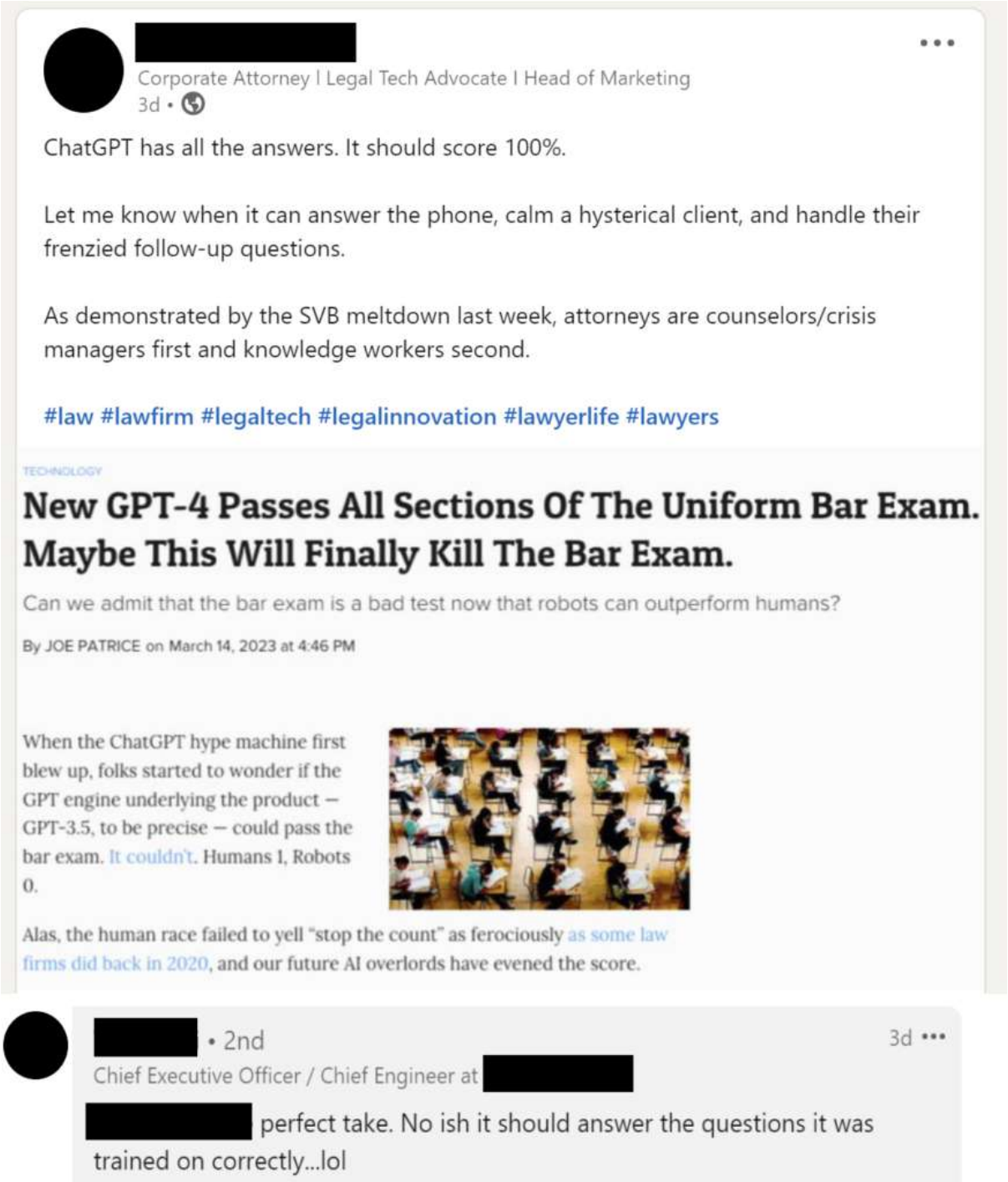
> In this paper, we experimentally evaluate the zero-shot performance of a preliminary version of GPT-4 against prior generations of GPT on the entire Uniform Bar Examination (UBE), including not only the multiple-choice Multistate Bar Examination (MBE), but also the open-ended Multistate Essay Exam (MEE) and Multistate Performance Test (MPT) components.



The progress is astounding (to me, at least).

Similarly, six months ago, the idea of a machine passing the written portion of the bar exam, let alone without being specifically designed to do so, seemed like science fiction because legal language is complex, nuanced, and uncommon. Historically, “computational technologies have struggled not only with natural language processing (NLP) tasks generally, but, in particular, with complex or domain-specific tasks like those in law” due to the “the nuances of legal languages and the difficulties of complex legal reasoning tasks.”

Yet here we are. Some people, however, are not the least bit impressed.



I've blacked out names because I have no interest in shaming anyone. But I also dislike arguing with strawmen. I am grateful for such a concrete example of bad takes I've seen sprayed all over the internet.

First, the reaction is factually inaccurate. This was zero-shot performance. The model was not fed domain-specific data nor tuned for the purpose of passing the exam. Moreover, the notion that LLMs have "all the answers" seems to be

a common misconception. LLMs like GPT-4 do not retain access to their underlying training data, let alone have live access to the internet. This is why raw LLMs hallucinate, and why many applications will need to pair LLMs with sources of truth (i.e., non-parametric knowledge bases like the common law). GPT-4 sat for the bar exam "closed book" just like the rest of us. Still, I concede that LLMs have now demonstrated marginal advantages over humans on the tasks tested—that is the whole point.

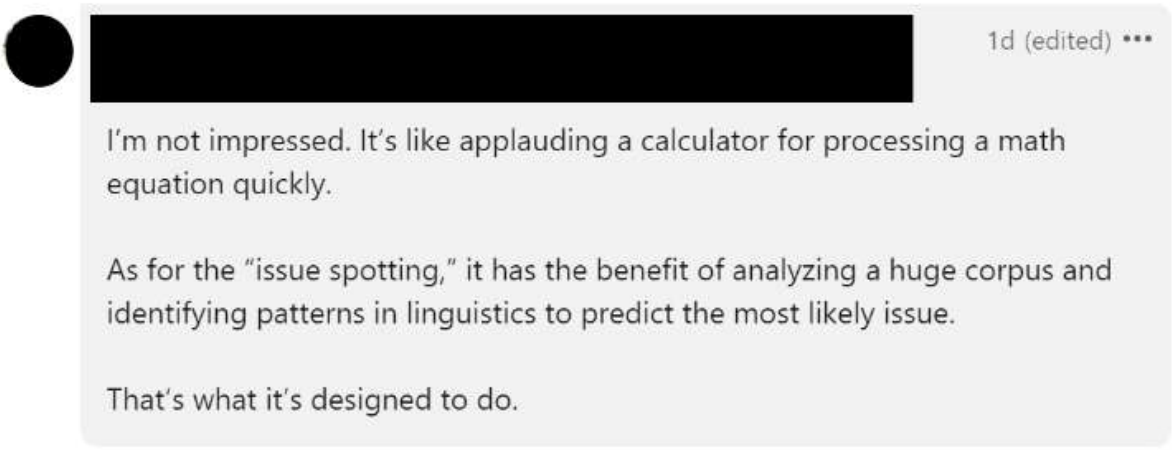
Second, this take is surprising because the poster and commenter work at the same legaltech company. They should certainly know better with respect to the tech (the commenter is both CEO & Chief Engineer).

Until I reflected on the sense of insecurity it must trigger, I was shocked a legaltech company would greet the news of technological breakthrough that can pass the bar exam out of the box with "let me know when it can answer the phone." I doubt the company turns up at pitch meetings and suggests their own tech is not worth exploring because "attorneys are counselors/crisis managers first." The closest they likely come is explaining that their tech will accelerate the completion of specific tasks attorneys currently perform and thereby free up attorney time to devote to counseling and crisis management. This is a valid point. But it only underscores that advances in the automation and augmentation of specific tasks that currently consume finite attorney bandwidth merit our attention, as opposed to a "let me know when" dismissal.

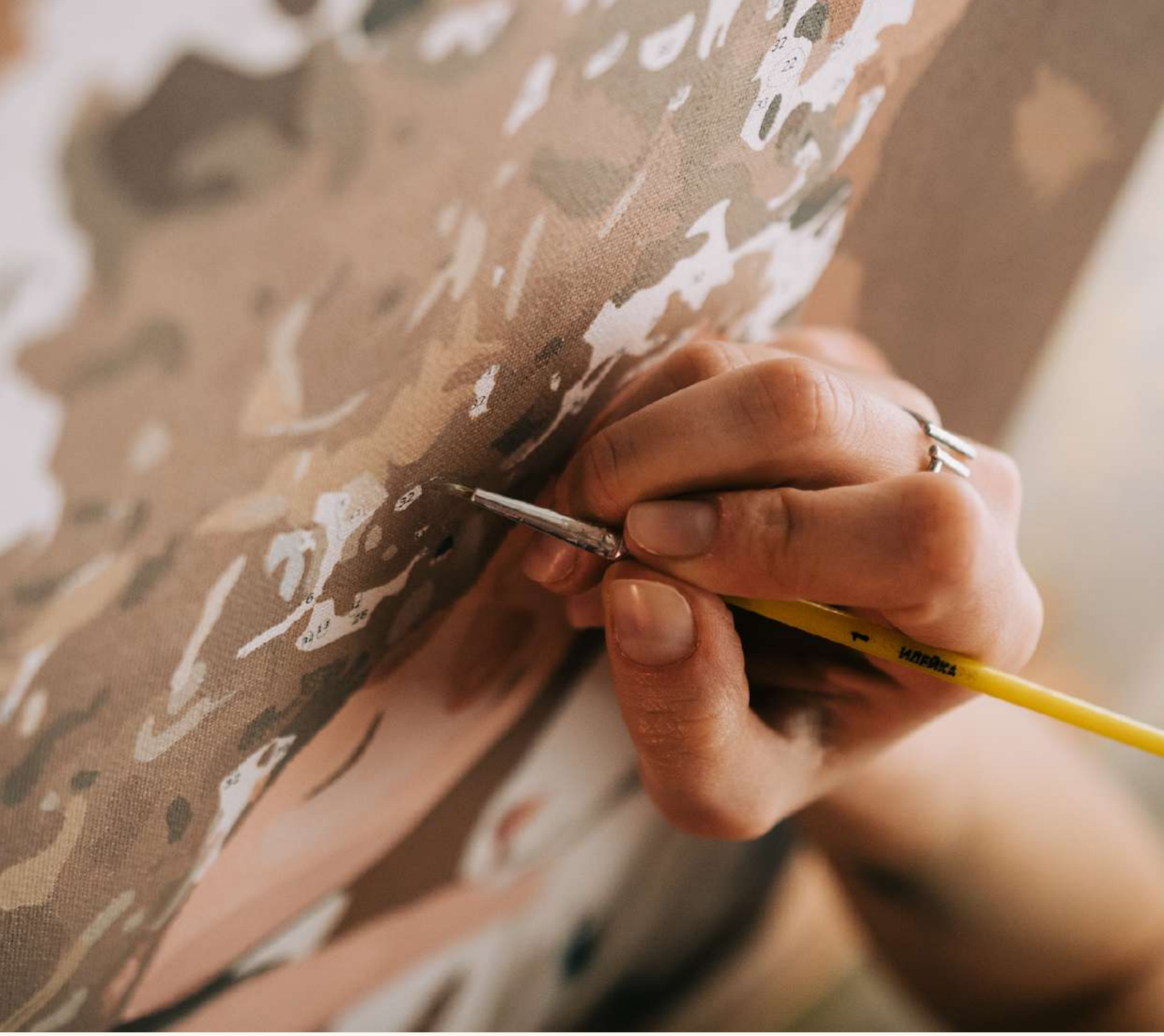
Third, in this vein, the bar exam supposedly tests minimum competence—that is, the "knowledge and skills that every lawyer should have before becoming licensed to practice law," including "a candidate's ability to think like a lawyer." The capacity to serve as a counselor to a hysterical client is nowhere among the admission requirements. Maybe it should be. But having reviewed hundreds of millions of dollars in legal bills, I can't say I recall ever having seen "calming a hysterical client" among the narratives.

While the counseling aspect of lawyering is critical, it is not where the majority of lawyers spend a majority of their time (limiting my comments to BigLaw and in-house). Neither the article nor the underlying paper come anywhere close to the ultra-strawman of suggesting GPT-4 immediately replace all lawyers. The impact of these advances should be framed in terms of tasks, not jobs, with measurements calibrated to return on improved performance, not headcount reduction.

These were patently poor takes. Yet, until I chimed in, the comments to the post were universally positive. Even in putatively sophisticated legaltech circles, confirmation bias and echo chambers are in full effect in ways that are stunting the discourse. My (least) favorite example:



While we just have to live with the disappointment of not impressing this commentator, the historical record suggests that Blaise Pascal's calculator did impress a few people in 1642—and for centuries thereafter. Indeed, it was considered such a monumental achievement with "such a profound influence upon applied mathematics and physics" that the tercententary celebration was held in held London because the inventor's native France was then under German occupation. But, no doubt, some hard-to-impress people responded to the calculator with a yawn and proclamation analogous to '*let me know when it can pass the bar exam*.'



Value Storytelling – Summary

By Casey Flaherty

October 24, 2021

Value Storytelling – Summary

By D. Casey Flaherty on October 24, 2021

SERIES TO DATE

Lawyers Lagging Behind (#0)

Maybe, Don't Be MacGyver (#1)

The Savings Trap (#2)

Defining Business Value (#3)

Start with Why (#4)

The Dept of Slow & No (#5)

Tech-First Failures (#6)

SUMMARY

Legal expertise is valuable to the enterprise. Demand is on steep upward trajectory. Budgets are failing to keep pace. We must optimize resource allocation and innovate—enhance productivity through process and tech. But, while innovation and optimization are key elements in our value story, we are still likely to need more money for the legal function to drive better business outcomes at scale and pace. Service levels are inextricably tied to resource levels—including the resources required to invest in innovation and optimization.

It is, literally, our job to ensure the legal aspects of business needs are met. Thus, it is also our job to secure sufficient resources for the legal function. Obtaining finite resources inside an enterprise carries substantial opportunity costs (other value the business could pursue with the same money) and therefore requires expert value storytelling, a learned skill in which few legal professionals are practiced.

The business defines "value." Yet the number one complaint among the legal function's business stakeholders is in-house lawyers "don't understand my business." Understanding—mastering our own context—is essential. We should be capable of framing our ask for incremental resources in the language and metrics of the business. Centering the creation, and preservation, of business value in our narrative is the core of value storytelling.

Business value is context-dependent, not unknowable. Conversations around the business value of, say, accelerating speed-to-revenue demand a different framing, and often has a different audience, than conversations around the business value of complying with new privacy regulations. We should know our audience and develop the attendant abilities to calibrate messaging for maximum resonance with specific sets of business stakeholders.

Being aligned with the business, however, does not spare us from making hard choices and engaging in hard conversations as to what constitutes value**.** Though it pains our service-loving souls, it incumbent upon us to prioritize activities by business impact and artfully say "no" when asked to handle deprioritized work. We should, however, capitalize on each

“no” as an opportunity to build our story that additional legal resources are required to address unmet business needs.

Yet, instead of a *more-with-more* value proposition, we too often default to savings-centric tropes valorizing *more-with-less* heroics reliant on extraordinary effort and improvisational ingenuity to bridge resource gaps (excess MacGyverism). Stories about savings are easy because they are counterproductive—reinforcing the attractive fiction that the business can, and should, spend less on legal. Good value storytelling is anything but easy for the same reason it is necessary—the hallmark of successful advocacy is not a penchant for combative argumentation but, rather, our ability to persuade those who need persuading.

We are similarly inclined towards the attractive fiction of tech-first solutioning. It would be convenient if tech were the solution to every problem. But value storytelling is persuasive nonfiction and is therefore required to survive contact with reality. In reality, we often need to pay down considerable process and cultural debt to lay the groundwork for necessary tech enablement.

Laying the groundwork starts with Why but needs to be supplemented with a compelling and coherent vision as to How business value should be delivered. We need an articulable, actionable approach that resonates with our business stakeholders. Target operating models. Technology roadmaps. Metrics. We have to be able to move upstream to address the business drivers of legal workloads, presenting a systems-oriented view of how legal supports better business outcomes. Doing this well requires work sorting because we are bandwidth constrained. We can only tackle so many projects, let alone programs, at once.

In addition to limited bandwidth, we are constrained by a fear of looking bad and a myopic perspective on risk. Legal is often labeled the *Department of Slow* or the *Department of No,* which undermines our value storytelling. We need to shift these perspectives among our stakeholders, in part, by understanding when and where they are grounded in some level of truth—candid self-assessments of being bottlenecks because of (i) bad processes or (ii) an acute focus on legal risk that ignores net business

impact. This candor extends to our business case: fix what we can, admit where we are falling short, and request the resources we need to serve the business better.

Explaining the joke: lawyers lagging behind

By Casey Flaherty

August 22, 2021

Explaining the joke: lawyers lagging behind

By D. Casey Flaherty on August 22, 2021

Legal Innovation is Here — Finally

We poke light fun at lawyers (which all three of us are) for remaining too analogue in an increasingly digital world. Our central premise is that digital transformation is inevitable (and already happening and good and hard and we at LexFusion can help). Underpinning the premise are some hypotheses about the shape, pace, and drivers of change in legal service delivery. We might be wrong. But our bets match our predictions. We all left excellent jobs to push our chips in on an accelerating growth curve in legal innovation. In short form:

- The absolute demand for legal expertise is increasing; this will continue
- The relative cost of legal services is also increasing; this will continue *until* we dramatically improve productivity
- The uptick in demand powered the rise of BigLaw for decades; this peaked in 2007
- Next came in-sourcing to meet demand, somewhat keeping costs in check, largely through labor arbitrage; this has likely peaked, or will soon
- Now, to satisfy growing demand while truly bending the cost curve, we must also materially improve productivity—i.e., innovate through process and tech (the trend LexFusion is betting on)
- Innovation is necessary but hard; we need to upskill in many respects, including value storytelling

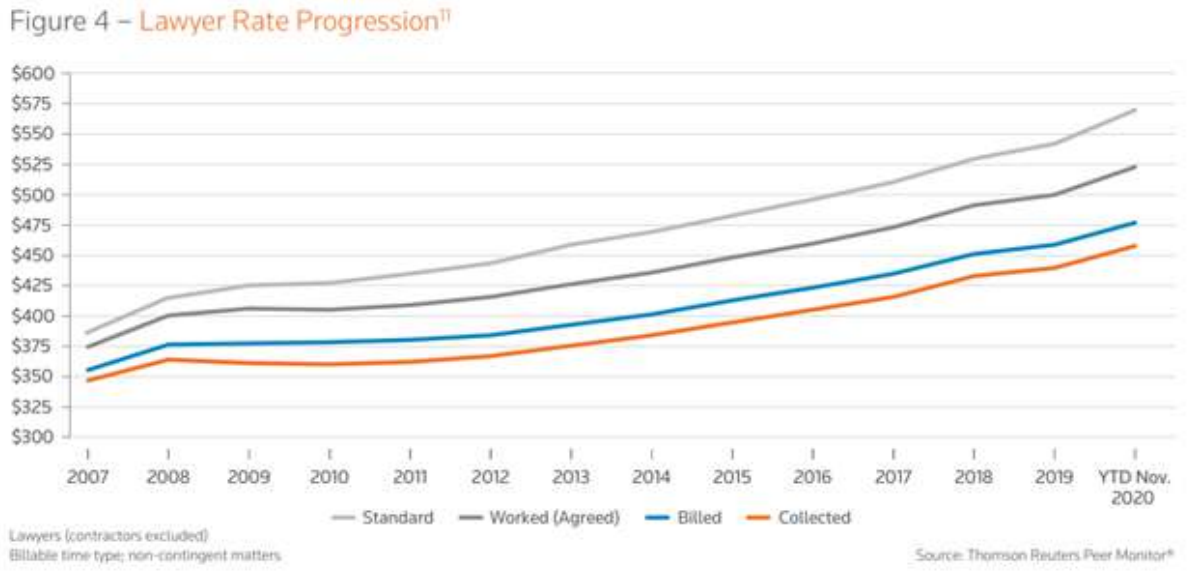
As is appropriate here, I nerd out slightly on our hypotheses below (for an even deeper treatment, let me commend to you the inimitable Jae Um, one of our advisors, from whose magnificent five-part series I borrow liberally–or check out Jae's recent Tweet storm).

Cost □ The clip hits on the general dissatisfaction with how lawyers operate in the modern age, seemingly not taking full advantage of tools that have transformed much of our world.

The world has changed; lawyers, not so much.

For $600, Amazon will next-day deliver a pocket computer (phone, camera, browser, word processor, gaming device, rolodex, clock, calendar, calculator ….) that remains constantly connected to a searchable repository of nearly all human knowledge (real and fabricated). This technology barely existed in recognizable form twenty years ago. My favorite piece of context: less than a decade after their introduction, iPhones were 120,000,000x faster than the $23,000,000 computer that weighed 600 lbs. and guided Apollo 11 to the moon. ("The iPhone is nothing more than a luxury bauble that will appeal to a few gadget freaks" – Bloomberg, 2007 😂)

Alternatively, also for $600, a junior BigLaw associate will allocate one heavily discounted hour to a client matter. Despite the apparent opportunity to be tech enabled, this associate hour is hard to distinguish from the same associate hour that cost $200 two decades ago. And because legal complexity has outpaced productivity, the number of hours required has also gone up.



Clients “feel” they get less for their legal spend dollars because they do—relative to the trajectory in electronics, logistics, consumer goods, transportation, clothing, food, etc.

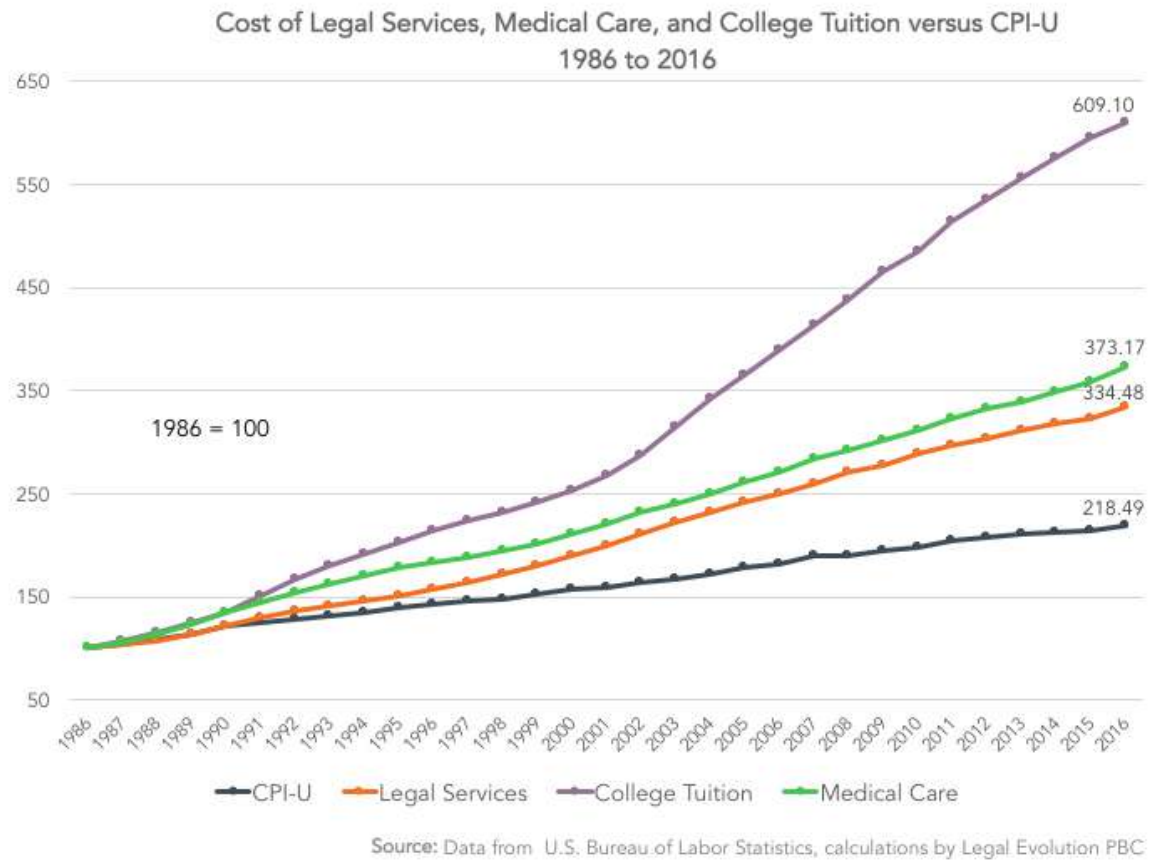
Law suffers from a cost disease, previously covered here:

> “
>
> This is Baumol’s cost disease, an economic phenomenon that undercuts the classical theory that wages rise with productivity. The classical theory: the more productive you are, the more you are paid. The reality is that (across industries, as opposed to within them) **the less productive you are, the more we need to pay you** (unless there is a glut of qualified workers competing for your job). Unsurprisingly, the eponymous Baumol identified “legal services” as subject to the cost disease. And recent scholarship has concluded, “Legal services are decidedly in the stagnant sector.”

Legal productivity has increased (an argument for another day). But it has not increased relative to most other sectors of the economy. Costs have therefore risen on a relative basis. The pervasive impression that clients get less for their money comports with reality.

Critically, the impressionistic sense of ‘too many lawyers’ ‘costing too much’ is in no way limited to how law departments feel about law firms. It is also a fair description of how many enterprises feel about their own law departments.

Law is not the only sector subject to the cost disease. While law has far outpaced the Consumer Price Index, we are pikers compared to college tuition and medical care (*read* Bill Henderson for what this says about the A2J gap and the underconsumption of legal services among the general population).



Need ☐

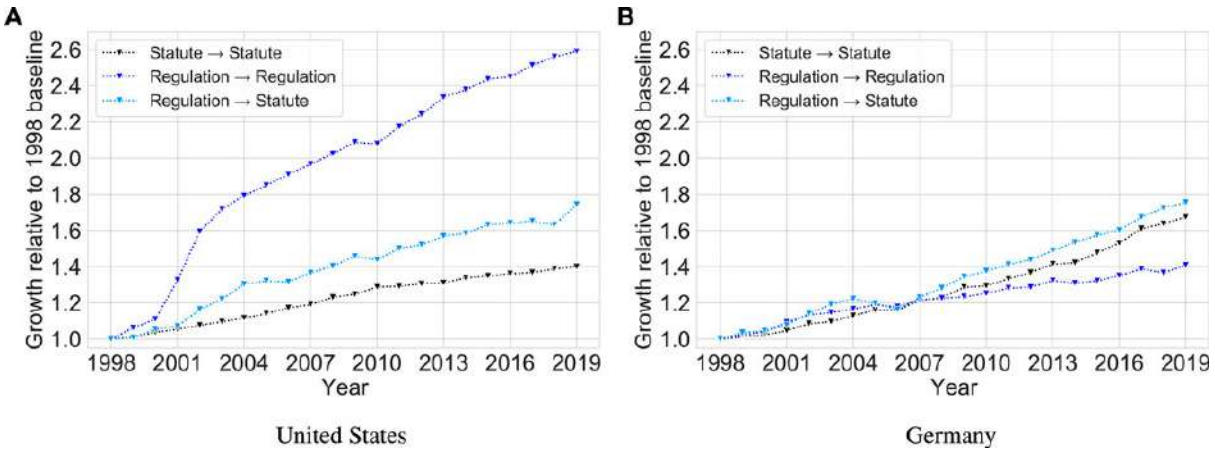
“

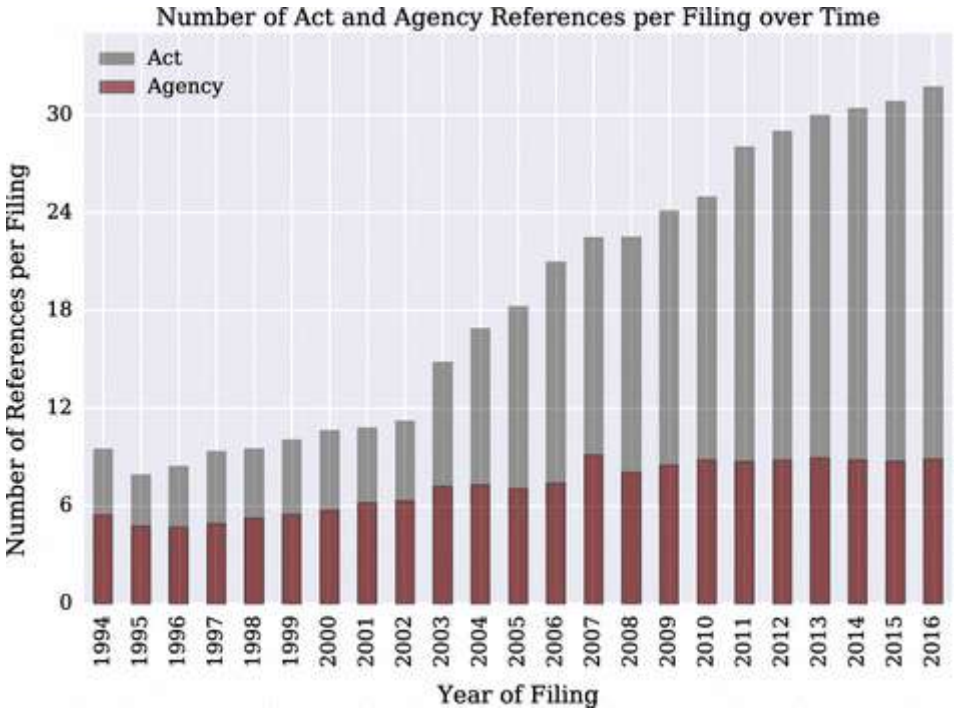
“We live in a law thick world. To secure a benefit or avoid a loss in this world, we often find that we must somehow use the law. This is as true for global corporations as it is for ordinary individuals…” Noel Semple in *Legal Services Regulations at the Crossroads*

Despite understandable discomfort with the growing expense of lawyers, now more than ever, clients require expert legal guidance (which, in theory, need not come in the form of lawyer-delivered services but, in practice, still largely does).

Dan Katz has labeled lawyers “complexity engineers.” Some of us create complexity. But most of us solve for complexity, helping clients navigate an increasingly complex legal landscape. Professor Katz and his collaborators

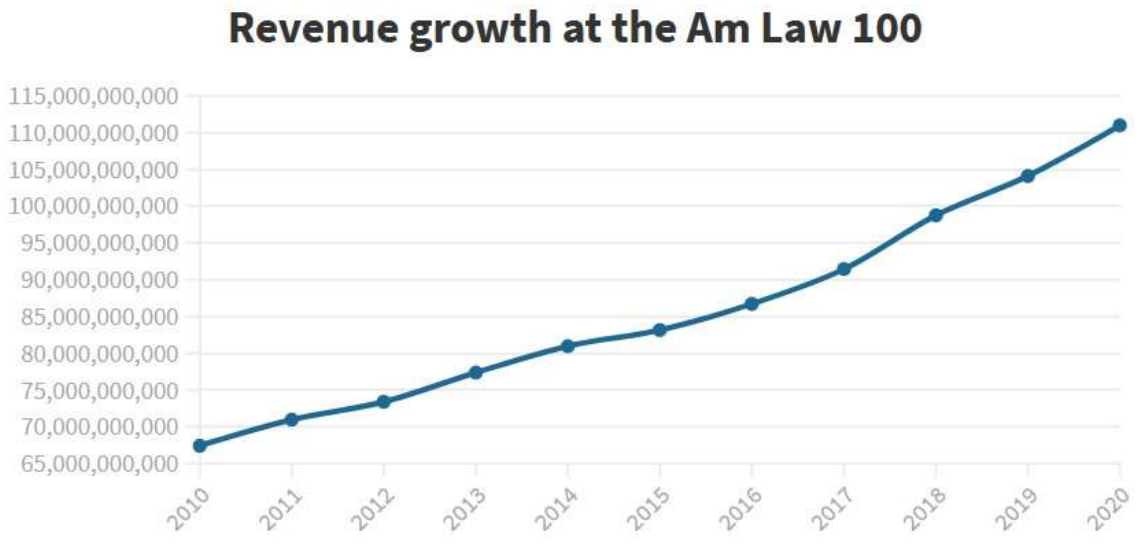
have made critical contributions empirically establishing the continued growth in legal complexity (and the attendant need for legal expertise to navigate it)—see here, here, here, here. Below is the growth in statutes and regulations, as well as the growth in references thereto in corporate 10-K's (the lawyer-influenced documents where corporations identify that which may have a material impact on their business).



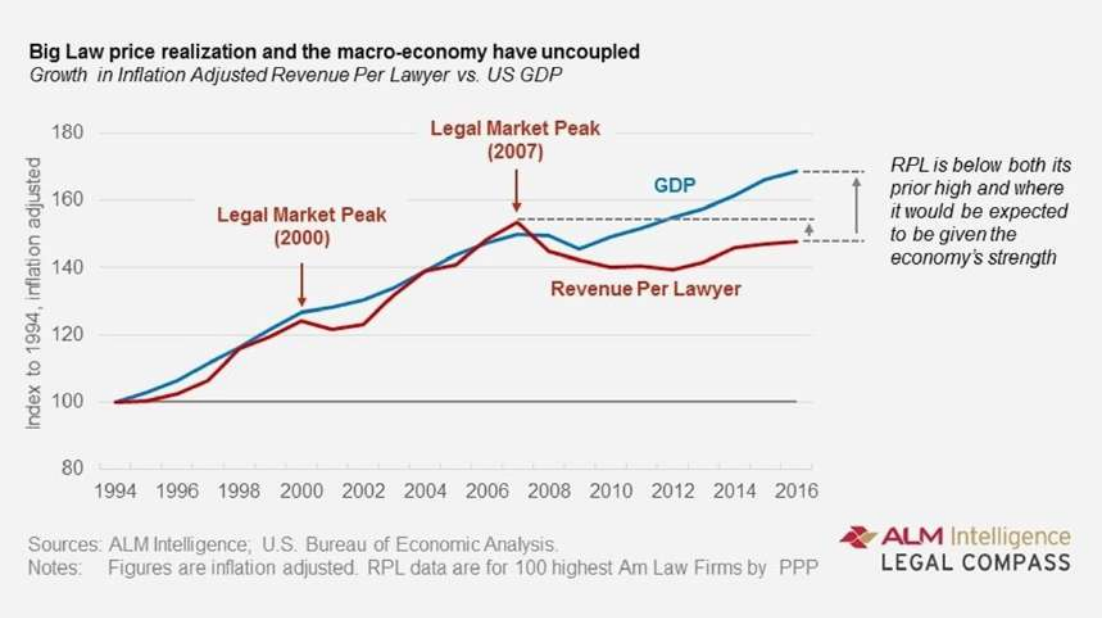


Law Firm $ □

Demand outstripping supply was a winning proposition for almost every large law firm for decades. Meeting clients' growing legal needs is propulsive force in BigLaw's origin story. We are accustomed to charts like the one below where the growth in dollars directed to large law firms mirrors those above showing the escalation in legal complexity.



These $ charts, however, omit critical context, like measuring growth relative to GDP, inflation, and headcount. More nuanced accounting paints a different picture.



	AmLaw 100	Second 100	AmLaw 200
Revenue			
2010	$67.4B	$17.5B	$84.9B
2019	$104.1B	$20.5B	$124.6B
(%) Change	54.4%	17.6%	46.8%
Annualized	**4.9%**	**1.8%**	4.4%
Adjusted for...			
Inflation [1]	31.7%	0.3%	25.2%
& Headcount [2]	5.8%	1.1%	6.3%
Annualized	**0.6%**	**0.1%**	0.7%

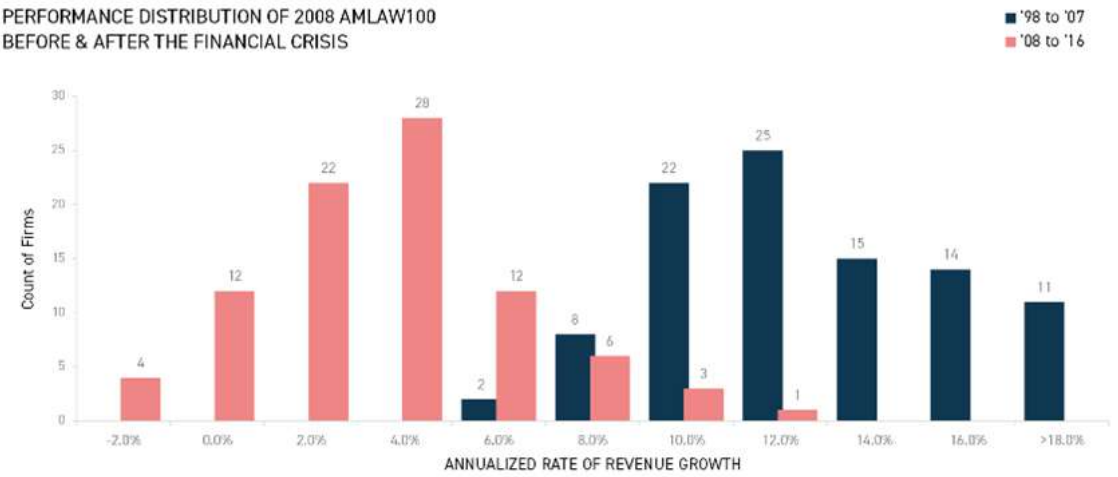
1. All historical dollar amounts indexed to 2019 dollars using CPI-U.

2. AmLaw 100 headcount increased 24.4% from 83.5k in 2010 to 103.9k in 2019. Second 100 headcount contracted -0.8% from 30.1k in 2010 to 29.9k in 2019.

Before the Great Recession, everyone was a perennial winner and the wins were big

@jaesunum

NOW THERE ARE WINNERS AND LOSERS



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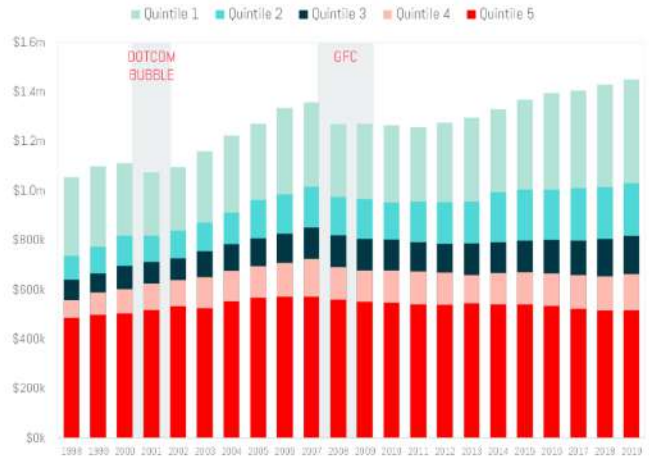
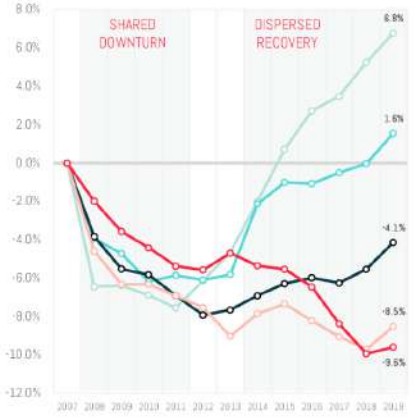
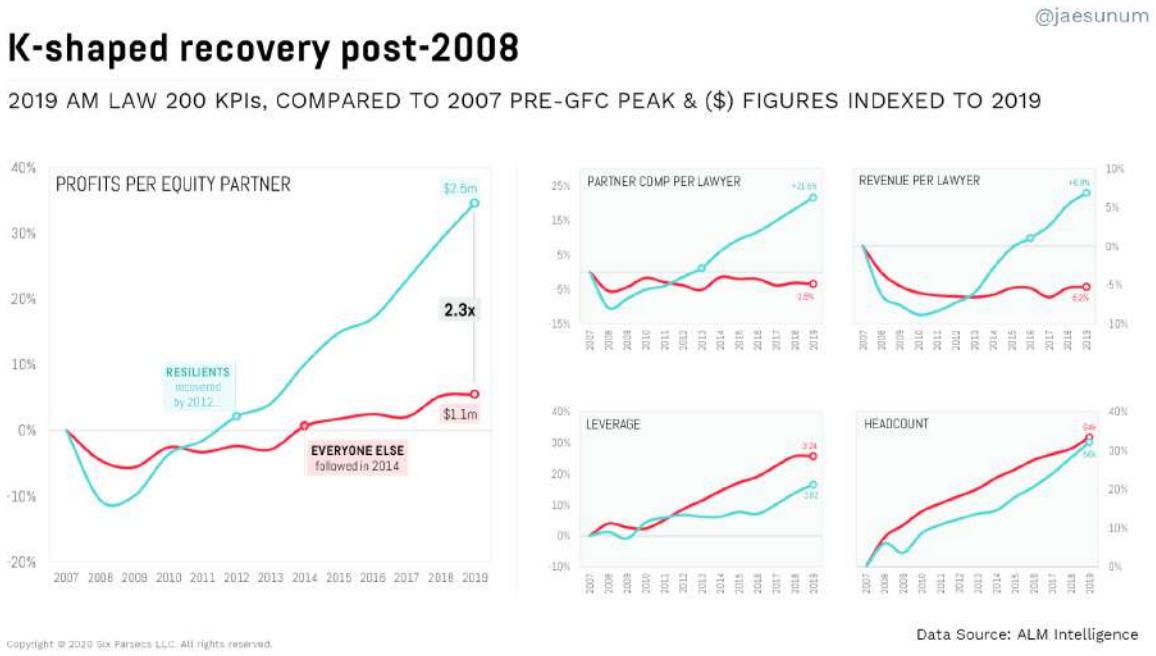
Post-GFC "recovery" was loooong (and unevenly spread)

AM LAW 200 / QUINTILES BY REVENUE PER LAWYER, 1998 – 2019 / INDEXED TO 2019 ($)





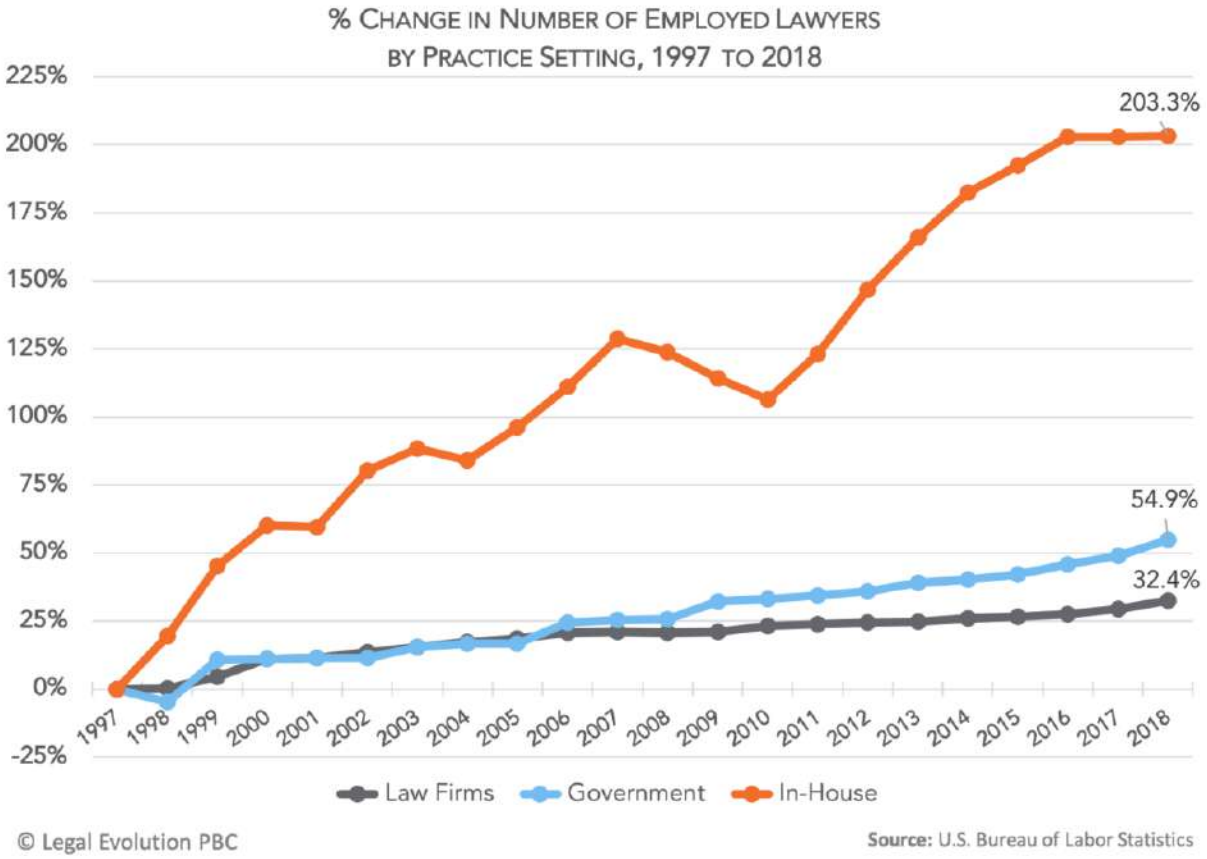
Data Source: ALM Intelligence



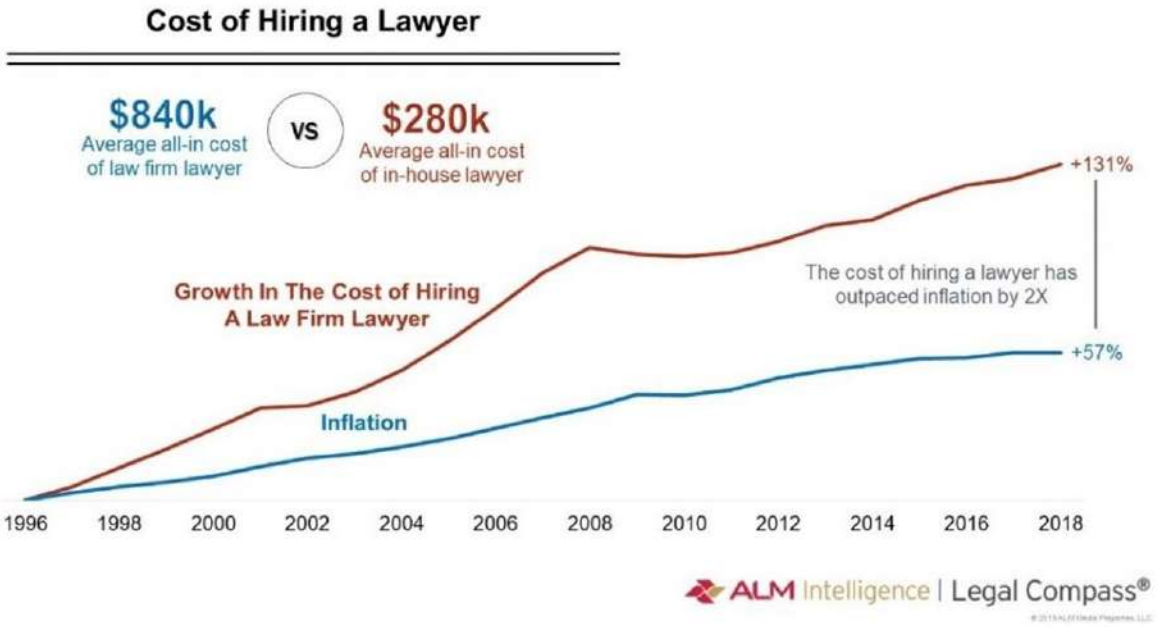
Despite prices and demand remaining on an upward trajectory in relative terms, and many positive headlines heralding banner fiscal performance in absolute terms, the pervasive sense among law firm partners that the market has tightened is also well founded (for most, not all). As an astute observer long ago explained, growth is dead.

ALSPs □ *How is demand being met? So where is the money going?* ALSPs are a key part of the story I've covered before (here, here) and will discuss again, just not today. Except to remind that ALSPs have a multiplier effect. Bruce MacEwen's working hypothesis, "**Simply put, for every $1.00 of revenue NewLaw gains, BigLaw loses $3.00.**" And if you were to ask Bruce about this, he would tell you his working hypothesis is conservative given the data he's subsequently interrogated. So the $15b ALSP market, adjusted for perspective, represents closer to $45b-$90b in diverted spend (*cf.*, the AmLaw 200's aggregate reported revenue for 2020 was $132b).

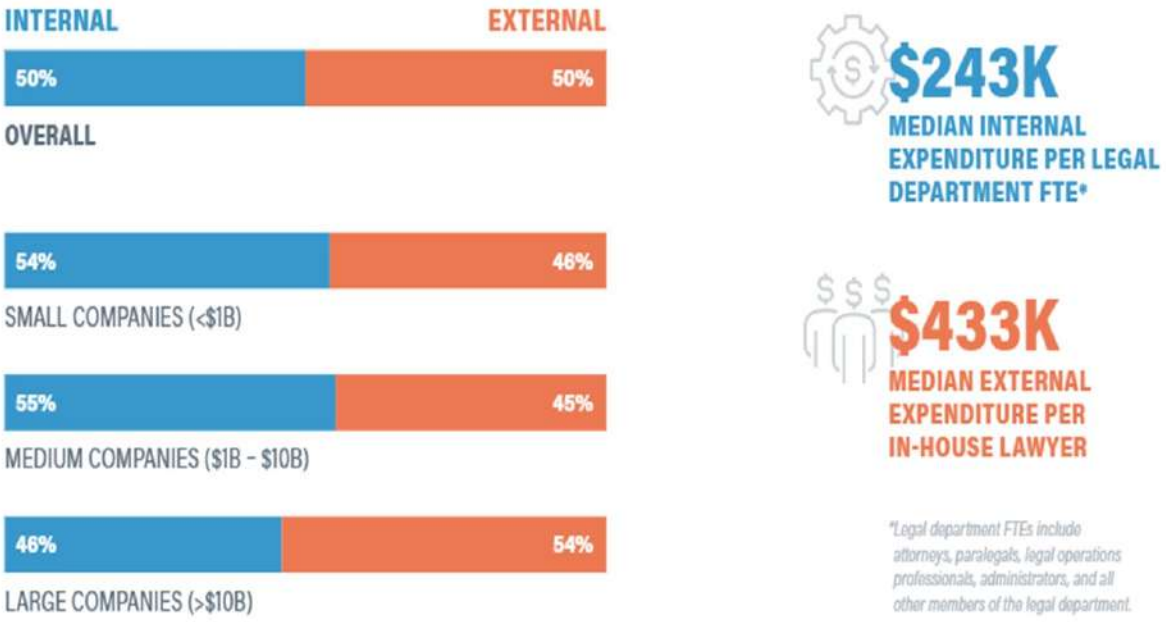
In-house □ but maybe □ The most game-changing realignment—in part, because it facilitated greater use of ALSPs—is the growth of in-house counsel. Since the middle of the 1990s, in-house legal departments have grown at 7.5x the rate of law firms. There are now more in-house lawyers in the United States than there are lawyers in the domestic offices of the AmLaw 200. In addition, corporations with one or more in-house counsel account for a majority of the purchase of all legal services in the United States. That is, **in-house counsel have, in many respects, become the primary suppliers of corporate legal services and primary buyers of *all* legal services**. (Note: the number of in-house lawyers has also tripled in the UK with anecdotal evidence of comparable growth around the globe – *if anyone has good, recent, global numbers, please do share*).



The growth of in-house counsel is multi-faceted. But a key driver is the perception (reality is more complicated) that in-house counsel are less expensive (lower salaries, no profit premium) and more effective (closer to the business, better aligned incentives).



But we've likely reached an inflection point—or, at least, a flattening out. According to CLOC's 2021 State of the Industry Report, the in-house share of legal spend is already at 50%, and the cost of hiring lawyers, including in-house lawyers, continues to rise (I expect Professor Henderson to address this with additional data in the near future).



Among my operating assumptions: there is only so much work that can be insourced—for a variety of reasons, including the need for niche specialties, geographic coverage, and accordion capacity; plus, there is only so much in-house headcount corporations will stomach.

Indeed, against this backdrop of increasing demand, increasing costs, and diminishing returns to insourcing, law departments are also expected to also **reduce their budgets in raw dollars**. Per 2021 EY Law Survey, "88% of General Counsel reported they are planning to reduce the overall cost of the legal function over the next three years — with pressure from the CEO and board ranked as the number one reason for doing so." On average, they expect to cut 14% (for smaller companies) to 18% (for larger companies) from their total spend.

Towards this end, according to Gartner, "by 2024, legal departments will ***replace* 20% of generalist lawyers with nonlawyer staff**. Increasingly, nonlawyers housed within the legal department provide technical and operational support. As these operational and technical roles increase, it will allow legal departments to **do more with scarce resources**. From 2018 to 2020, the percentage of legal departments with a legal operations manager (responsible for technical staff) grew from 34% of legal departments to 58%."

In short, law departments are searching for ways to boost productivity while keeping headcount in check.

The Productivity Imperative and Cost Myopia. We are predisposed to think, and speak, in terms of our "runaway costs." But the more accurate frame is our collective "productivity problem." Cost is a symptom of the disease explained above. The rise in relative cost is rooted in legal productivity lagging behind the broader economy. Cost increases are an outcome, not a driver.

Relative cost increases combined with raw increases in demand constitute a recipe for pain. Many exogenous factors affecting demand are beyond our immediate control. The only way to meet increased demand without a consequent increase in spend is through increased productivity (which, in

turn, reduces unit costs). This requires leveraging domain expertise through process and technology.

As Jason Barnwell, General Manager for Digital Transformation of Corporate, External, and Legal Affairs at Microsoft, cautions, "If capacity must increase by 10x, our current approaches break, as the option of a 10x increase in hiring is simply off the table." Controlling costs is important. But cost myopia is counterproductive. We can't cut our way to a 10x increase in capacity, because math. We must solve for scale.

Hence, why discount kabuki (including onerous billing guidelines) causes me angst. In the abstract, I can't muster the energy to care that haggling is now a game we always play (procuring legal services too closely resembles buying a car). But, without even addressing the persistence of the billable hour, I can't fathom how much energy is expended by both law departments and law firms on negotiating minute changes in the multiplier (rate) when the only sustainable path forward is collaboration on eliminating material chunks from the multiplicand (hours)—e.g., through reducing low-end friction.

The need for innovation is obvious. But is not necessarily simple, and, rarely, easy (obvious ≠ simple ≠ easy). Innovation is, therefore, often slow—like really, really, painfully slow. As in, 25 years after writing *The Future of Law* and 11 years after writing *The End of Lawyers?*, Richard Susskind is publicly proclaiming that taking the lawyers out of legal work is "harder than expected."

This acknowledged (I'm not predicting a productivity phase shift), as I discussed here, the pandemic demonstrates how surprisingly prepared we are for digital transformation when we have no other choice, and the infrastructure is already available. Our choices are narrowing. And the inventory of shovel-ready infrastructure projects (actionable process and tech improvements) has exploded—to the point where LexFusion serving as a trusted guide to this evolving ecosystem is a viable business model (that already has imitators).

The mistaken premise of change management is that we must change (all the) minds in order to change behavior. Causation usually runs the other

way. Changed behavior is often the best route to changed minds. Or, as James Clear writes, “The idea that ‘change is hard’ is one of the biggest myths about human behavior. The truth is, you change effortlessly and all the time. The primary job of the brain is to adjust your behavior based on the environment. Design a better environment. Change will happen naturally.” Fair enough. But there are always a few minds–i.e., leadership buy-in–that must be changed before the environment can be meaningfully re-designed.

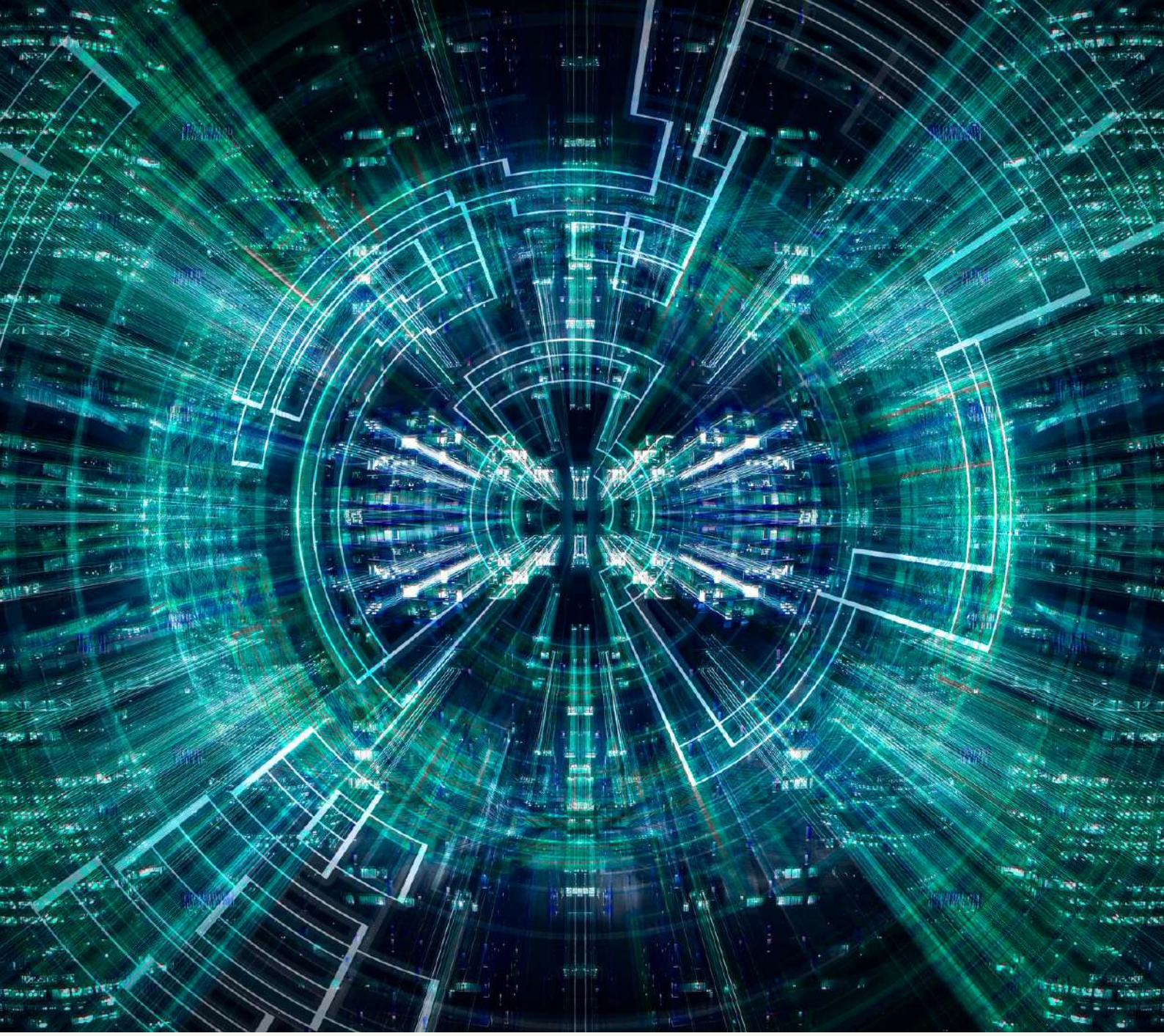
The Value of Value Storytelling. Capturing mindshare is part of what makes innovation so hard and so slow. According to the 2021 EY Law Survey, “General Counsel report that increased use of technology offers the greatest opportunity for cost savings. Yet, **law departments face challenges securing budget for technology and process improvement**…**C-suites have not been persuaded** to support critical investments in legal technology and process improvement.”

Yet there is no other sustainable path. Despite this persuasion deficit, in addition to adding all the operations professionals (an imperfect proxy for process–a discussion for another day), in-house counsel still expect to triple the wallet share allocated to technology. Per Gartner, “Legal technology spending has already increased 1.5 times from 2.6% of in-house budgets in 2017 to 3.9% in 2020. Gartner predicts legal technology spending will increase to approximately 12% of in-house budgets by 2025, a threefold increase from 2020 levels.” In-house is not alone in redirecting their dollars. Legal tech is maturing and outside investment has followed suit, to the point of frothiness:

Jae's conclusion seems undeniable, "I posit that the most valuable skill that every corporate law department needs in 2021 and beyond is the executive art of the business case."

Improving productivity requires investment. Even then, demand may still outpace productivity gains in the near, medium, or long term. The choices could be stark: spend more or accrue operational risk (to the enterprise).

Some law departments simply need more money. Not all of them will get it (as I will discuss next post).



Maybe, Don’t Be MacGyver – Value Storytelling (#1)

By Casey Flaherty

September 12, 2021

Maybe, Don't Be MacGyver – Value Storytelling (#1)

By D. Casey Flaherty on September 12, 2021

> I posit that the most valuable skill that every corporate law department needs in 2021 and beyond is the executive art of the business case….The reasons for this are many, but I'll give just one: This is a task that cannot be outsourced. Without the ability to secure the budget and investment required by the demands on the function, corporate clients will remain forever trapped in a never-ending cost-cutting exercise, to the detriment of everyone involved. Worse yet, sustained strain on the corporate legal function and its outside supply chain introduces net-new risk — legal, financial and compliance risks — not only for the enterprise but for the social system to which we all belong.
>
> Jae Um

I concluded my last post, on ever-increasing demand and our resulting productivity imperative, with the observation, "Some law departments simply need more money. Not all of them will get it." In what may be a mini-series of follow-up posts, I try expand some on the value of value storytelling with a bias towards the uncomfortable and controversial. As I have been recently helping some GCs with annual budgeting, my primary orientation here is in-house but many lessons are more generally applicable.

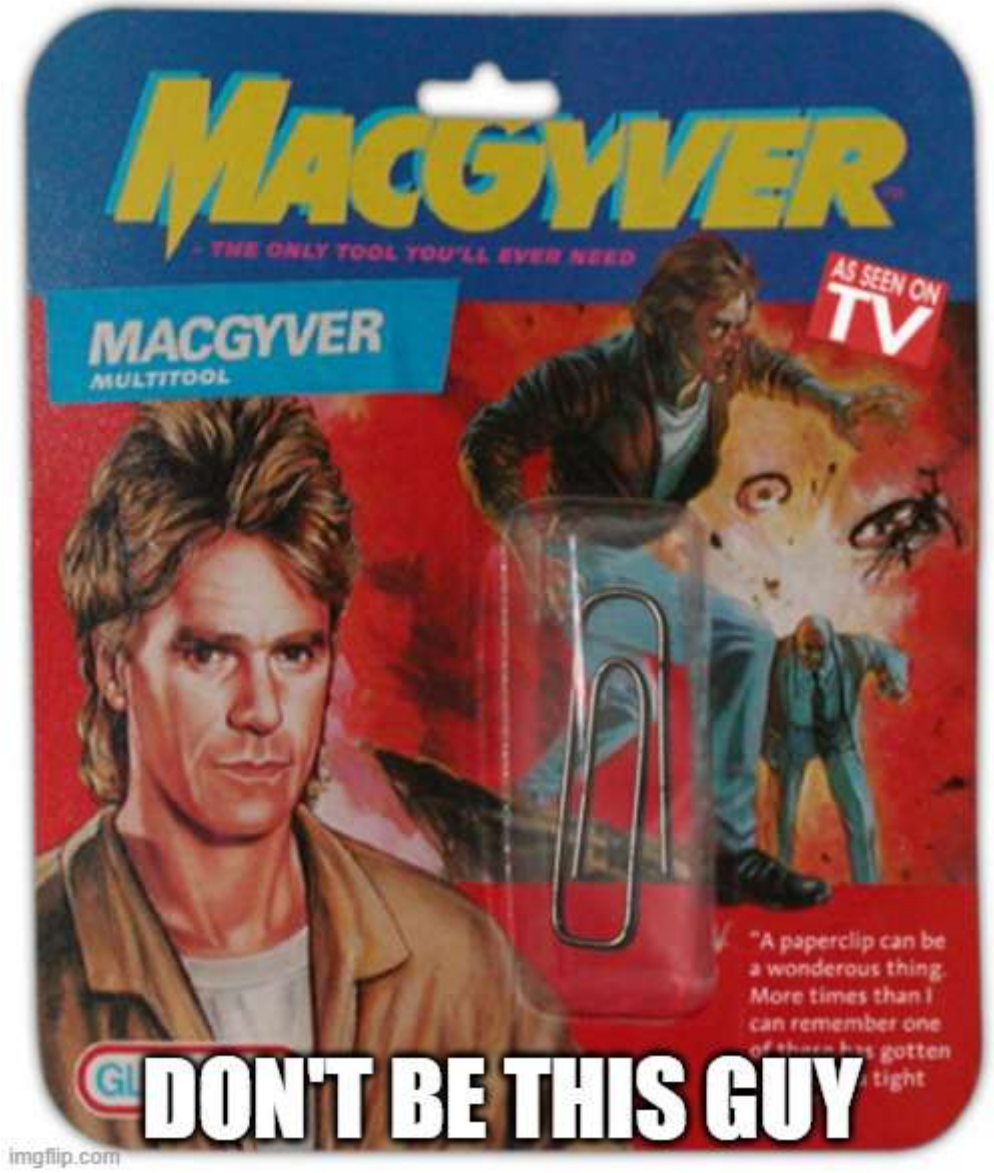
It depends (on context). As Jae says, the business case cannot be outsourced. While good questions tend to be universal, good answers are almost always context dependent. We are responsible for achieving mastery of our own context. Mastery entails being able to navigate our context successfully, a higher bar than issue spotting for outsiders as to why "*that* won't work here." Having an information advantage over outsiders is meaningless. Your audience, and your competition, are inside your organization.

This is supposed to be hard. The Australian women smashed the world record in the 4x200m freestyle relay during the 2021 Summer Olympics—and still only won bronze. Falling short is common when competing against the best in the world. In seeking to secure finite resources within a world-class organization, we likely face world-class competition.

Maybe, just maybe, don't be MacGyver. When we are under-resourced, the temptation is to fill in the gaps through extraordinary effort augmented by ingenuity. Yet any system predicated on extraordinary effort is unsustainable.

In one sense, it is laudable to meet several unfunded mandates with a paperclip, chewed bubble gum, and some duct tape, while working nights/weekends. Then again, if our organization is accreting operational risk by underfunding mission-critical work, it is our responsibility, as a conscientious steward of said organization, to make this manifest and pursue adequate resourcing. Superhuman gap filling can be counterproductive. We undermine our own case. Extraordinary yet unsustainable performance masks deficiencies and gives outsiders the illusion we have all we need—almost no one cares how busy we are perpetuating the illusion.

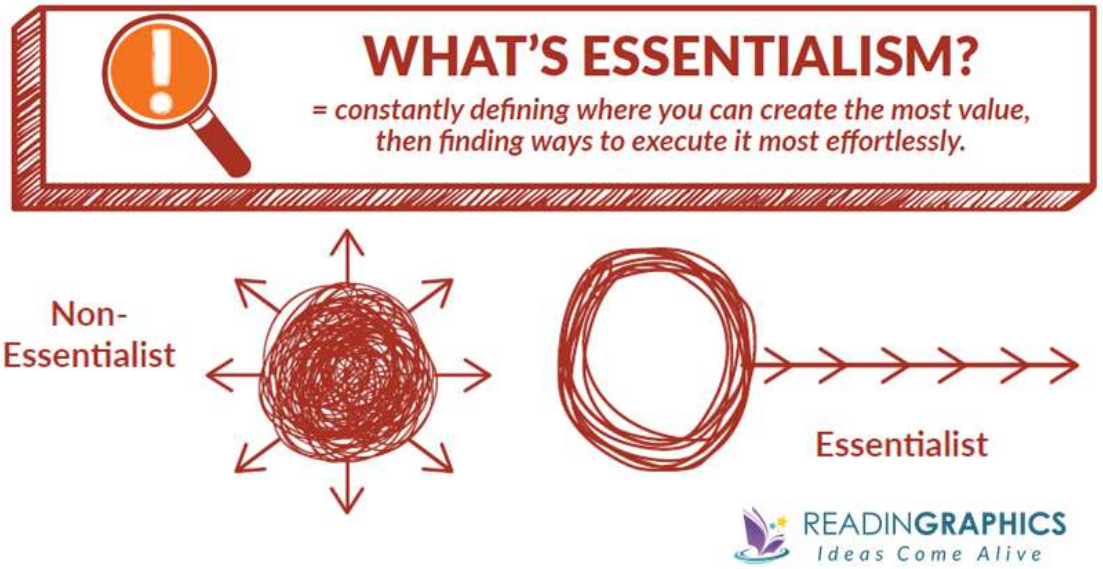
I recognize *not doing things* that, ideally, should get done demands uncomfortable choices and uncomfortable conversations. That's the job. Sometimes, it is incumbent upon us to be correct, consistent, and persistent (Andy Dufrensene) rather than heroic (MacGyver).



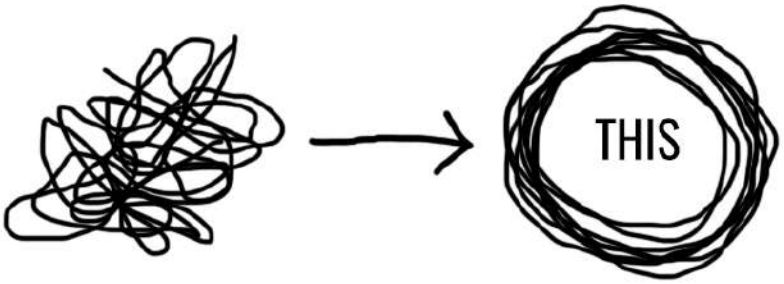
Be prepared to say "No" and "I told you so" often (and ever so politely). Not being MacGyver requires saying No more often, and more clearly. I am deeply familiar with the angst this triggers. Many legal professionals have rightly cultivated a service mentality and are committed to doing everything in their power to meet the multifaceted (and multiplying) needs of their organization. Saying No reeks of disappointment, if not outright dereliction of duty.

But, eventually, everything brittle breaks as stress accumulates. If resources are insufficient to do everything well, then some things will not be done well. Prioritization, by commission or omission, is inescapable. In many instances, the dominant strategy will be to concentrate scarce

resources, rather than spread resources thin. Standard essentialism, deliberately not majoring in the minors.



The Model



	Nonessentialist	Essentialist
Thinks	**ALL THINGS TO ALL PEOPLE** "I have to." "It's all important." "How can i fit it all in?"	**LESS BUT BETTER** "I choose to." "Only a few things really matter." "What are the trade-offs?"
Does	**THE UNDISCIPLINED PURSUIT OF MORE** Reacts to what's most pressing Says "yes" to people without really thinking Tries to force execution at the last moment	**THE DISCIPLINED PURSUIT OF LESS** Pauses to discern what really matters Says "no" to everything except the essential Removes obstacles to make execution easy
Gets	**LIVES A LIFE THAT DOES NOT SATISFY** Takes on too much, and work suffers Feels out of control Is unsure of whether the right things got done Feels overwhelmed and exhausted	**LISES A LIVE THAT REALLY MATTERS** Chooses carefully in order to do great work Feels in control Gets the right things done Experiences joy in the journey

Inevitably, some important stakeholder will issue a demand that falls into the “we don’t do that” or the “we do that but sporadically/slowly” category of our prioritization matrix. Because the stakeholder has juice, and we are committed to being of service, the path of least resistance will be to just say Yes, and then figure out how to—rob Peter to pay Paul—satisfy them somehow. But saying No is part of the job. As is spelling out Why.

Among the hardest truths to speak to power is explaining to the powerful that their power is insufficient in a given situation—to disclose not only that we are resource constrained, but to state plainly that their need, genuine though it may be, does not merit allocation of finite resources. Done indelicately, this will ruffle feathers. Done delicately, this will still ruffle feathers but can also foster alignment, recruiting allies and marshalling support for our efforts to secure resources—because we will deploy the incremental resources to satisfy these unmet needs.

As a master of our own context, we should know who our stakeholders are and take every opportunity not only to articulate what we are doing but also what we are notdoing, and why. Our successes should be known. But so should our limitations and the consequences thereof, both patent and latent. Importantly, being explicit on the regular about the implications of deliberate strategic choices is a distinct exercise from whinging. Still, while maintaining the appropriate tone/focus, being a broken record can be devastatingly effective in ensuring our message penetrates—and, ultimately, resonates.

When the inevitable kerfuffle transpires because something was not, or will not be, done, it should be completely explicable to our primary stakeholders because we have accomplished the necessary foregrounding. We shouldn’t have to, literally, scream “I told you so!” while executing the accompanying dance with aplomb.

Rather, we should have positioned ourselves to, ever so gently, remind our stakeholders of previous, prescient conversations, presentations, memoranda, budget requests, resource plans, roadmaps, strategic overviews…..that predicted this eventuality. The crisis of someone complaining about us not meeting their needs is an opportunity to reinforce our messaging and should add weight to, not detract from, our business case.

Sometimes, politics get messy, favors are traded, and orders come down that we *must* meet the presently deprioritized need. Fair enough. While it is incumbent upon us to have an informed opinion on proper prioritization, the enterprise owns final say. Disagree and commit. But also be explicit as to what will be deprioritized in the forced reprioritization. Don't pretend to have sufficient resources to do it all. Working harder/longer while putting on a happy front is appealing; we avoid discomfort in the immediate. But the problem with the easy way is eventually it becomes too damn hard.

More on this next post re the Siren's Song of "Savings"

The Savings Trap – Value Storytelling (#2)

By Casey Flaherty

September 19, 2021

The Savings Trap – Value Storytelling (#2)

By D. Casey Flaherty on September 19, 2021

Me: Which “genius” decided savings should be a prime objective and metric of success for law departments?

Jae: [*purses lips & tilts head*]

Me: But…

Jae: [*rolls eyes*]

Me: No…like…well, actually…but see…what had happened was…

Jae: [*sighs*]

Me: Fine. I’ll recant and repent. But, just so we’re clear, I am not happy about it.

Jae: [s*hrugs*]

Saving money is essential. But not as an end in itself. Centering savings in our value storytelling is seductive but, long-term, counterproductive. Our story should be one of delivering business value. Delivering business value is contingent on us having sufficient resources to meet the evolving needs of the business.

To the extent I have played any role in promoting the narrative that law departments should prioritize savings for savings sake—as in, "today over half of these departments are targeting savings of 20% or more" (2021 EY Law Survey)—I seek absolution, and wish to atone, for my sins.

I remain a harsh, vocal critic of waste in the delivery of legal services—without remorse. Yet, in what may be revisionist history, I protest: I have been misunderstood. I hold nuanced views. My focus is reducing the *unit cost* of legal services as one component of us collectively solving for scale.

My operating assumption remains that demand for legal expertise is on a steep upward trajectory in our law-thick world; to the point where, even if we can reverse the correlated trend in relative costs, many law departments will require more, not less, budget to address the legal dimensions of business problems. Indeed, this series commenced with my observation that "Some law departments simply need more money. Not all of them will get it." This was the conclusion to a post I wrote about ever-increasing demand for expert legal guidance, the rise in relative costs, the failure of corporate legal budgets to keep pace, the limits of insourcing, the resulting productivity imperative, and our need to improve at value storytelling.

I built on this observation last post contending that superhuman efforts to do too much with too little (excessive MacGyverism) sabotages our legitimate ask for allocation of incremental resources to the legal function. I maintain it is incumbent on us to do the uncomfortable, including saying "no" and "I told you so" the right way. Our natural state is a reflexive "yes" followed by extraordinary, unsustainable effort. Holding the line on strategic prioritization is an unsettling but necessary exercise, as is elevating our effectiveness at the "executive art of the business case."

Herein, I posit that savings, as an end in and of itself, should not be a strategic priority and, like excessive MacGyverism, undermines our business case.

This is supposed to be hard. This is the big leagues. Corporate dollars are fungible but finite. The opportunity costs of apportioning incremental funds to legal are considerable. I am intimately familiar with how challenging it can be to secure budget. I am also intensely familiar with how it becomes increasingly impossible to satisfy ever-expanding business needs with an ever-shrinking budget—we can only do so much extraordinary gap filling. It is essential we do the hard things well to avoid facing the impossible. When put in a no-win situation, we lose.

Our general value may be self-evident but our marginal value probably isn't. "We need more resources because we're busy" is only moderately useful as an argument for the allocation of marginal dollars. It is, however, quite common because it is inherently logical—if we accept the premise that legal support is necessary to the proper functioning of the enterprise.

"what we do is important" + "don't have enough resources to do it" ≠ more resources

We often face a high evidentiary burden when requesting incremental increases in resource allocation even where the foundational case for our existence is treated as axiomatic. We ratchet up the difficulty setting when we suggest we already have more resources than we need—or worse, have been wasting resources for years.

Corporations underinvest all the time, for many reasons. Organizational underinvestment is endemic. This includes underinvestment in legal, which is often a budgetary rounding error (in percentage terms, even where the raw dollars are massive). Sometimes, corporations underinvest because they must consciously make hard choices. Sometimes, corporations underinvest because they unintentionally make poor choices.

Good value storytelling will increase the likelihood of adequate investment in legal but is no guarantee. In crafting a compelling story, centering

savings can be enticing in the near term. But, long term, framing savings as end in itself can prove to be an unforced error as it perpetuates the attractive fiction that corporations can, and should, spend less on the legal function.

Saving money is easy in the short term. Just fire someone. *Who?* Doesn't really matter. A reduction in force will eliminate nominal costs from one area of your budget. *Too crude and close to home?* Fine. Demand ever deeper discounts from your law firms. Or hold a reverse rate auction. Or add another dozen items to the list of what you won't pay for in your outside counsel guidelines. Keep going back to the well; double down on whatever "worked" before (or has purportedly worked elsewhere).

The levers available to superficially cut costs in the near term are legion. Most of them are fine as far as they go—they just don't go very far.

We absolutely must make decisions about the size and shape of our law departments. We must regularly revisit and refresh our relationships with external providers. But we should do so with an eye towards long-term sustainability, not only short-term savings. The associated messaging should be about optimal reallocation of finite resources to better support strategic enterprise priorities—not a net, permanent reduction in resource requirements.

With an eye towards quick, tangible wins, too many law departments have seized on building their fiscal bona fides through aggressive, explicit efforts to save money. This is understandable. "Less-expensive alternative to outside counsel" is the origin story of many law departments. But after quick wins are quickly forgotten, a savings-centric value proposition positions us poorly for our next magic trick. One-time lifts do not lend themselves to repetition or, at the very least, are subject to diminishing returns. Worse, foregrounding savings creates, or cements, the expectation that the law department should be judged on our ability to spend less money. This expectation is at odds with our true purpose (meet the needs of the business) and long-term reality.

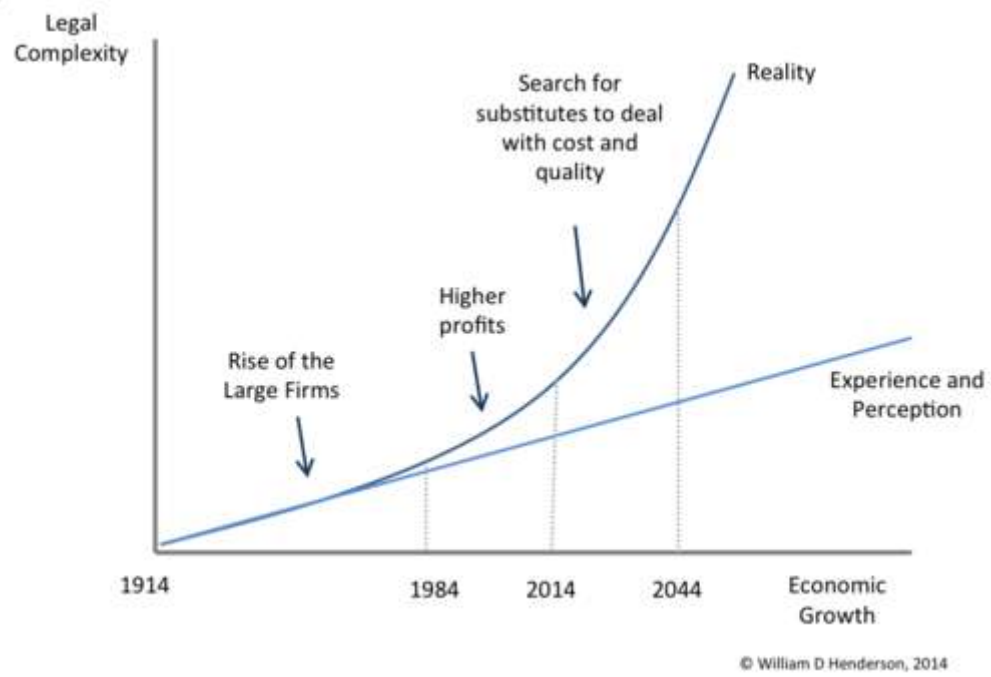
One hope is that by showing ourselves to be conscientious stewards of corporate resources with an established track record of fiscal prudence, we

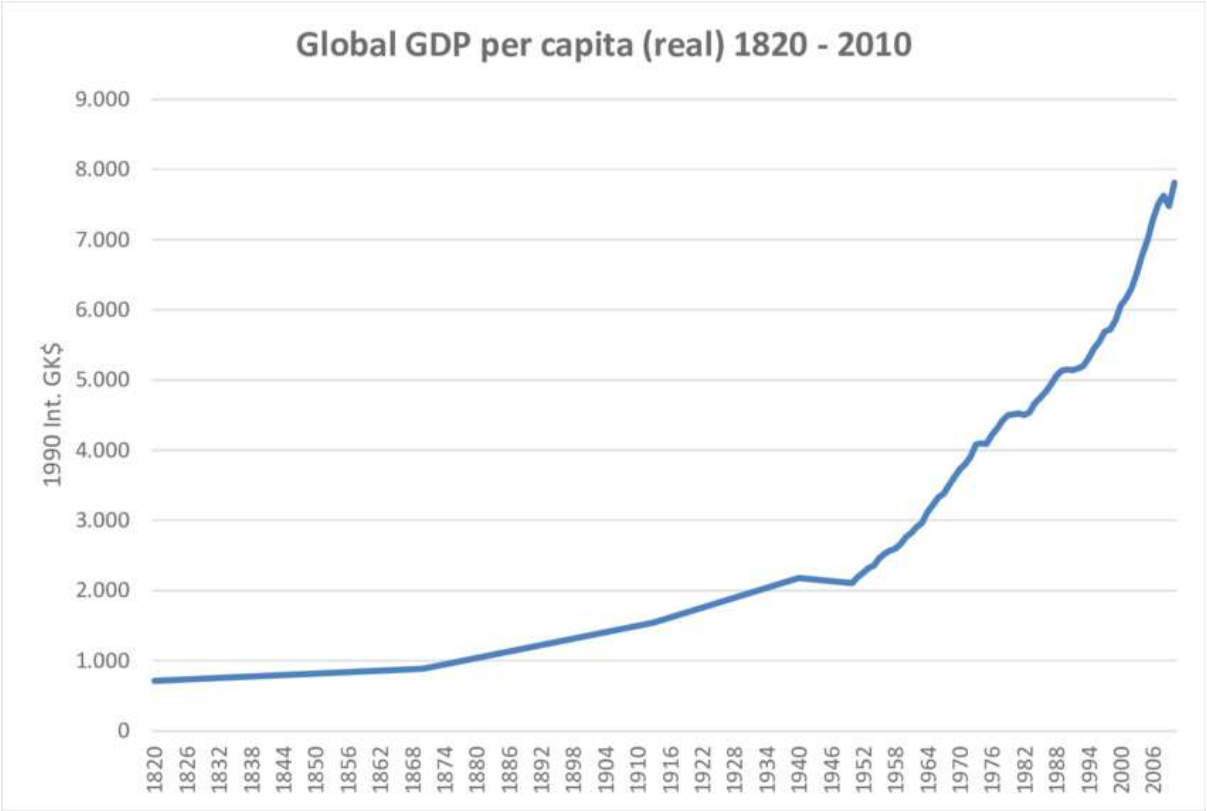
will garner credibility that serves us well in our quest for more resources. It rarely works this way. In some narrow contexts, savings are a path to glory. Most of the time, however, the sole reward for spending less of your budget is less budget going forward. Short-term cost savings only imprint to short-term memory.

Track record matters. But, most places, goodwill is earned through recognized value delivered to the business, not cutting legal costs (a fractional amount of a fractional amount). We are remembered best when we help make or save real money. The job is to enable the business. The symbiotic responsibility is to secure sufficient resources to do the job.

What about doing more with less? Sure. We must do more with less—*on a relative basis*. We face a productivity imperative grounded in ever-increasing demands with which our budgets will simply not keep pace. Our resource/demand gap can only grow so large, so fast, until something critical falls into the gulf.

Business activity is increasing. Government activity—legal complexity in the form of statutes, regulations, investigations, etc. compounded by cross-border complications–is increasing in response thereto. The related costs of doing business escalate with the amount of business being done. Specifically, legal is a cost of doing business on an explicable upward trajectory.


Legal Complexity
Reality
Search for substitutes to deal with cost and quality
Higher profits
Rise of the Large Firms
Experience and Perception
1914
1984
2014
2044
Economic Growth
© William D Henderson, 2014


Global GDP per capita (real) 1820 - 2010
1990 Int. G K$
9.000
8.000
7.000
6.000
5.000
4.000
3.000
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1820
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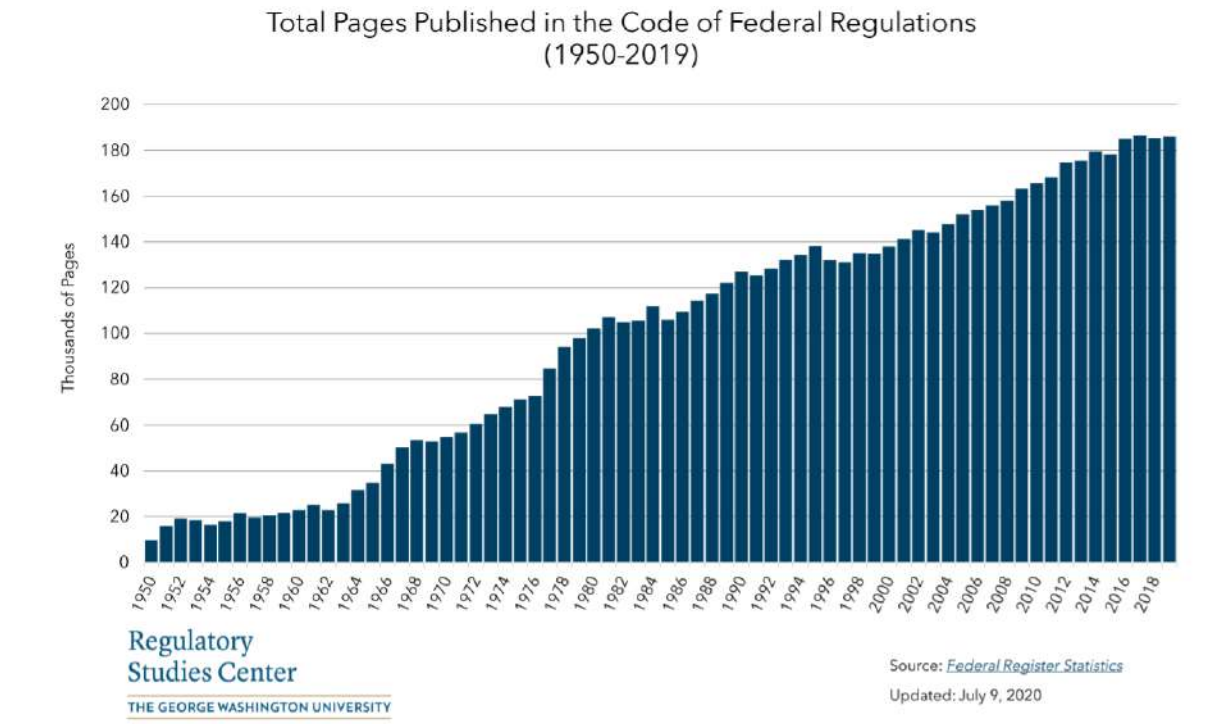
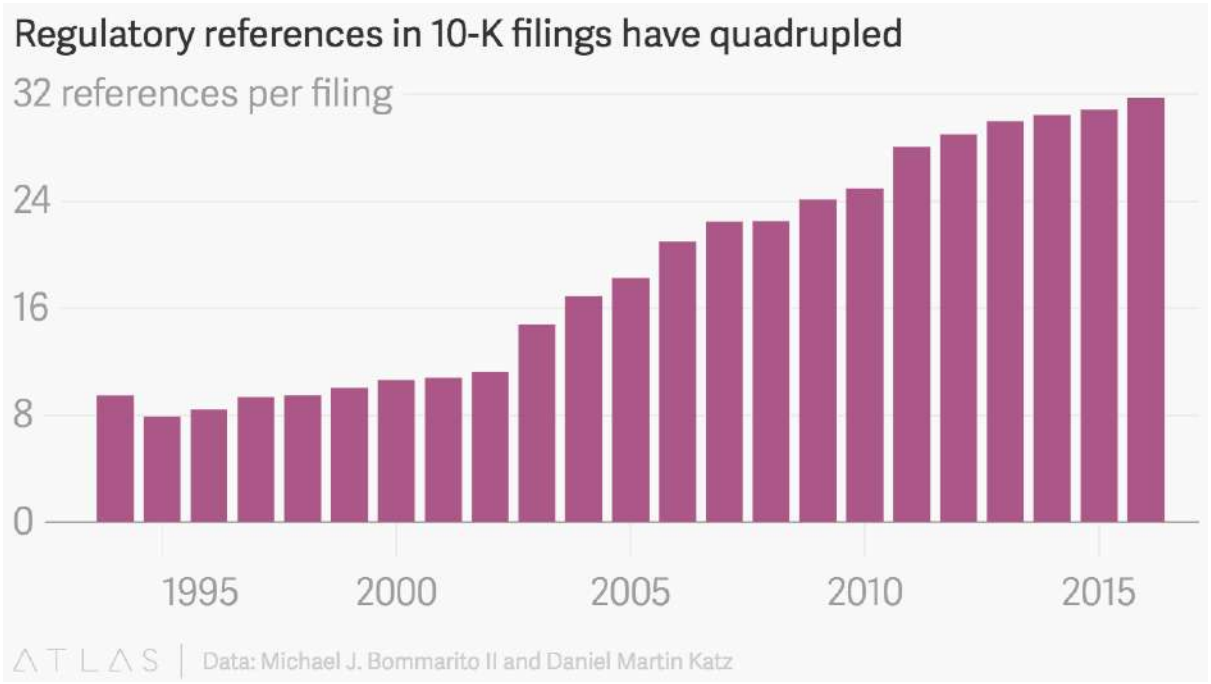




Given the uptick in total demand (more economic activity in a more densely regulated environment), there is no self-evident reason to expect total spend on legal will be reduced in the foreseeable future.

Process-driven, tech-enabled legal service delivery can reduce the *unit cost* of legal services while moving upstream to address business drivers of legal spend (e.g., #dolesslaw, prevention) can reduce the number of units

of legal services required per quantum of business activity. But I am still hard pressed to imagine a world where aggregate spend decreases even if we materially increase our yield per dollar expended. Costs in raw dollars will still likely trend up, even if we bring relative costs down dramatically. Pretending otherwise is a recipe for pain. Frankly, our expectation should not be *more with less,* regardless of how common that refrain has become. Rather, we will need to do ***more with more***. Embedding this expectation with our stakeholders requires us to be expert in arguing for more in an environment where that is the opposite of what anyone wants to hear.

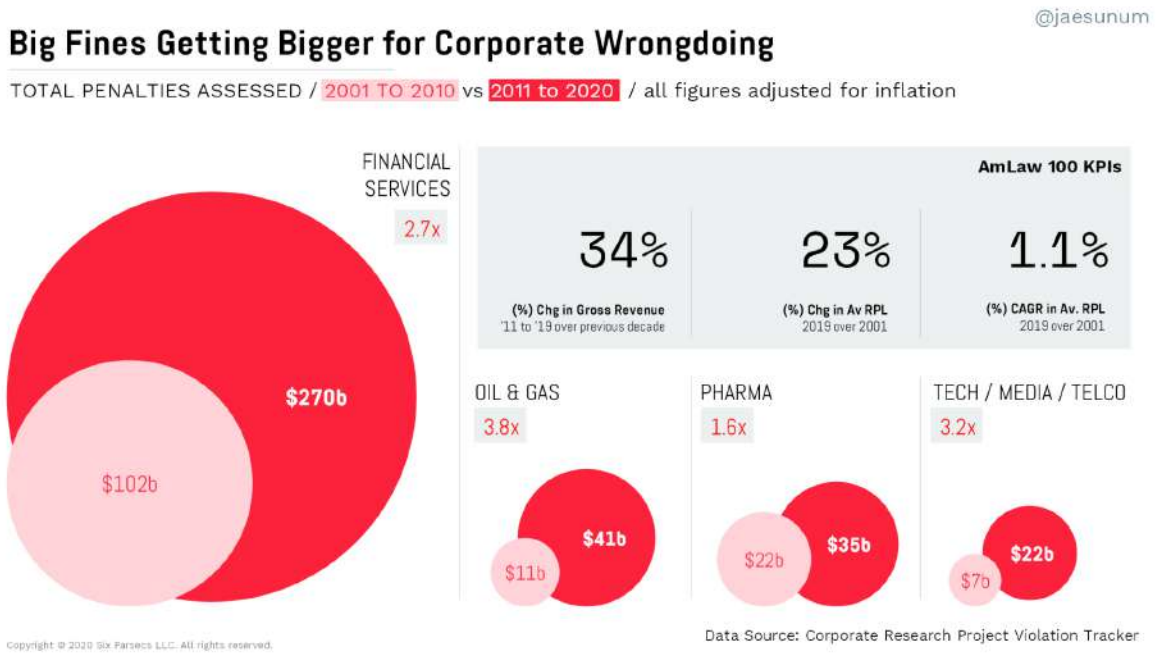
A word of caution even about relative spend. Measurement is a tricky beast. Goodhart's law, for example, tells us that once a measure becomes a target, it ceases to be a good measure. The answer is not to abandon data. Rather, we are best served by a balanced bundle of meaningful metrics and the attendant ability to weave them into coherent stories—raw data is not a story.

Legal Spend as % of Revenue, for example, is a solid benchmark and KPI. No argument here. In a stable environment, reducing spend as a percentage of company revenue can help tell the story of our ability to control unit costs relative to company activity while simultaneously reinforcing the proposition that the legal budget should remain on a smooth upward trajectory. Yet spend as a percentage of revenue can be wildly misleading in a volatile environment or during periods of punctuated equilibrium.

The fun version of budgetary chaos is a healthy, well-run, growth-oriented company going on a smart acquisition spree, injecting a large bolus of M&A activity that spikes legal spend. Great. We exist to support the enterprise in creating new business value. Totally understandable if previously unbudgeted expenditures on deal counsel, due diligence, and post-merger integration do some violence to our expected outlays.

Alternatively, our company could find itself in new regulatory environment or on the wrong end of a government investigation. Less awesome from the company perspective. But legal's role in value preservation is no less vital—and no less expensive. Per Jae, when we look at the prevalence and

severity of fines against large corporations, the upward pressure on legal budgets presents as an organic outcome.



We should not erect false idols ("reduction in legal spend is our objective") to which we can be sacrificed when events outside our control force us to violate self-imposed strictures. Instead, we need to properly manage expectations by meticulously crafting a convincing story of how corporate funds should be spent, and why. Exogenous events will shape our story, so we should be exceedingly careful not to paint ourselves into narrative corners.

So we shouldn't save money or talk about it if we do? We should continuously strive to maximize the value derived from every dollar spent. This will often involve creatively identifying ways to reduce costs in one area so we can reallocate money to other underfunded mandates. We absolutely should talk, proudly, about how we saved company money but should be careful not to speak as if saving money is itself an objective. Rather, the mission is to better support the company's strategic priorities. Our emphasis should be on the enhanced business value the savings enabled, not the savings themselves. Our framing therefore should be focused on more optimal allocation of scarce resources, not the reclamation of excess resources.

What about when the enterprise requires us to reduce spend? Then we reduce spend. The foregoing is not some pollyannaish take willfully blind to the realities of operating in a corporate environment. The reality is, even with exceptional value storytelling, most legal functions will remain chronically underfunded relative to the intensification of demand, and will also have to weather episodic cost-cutting mandates. I'm not saying it is easy. I'm saying don't make it harder than it already is by falling prey to the Siren Song of Savings and centering cost cutting in our narrative as some sort of intrinsic, independent good.

More about *more for more* in the next post in this series.

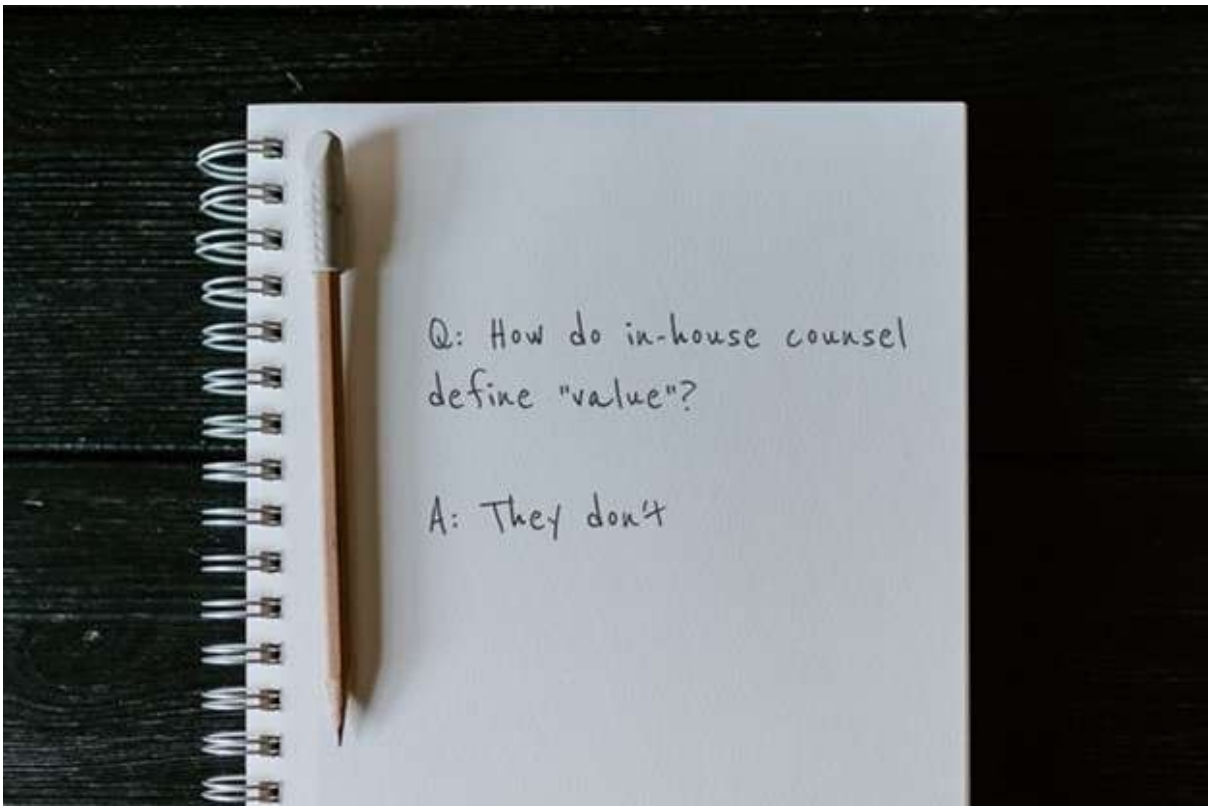
Defining Business Value – Value Storytelling (#3)

By Casey Flaherty

October 4, 2021

Defining Business Value – Value Storytelling (#3)

By D. Casey Flaherty on October 4, 2021



Business value is business-centric. Law departments frequently ask me about metrics. My response is not nearly as definitive as they desire. I recommend they start with the customer—incorporating the metrics the business is already using and then proceeding accordingly to develop the complementary, internal (to the law department) metrics necessary to manage the department in supporting business objectives.

Talk to most (not all) law departments, you find the inverse. Most law department metrics are law-department centric, full stop. Most track their spend, consistent with a savings-centric narrative, the pitfalls of which I discussed last post. *Spend with law firms. Spend v. budget*. *Internal v. external spend*. Necessary. Fine. Limited.

You can also find excellent content online on how a more sophisticated law department can, and should, measure itself. *Matter volume. Matter velocity. Cycle times.* Better. Rare. Still law-department-centric.

To ground the conversation, we require some metrics on metrics. The most common law department metric is Total Spend By Law Firm, in use at 90% of law departments. No other metric cracks 60%. Cycle Time, by contrast, is near the bottom, tracked by only 16% of law departments. Legal Spend To Revenue is in the middle of the distribution at 29% penetration.

Routinely reported on legal metrics	% of legal depts.
Total spend by law firm	90%
Total spend by practice group	59%
Total spend by matter type	58%
# of legal matters opened & closed	53%
Total spend by business unit	50%
Forecasted/budgeted spend vs. actual spend	49%
Savings from invoice review/reduction	40%
Spend to budget by law firm	34%
Avg. matter spend by law firm	31%
Savings/discounts from timekeeper rate negotiation	29%
Legal spend to revenue	29%
Savings from alternative fee arrangements	26%
Timekeeper rates - local market	25%
Savings by handling matters in-house	23%
Law firm diversity	21%
Savings from using legal technology	18%
Costs avoided - won case, settled quickly	16%
Cycle time - average period of time between opening and closing a matter	16%
Quality of legal outcomes	16%
Outside counsel evaluation results	11%
None of the above	3%

Critically, excepting diversity, these metrics are essentially meaningless from a business perspective. The CEO cares as little about how many matters the law department handles as they do about how many tickets the IT help desk closes, despite the fact both are essential to running the business. These are useful measures for managing workload within a specific function but irrelevant for managing the business—unless and until they are translated into actual business impact (i.e., value storytelling).

Undoubtedly, C-suites are money-conscious. But while law department budgets can appear massive in raw dollars, legal spend at a large company averages about **0.5%** of revenue. With internal and external expenditures split about evenly, the common ambition to cut 20% of law-firm spend represents 0.05% of revenue (yes, 0.0005) even if you assume it is pure, sustainable savings (rare). Fractional amounts of fractional amounts.

For comparison, according to the WorldCC, poor contract management costs companies **9.2%** of their bottom line. That's 184x more financially significant than the entirety of the legal budget and 1840x more consequential than a 20% reduction in spend on outside counsel. Marginally improving the legal-supported business process of contracting has a materially greater business impact than "saving" (i.e., eliminating) the legal budget many times over.

A proposal to insource work, move to managed services, or procure technology in order to save legal budget is ultimately legal-centric. A similar proposal expressly aimed at, and framed as, addressing value-eroding gaps in the contracting process is business-centric. The former may sometimes be successful. The latter may sometimes fail. But, over the long run, seeking to address business needs, in the business's own language, is more likely to win friends and influence people—i.e., secure the resources required for the legal function to help create, and preserve, business value.

Know your customer. I have a vivid recall of one of my many personal failures to influence people. I crashed and burned in an attempt at ingratiating myself with in-house lawyers during a consulting engagement.

In my presentation, I made repeated references to the company's key performance indicators. The KPIs, and I, elicited blank stares. Some (ill-advised) prodding revealed that not only did these in-house lawyers not know the company's KPIs, they were also blissfully unaware the company had KPIs. Me sharing that I had found the KPIs at the front of the company's annual report, immediately following the chairperson's introductory letter, won me no friends.

I failed to tailor my message to my audience. I made erroneous assumptions about my audience's knowledge, perspective, and interests. My message did not land. It matters not that, in my subjective opinion, the in-house lawyers should have been familiar with, and fully invested in, the primary metrics by which their company measured itself. It does not matter if you want to go so far as to argue that my subjective opinion comports with objective reality—in-house lawyers should be consciously aligned with their company KPIs.

The purpose of the meeting was not to convince these in-house lawyers of the importance of their company's KPIs. The purpose of the meeting was to

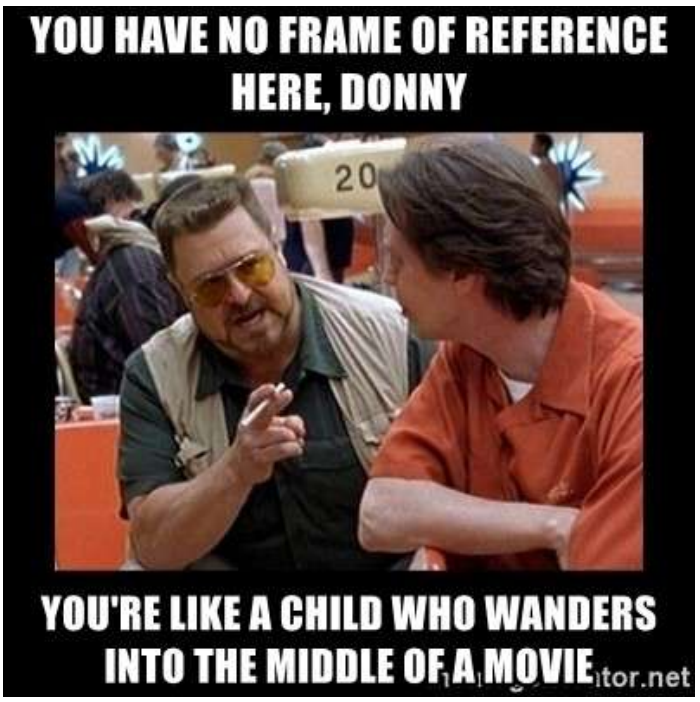
secure buy-in for operational improvements that required their input, support, and (most elusively) patience. The nexus between the outcomes of the proposed changes and the company's KPIs was intended to make the case for change more saleable. It did no such thing. Embarrassing your audience, even unintentionally, is a bad plan. Ego defense mechanisms were triggered; professional issue spotting was turned up to 11.

That private room was not the forum for me to argue in-house lawyers should be invested in their company's public priorities. But I am more than happy to do so here.

We must be masters of our own context. Often, I feel like I am campaigning to be elected Mayor of Obvioustown. But too many exchanges like the above compel me to state plainly: how our organization makes money is critical context.

This is beyond, "we're a [*blank*] company." We should have some level of understanding of revenue streams, pricing, profit margins, performance indicators, supply chains, the competitive landscape, differentiators, our business model, our constraints, our strategy,…and the vocabulary/framing that resonates with company insiders.

I stand by my position that every organization, no matter how venerable, looks like a goat rodeo from the inside. Poor strategic discipline from imperfect humans laboring inside imperfect systems leads every employee to wonder "What the frak?" on the regular. Yet cultural fluency and situational awareness often enable us to make sense of what would appear inexplicable with no frame of reference.



As an in-house lawyer, the WTF moments often come like Jeopardy!: *in the form of a question*. Businesspeople will ask questions that, taken at face value, are pure nonsense. Often, however, the intent of the question can be intuited by understanding who is asking and why.

Early in my career, I was regularly quizzed with variations on, “Can we do X?” and answered accurately with different flavors of, “LOL. Naw. X is straight-up illegal” (bc heavily regulated environment).

It took some seasoning for me to situate these inquiries in an organizational context and recognize that “can we do X?” was garbled shorthand for “we have a nascent idea for a particular program we believe may benefit the company and are trying to determine if it is worth pursuing before we put in too much effort given how frequently we are told no.” At that more mature stage, I was better positioned to turn a narrow conversation about X itself (still totally illegal) into a broader discussion of objectives (rather than specific mechanics) and then work collaboratively to design an objective-satisfying program that passed legal muster (i.e., not resembling X).

This transformation was part of shifting from a law-school mindset of issue-spotting excellence to a business mindset of organizational

enablement—evolving from the *Department of No* to the *Department of How (except when No is the only right answer)*.

Again, painfully obvious, bordering on banal. Yet far less common an evolution than I would have thought—with major implications for effective value storytelling.

We should understand our stakeholders' context. The anecdote above about in-house counsel unfamiliar with their company's KPIs was not an excuse to dunk on people from my past. I meant exactly what I said. I failed. I blundered at crafting a message that would land with the intended audience. Importantly, the project itself was still a success because they were only one audience of many.

Corporations are not monoliths. Corporations are composites of different constituencies with their own perspectives, incentives, and politics. These constituencies comprise individuals with personal viewpoints, motivations, and idiosyncrasies. The sales department is unlikely to view the world the same way as the marketing department. And the director of sales is unlikely to always agree with the vice-president of sales.

Task conflict, as opposed to personal conflict, is natural and healthy, in the right environment. Handled professionally, disagreement is foundational to productive battles that refine ideas and lead to superior decisions/outcomes.

For our purposes, however, the heterogeneity of viewpoints means we should not presume our story, no matter how well-tailored to the broader context of the organization, will resonate with each constituency or individual stakeholder without being calibrated to **the stories they tell themselves**. We should endeavor to learn these stories, and determine which ones are actually important (identifying the signal in the noise is part of mastering context).

Specifically, different stakeholders will have different ideas about how the enterprise currently makes money, how it will/can/should make more money in the future, and their role in the enterprise's success. They will have their own audiences, accountabilities, objectives, key results, and

performance indicators—which they will interpret through their own distinct lens.

The business defines value (most of the time). Up top, I quipped that in-house counsel do not define “value.”

In one sense, adjacent to the current discussion, the reluctance to define value with sufficient specificity is a constant source of tension in the inside/outside counsel relationship. Both sides throw “value” around liberally but—like “innovation”—do not articulate, in practical terms, the meaning of the word.

I've covered in-house counsel's inadequate efforts to define "value" for outside counsel before—*see* the lawyer theory of value and in-house counsel don't value diversity (even if they care about it). I have no doubt I will again. But enough of the digression.

While in-house counsel may struggle to communicate what constitutes value externally, the key takeaway here is that, internally, defining value is primarily an exercise in understanding. Oversimplified, in-house counsel do not define value, the business defines value. It is incumbent on in-house counsel to understand how the business defines value and then align themselves to help create, or preserve, that value.

The precise definitions of business value will vary, contingent on context—different stakeholders working at different levels of abstraction. *Context-dependent, notunknowable*.

Just ask. Most business stakeholders are keenly aware of their own context and eager to talk about the topics with which they are most intimately familiar: themselves, their team, their needs, their ideas, their constraints, their objectives, their burning platforms…

More tangibly, most departments have their own key metrics. They focus on their own versions of Total Spend By Law Firm and Cycle Time—i.e., the semi-meaningful, self-centric metrics to which they default and the broader, more business-centric metrics that increase in salience as they grow in sophistication.

While business stakeholders may struggle to articulate exactly what they need from the law department (just as in-house counsel struggle to articulate what they need from outside counsel), they are usually more than capable of explaining what they themselves are accountable for—i.e., what they need to accomplish to propel the business forward and satisfy their own stakeholders. Savvy in-house departments translate business requirements (what drives business value) into law department requirements (how the law department can help satisfy business requirements to drive business value).

The beautiful part is that much of the math is frequently done, vetted, and accepted.

The in-house department that starts tracking cycle times likely already has broader business metrics into which cycle times can be integrated. Take *Speed to Revenue* as a digestible example. The law department does not need to invent, justify, or socialize Speed to Revenue. Instead, we need to deconstruct it to a deep enough degree that we can demonstrate how improved legal cycle times improve Speed to Revenue. But if we can accomplish that, the business-impact arithmetic is already settled.

Indeed, when you unpack the 9.2% value erosion figure from the WorldCC, there are many opportunities for law departments to make a demonstrable business impact.

Start at the beginning. Speed To Revenue is, admittedly, cherry-picked. The professional issue spotters reading this piece reflexively identified all manner of standard legal work that does not fold so neatly into a common, prepackaged corporate metric.

But when only 16% of law departments track surface-level Cycle Time, how many have done the deep work to demonstrate the effect of contract-type-specific legal cycle times on Speed to Revenue and the attendant business impact?

Can we start by doing the (relatively) easy but impactful stuff well?

Yes, it gets harder. Recall, I warned “the business defines business value” precept was “oversimplified.”

In particular, it becomes appreciably harder when the law department is responsible for helping define business value in areas—contractual protections, litigation, compliance, privacy, IP, ESG—where value preservation is prominent and lawyers (and other similarly situated professionals) must serve as domain experts.

Even the relatively straightforward value-creating contracting examples are not as simple as parroting the 9.2% value-erosion statistic and then asking for more resources to make it go away. That’s an attention grabber, not a business case. More of this next post on the hard, necessary work of work sorting.

Start with Why – Value Storytelling (#4)

By Casey Flaherty

November 14, 2021

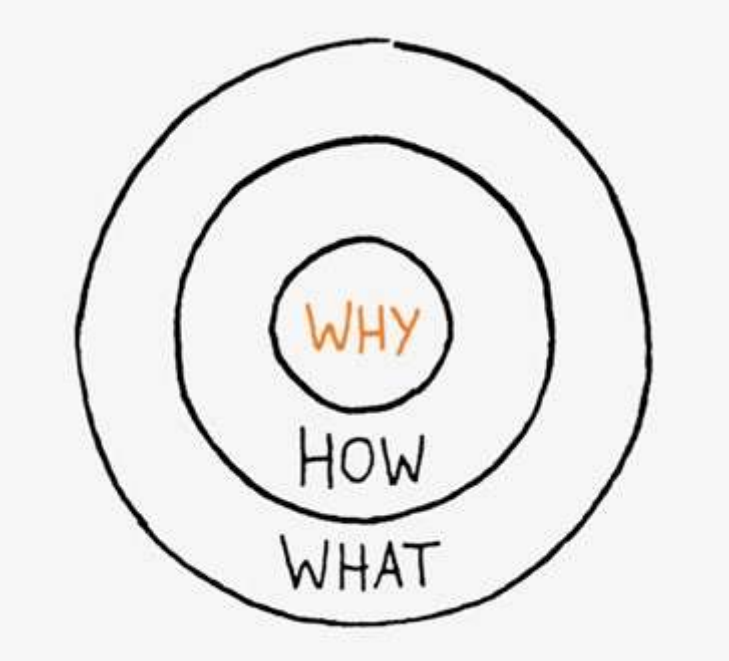
Start with Why – Value Storytelling (#4)

By D. Casey Flaherty on November 14, 2021

Start with Why. Value storytelling is essential (series summarized here). But, as storytellers, we're not experimenting with the form. We should tell simple, compelling stories with no mystery as to the What, How, and Why.

What is outputs. *How* is inputs/process. *Why* is purpose, outcomes, and value.

What, How, and Why all matter. But, for our business audience, legal's What and How are inherently uninteresting. Always start with their Why.



Why is the subject of the previous post. Business value is the one true Why. The call to action. The hook. The propulsive force. But the framing of Why is context dependent. The way we talk about business value will often need to be calibrated to our subject matter and our target audience—identifying our target audience and understanding what messaging resonates with them is quintessential to mastering our own context.

The stories we tell must cohere with the stories our audience tells themselves about their own starring role in the business's journey. We must present ourselves as allies in the same cause. Which we are. This sense of shared purpose is most crucial when we are engaged in productive disagreement and accountable for persuading our allies of unpalatable truths—whether seeking to rejigger their perspective on value preservation (e.g., refining their legal-risk/business-reward calculus) or recommending that finite resources be allocated to the legal function despite the very real opportunity costs.

I recognize this all sounds quite theoretical, ethereal, and squishy because it is ultimately about soft skills. First, soft skills are wildly underrated. Second, fair enough.

(h/t Alex Suv)

Real fake examples

Common: Head of Sales complains to GC that legal review is the bottleneck for revenue contracts. GC responds that the legal team is drowning and needs more headcount.

Uncommon: The GC approaches the Head of Sales and broaches the backlog of revenue contracts. The GC offers kudos, observing that the Head of Sales' new strategy has caused a spike in contract volume—a wonderful "problem" to have. Last year, volume was 40 contracts per week. Now, volume is 65 contracts per week. On average, the law department turns 1.7 contracts per FTE per day, and there are 5 dedicated FTEs supporting revenue contracts (or 42.5 contracts/week). Last year, the team was right sized, but, today, the backlog only continues to grow (22.5 contracts per week above capacity). The GC asks the Head of Sales to support legal's request for 3 additional headcount so resource levels are commensurate with the required service levels (i.e., capacity increases to 68 contracts per week).

The Why: accelerate speed to revenue

The How: by having sufficient FTEs to

The What: move revenue contracts through legal review in a reasonable timeframe

To be clear, I do not love this. I am allergic to throwing bodies at the problem (we can see how they are likely to be having the exact same conversation again very soon). Yet stockpiling bodies is what we do. From astronomical bonuses from law firms desperately looking for laterals to the continued upward trajectory of in-house departments, more hours from more lawyers is the lens through which we frequently view the delivery of value. The above is far from perfect but disappointingly close to accurate (and, at least, more productive than centering "savings" in our value narrative).

Indeed, the second scenario is only slightly more sophisticated than the first—and yet materially different. From a metrics perspective, the law department only needs to know its headcount allocation and contract

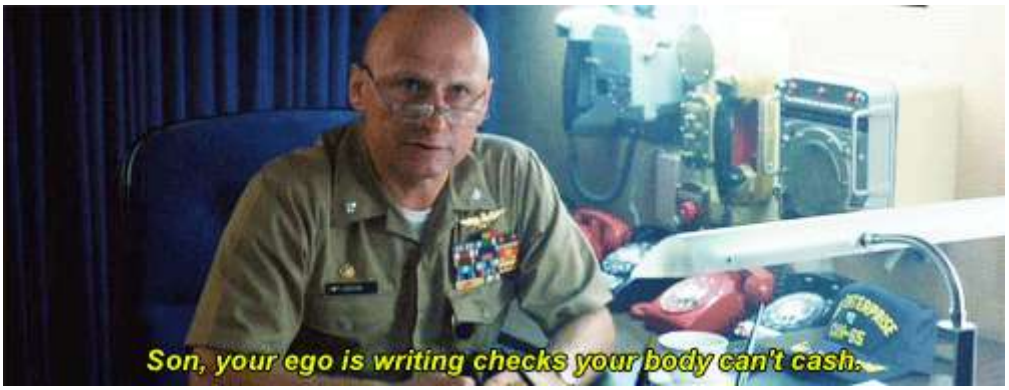
volume. From a storytelling perspective, we only need to situate these in the most basic business context. Relatively simple and yet surprisingly uncommon.

A more complex, real fake example. Same hypothetical. Head of sales complains legal review is too slow and a bottleneck for revenue contracts. Many (not all) law departments react with variants of the following:

- Anecdotes about how the legal professionals who review contracts are doing their best but are overburdened (probably true)
- Anecdotes about how the sales professionals engage in behaviors—unauthorized concessions to counterparties, last-second requests—that exacerbate legal's resource constraints (probably true)
- Vague suggestions that various technologies could improve contract velocity (probably true)
- Vague commitments to pull some people off other items, try to work harder/faster, or innovate—cobble together process/tech improvements (probably true aspirations)

Nothing factually wrong. But not a compelling story.

The preceding list ignores Why completely. Instead, it jumps directly to How—and then lacks the requisite specificity. It also makes promises to do more with the same level of already overburdened and exhausted resources. Service levels are inextricably tied to resource levels.



There is a better path. But it is a rough slog.

- Acknowledge the centrality of Speed to Revenue to the business generally and the sales function specifically with a deliberate emphasis on how sales professionals are mission-critical to the success of the business, as well as how committed the law department is to enabling that success.
    - Identify a legitimate Why that rings true with the specific audience
    - Communicate real understanding of, and support for, the business objective
    - Lay a foundation of shared purpose
- Start with the business drivers of revenue-contract volume, velocity, and variety, including any lumpiness thereof (e.g., acute peak-load problems at the end of months, quarters, or fiscal years).
- Present law department cycle times specific to revenue contracts along with the estimated impact of improved legal cycle times on Speed to Revenue.
- Detail the steps in the current workflow and, where necessary, explain the reason for legal's involvement in specific steps (i.e., where and how legal adds value).
- Call out the primary constraints and other rate-limiting factors in the current workflow, including those originating outside the legal function.
- Offer a target operating model that optimizes the workflow through a mix of improvements/additions in personnel, process, and tech. If possible, move upstream, painting a picture that extends well beyond legal—a business-level, systems-oriented view in which legal is a key contributor.
- Breakdown the target operating model (which is a program) into constituent projects with expected impact, costs (money, attention, implementation dips), timing, and ROI.
- Delineate projects legal can accomplish on its own (with proper resourcing) from projects that will require considerable cross-functional collaboration.
- Express a view on the optimal sequencing of projects, including potential pilots, starting with the primary constraint(s).

- Request support from the head of sales in winning key stakeholder support, obtaining resources, driving cross-functional collaboration, and spreading the gospel of patience.
- Where possible, explain how particular improvements will make life better for sales professionals in addition to the positive business impact of increased Speed to Revenue.
    - Tie How directly to Why
    - Translate real understanding of, and support for, the business objective into tangible options for improving business outcomes
    - Build on the foundation of shared purpose to recruit an ally in the internal competition for finite resources as part of broader effort to foster cross-functional collaboration
    - Establish mutual commitments contingent on obtaining sufficient resources and collaboration

At this point, I suspect my own audience breaks down into three camps:

1. Legal innovation enthusiasts who never had much opportunity to get an inside view of law departments. You are thinking my candidacy for Mayor of Obvioustown is looking strong. This all seems so self-evident.
2. The tiny subset of experienced, successful outliers. You find my lack of sophistication amusing (like when a dog wears pants).
3. The remainder of the in-house community. You are either (i) wondering why I woke up and chose violence, or (ii) daydreaming of a timeline in the multiverse where such superhuman exploits are conceivable. But mainly you are bewildered as to how anyone could be so naïve as think you have time for all that.

Almost No One. Recall my rhetorical question from the conclusion to last post, "But when only 16% of law departments track surface-level Cycle Time, how many have done the deep work to demonstrate the effect of contract-type-specific legal cycle times on Speed to Revenue and the attendant business impact?"

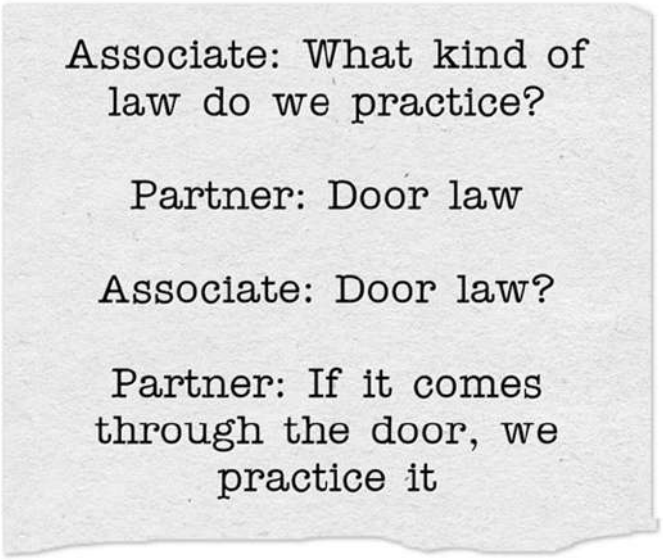
Our ceiling is 16%. Only 16% of law departments track some form of cycle time. What share of that 16% also:

- Are conversant with the business?
    - How the business currently makes money and plans to in the future (model/strategy)
    - The business value of specific legal workstreams
    - The business drivers of specific legal workloads
    - The attendant business metrics, and the impact of law department metrics thereon
- Have mapped and measured their processes to the degree they can project the impact of re-engineering?
- Have developed target operating models with the attendant ROI estimates, resource requirements, sequencing, step plans, and technology roadmaps (that not only take account of, but take advantage of the existing corporate tech stack)?
- Have attained cultural fluency and are aligned with their key stakeholders to the point they can successfully code switch in packaging the above into salient, salable stories that win friends and influence people—i.e., increase the law department's ability

to secure sufficient resources and cross-functional collaboration in order to drive better business outcomes?

Almost no one. Including me, except in very select circumstances.

Work Must Be Sorted. You likely know the old joke about law firms specializing in door law.



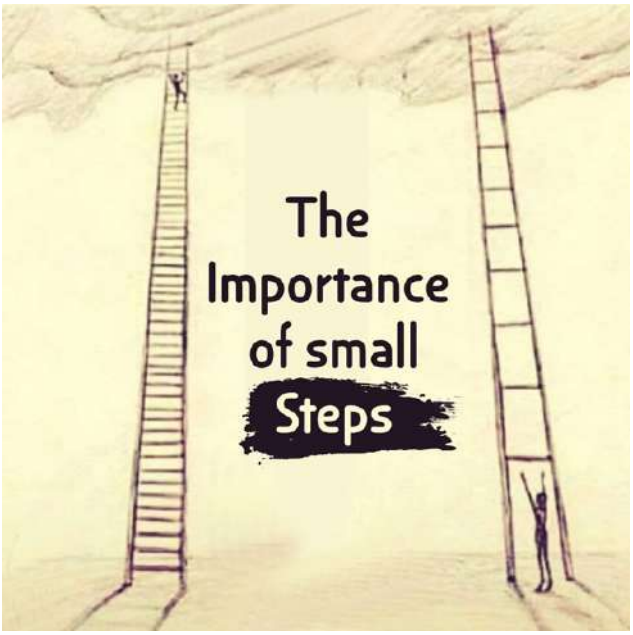
Under the new world order, that punchline applies even more to law departments than law firms. But ratcheting up effort levels to quickly turn around whatever crosses our desk is untenable. Budgets are not keeping pace with ever-increasing demand. We cannot avoid, either by commission or omission, allocating scarce resources. Optimal allocation will not occur by accident. Legal work must be sorted, including being ranked by business value.

Work sorting has all manner of implications. Deciding what not to do (the essence of strategy). Unbundling. Insourcing versus outsourcing. Internal resource allocation. External supplier sorting. Target operating models and roadmaps, including identification/prioritization for automation and self-service. Dashboarding/metric selection. The list goes on.

For our purposes today, however, some surface-level work sorting is often required just to decide where to start. My complex example above sits at the extreme end of the “so much easier said than done” spectrum. The

notion that a law department will achieve enlightenment on all their workstreams simultaneously is nonsense. We must choose which stories are worth telling first—i.e., size the prize.

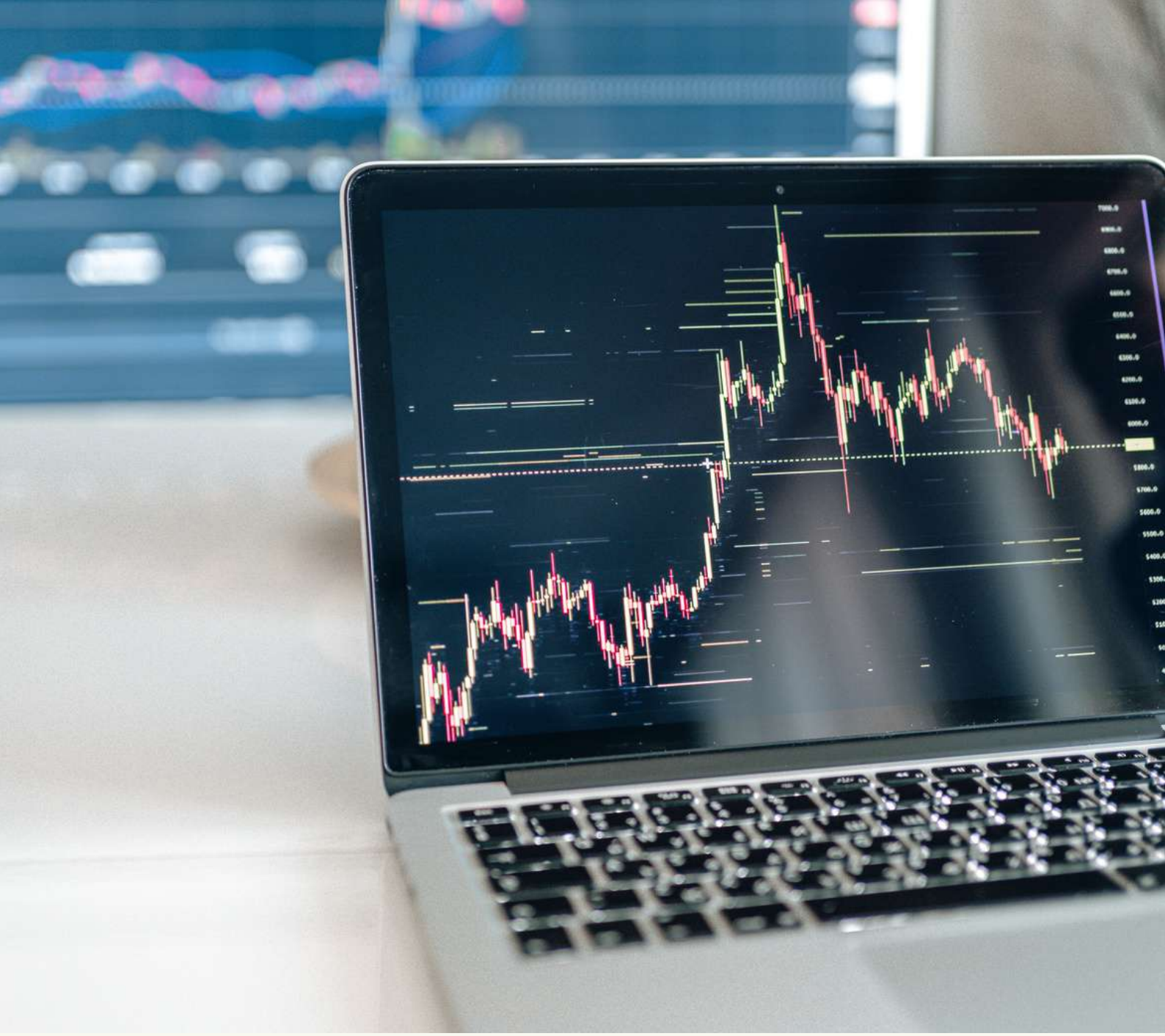
And, even then, we continue sort and prioritize. We don't have to do it all. Leveling up to the slightly more sophisticated version in the opening hypothetical above is still a material improvement on the status quo. This is not about being perfect. This is about getting better. My complex example is not intended to be an ideal end state (it is merely a composite of approaches that have been effective in specific contexts). But even if regarded as the apex of a maturity model, it can still be broken down into small steps, each of which constitute valuable progress in their own right. Our story does not have to be complete to prove persuasive.



Yet, because we are so committed to accomplishing everything asked of us, selecting which stories to focus on can seem daunting. And it probably is, some places. But, usually, the initial triage—as opposed to the subsequent deep dive—does not require much detective work. The biggest problems tend to be glaring, persistent, and obvious, especially to legal's primary business stakeholders. If you are unsure, just ask—uncomfortable though it may be. The business stakeholders may not be well positioned to recommend a treatment plan, but they rarely struggle with symptom

identification. They knew where it hurts, even if they don’t exactly know why.

We will touch on more detailed working sorting in a later post on supplier sorting. Next post, however, we’ll address how work, once sorted, should broken down, measured, and reassembled into a story—and, more specifically, why fear of what me might find is often an impediment to action.



The Department of Slow & No – Value Storytelling (#5)

By Casey Flaherty

November 28, 2021

The Department of Slow & No – Value Storytelling (#5)

By D. Casey Flaherty on November 28, 2021

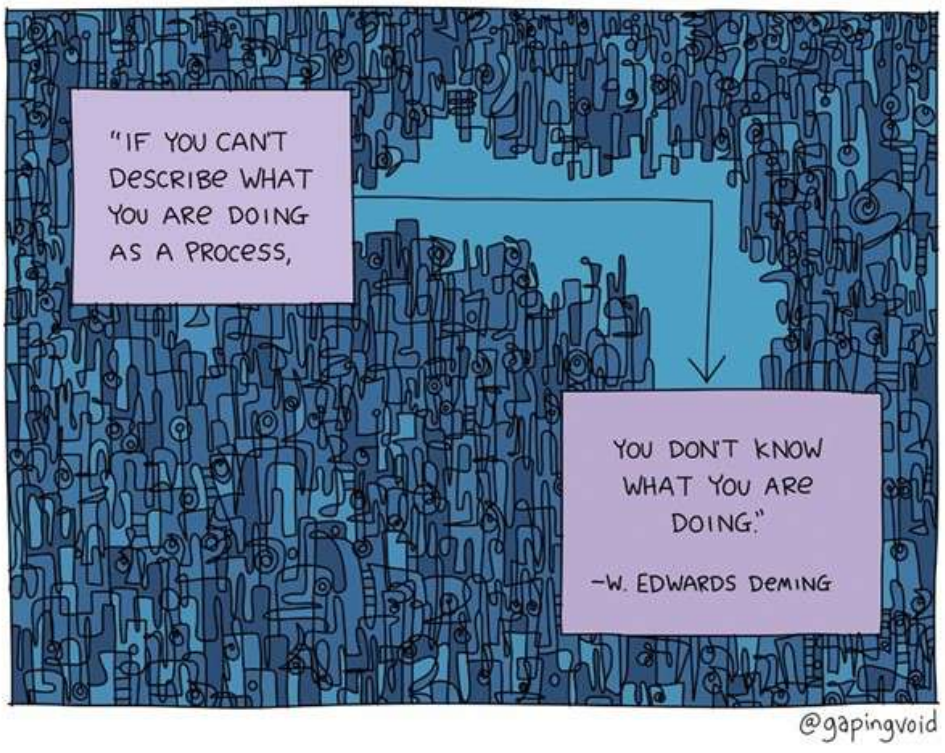
Two massive barriers to good value storytelling (series recap):

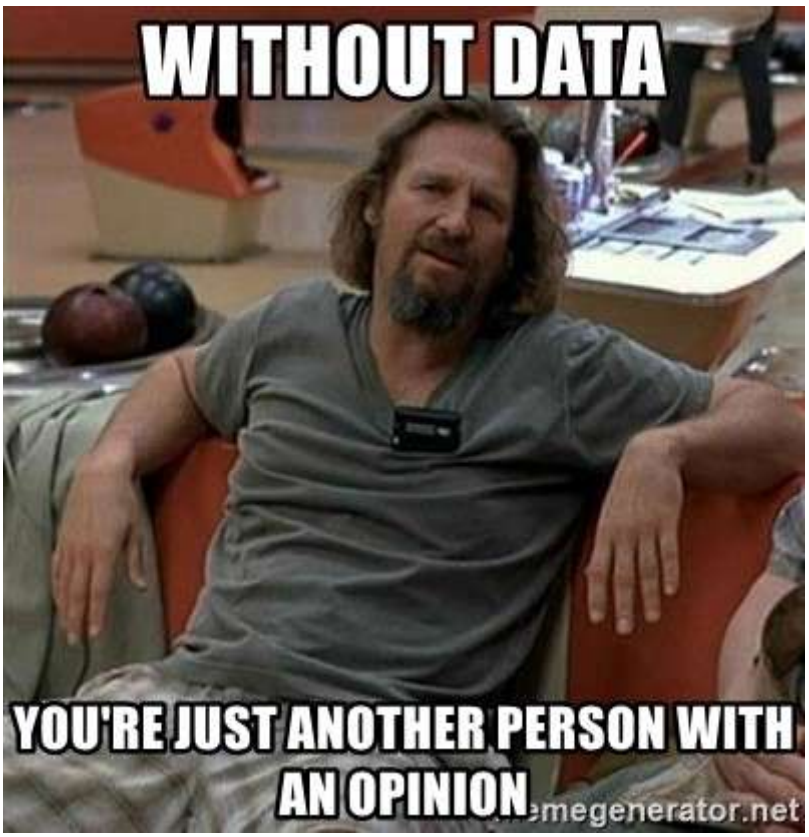
1. It requires hard work, taking time we don't have
2. Even if we have the time and do the work, our current chapter might prove unflattering

Herein, I focus on #2. Ego is often the enemy and, thus, we must frequently first edit the stories we tell ourselves.

I give short shrift to #1 only because it lends itself better to books, coursework and practice than a brief blog post (or even a long blog post).

In the beginning, there was the current state. We start by mapping existing processes, capturing meaningful data, and (eventually) using that data to craft a story (last post) that resonates with our business stakeholders.





ANALYTICS PATH TO VALUE (WITH DATA STORY)

Per usual, easier said than done. The rigor and effort required to overcome inertia consume finite resources (almost no one has strategic reserves of time and attention). Mapping and measuring is often labor intensive because we don't just need to know who does what and how, but why. And not the superficial why but the root-cause why.

It is astounding how often we dig into long-established processes and the reasoning behind a particular step turns out to be ¯_(ツ)_/¯. Vestigial activities are endemic, as are kludges and compromises born from

expediency (the need for speed). We are awash in technical, process, and cultural debt.

The status quo, however, rarely bears any evidentiary burden whereas proposals to improve on the status quo are often subject to strictest levels of scrutiny. We need to get our story straight, including being prepared for one troubling angle of inquiry: *how did you let it get so bad?* Identifying an opportunity for improvement can be flipped on its head as an indictment that persists whether or not we secure the resources required to remedy the issue. Volunteering for additional accountability is not an appealing option.

Early on, our story is rarely a happy one (and that's ok). As discussed last post, we often default to vague stories because we have no other choice. We lack the details, data, and insights to paint a compelling picture. Resource constraints are, as always, a primary culprit—which is why we must be selective in the stories we aim to tell well. But another blocker is the forgivable fear of what we might uncover.

The excusable ambition is to tell a story in which everything legal does is awesome—with even more awesomeness bound to result from earmarking additional resources for legal. But this narrative will usually ring false. Because it is not true. Which creates a conundrum. Maximizing throughput at current resourcing levels would, at first glance, seem foundational to a persuasive story of how incremental resources will be deployed to benefit the business—i.e., *use what've you got wisely before asking for more.*

Unfortunately, there is likely considerable waste embedded in our current operating model. Even if we prefer to believe our initial design decisions were impeccable (no) and our execution thereof flawless (also no), we are confronted with the harsh reality of entropy as the world moves faster than our department ever could. The endless pursuit of optimal requires regular recalibration. True transformation requires much, much more. But telling a story in which a pivot results in a positive outcome is almost invariably an admission that, at some point, our choices and behaviors were suboptimal.

We do not like to look bad. But we probably need to look bad before we can get good.

The first step is admitting imperfection. Take, for example, this fabulous case study from my friend Alex Hamilton's must-read book on contracting, *Sign Here* (reprinted with permission, of course):

Case Study: The Split Test

In 2018, we helped four companies update their contracts to deal with new privacy legislation that was about to come into effect. We noticed that the four projects were taking wildly different times to complete—some were quick, while others dragged out:

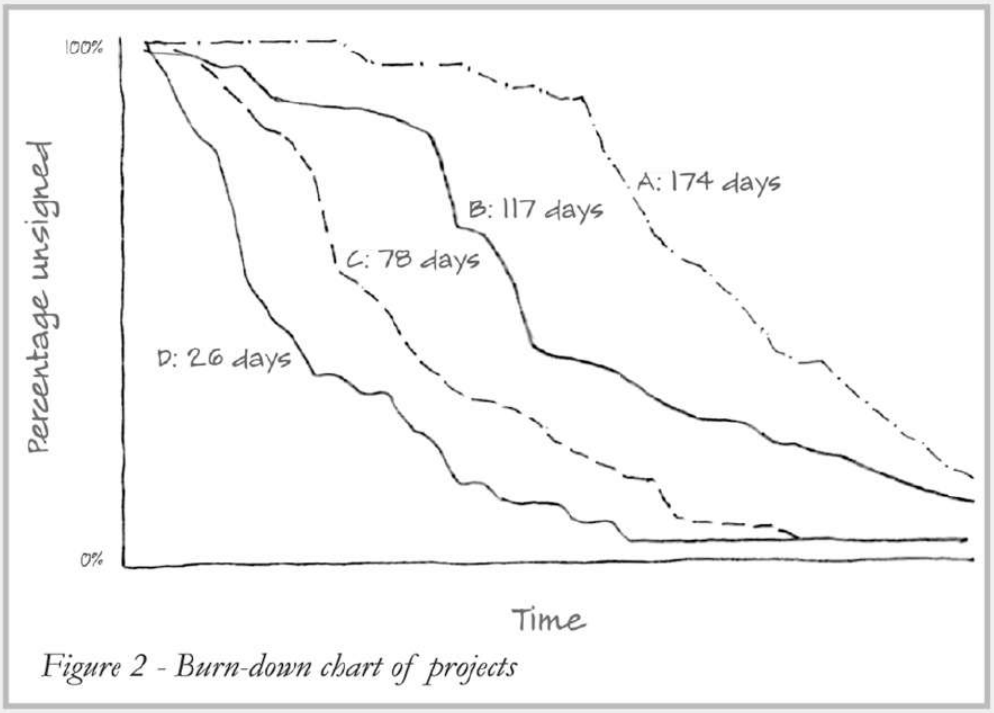


Figure 2 - Burn-down chart of projects

Project D was closing amendments almost seven times faster on average than Project A (26 days on average compared to 174 days).

The range was so surprising that we dug deeper. The team identified two differences between the projects: how good the clients were at getting approvals, signatures, etc. (unsurprisingly, large enterprises struggle) and how reasonable the first draft was (specified by the client). A statistical analysis suggested both factors were affecting the time to complete the projects.

The difference between Project B and Project D stood out. The only difference between the projects was one additional provision asked for by the Project B client to increase the other side's overall liability. That one provision (not required by the change in law) caused the average time to close an amendment to take over four times longer.

That’s four very different stories.

The common Why is “because the government said so.” This Why is not fun—money spent to preserve, rather than create, value in response to increased legal complexity. But, as Whys go, sufficiently clear and compelling. More intriguing are the divergent Hows.

The companies resemble one another, from a distance. Each company is partnering with the same New Law company to tackle the same problem. Each has sufficient rigor around process and metrics to the point of being able to identify specific bottlenecks. Yet, despite superficially similar levels of sophistication, there are material differences in outcomes.

The Department of Slow. By attempting to insert a provision, not required by the new legislation, to materially increase their counterparties’ potential liability, Dept B moved 4.5x slower than Dept D. This delay cuts right to the heart of the relationship between legal work and business outcomes and why divorcing legal considerations from business value can diminish the legal function’s standing with business stakeholders.

(h/t Alex Su)

According to Gartner, when legal guidance is too conservative, business decision makers are:

- 2.5 times more likely to forgo business opportunities that legal recommendations have made less attractive
- 2.5 times more likely to suffer delays in capturing opportunities as they work through legal guidance and requirements
- 4.25 times more likely to scale down the scope of opportunities

What lawyers consider “conservative” can put a company into an “aggressive” posture vis-à-vis counterparties with whom they are trying to do actual business. Consider this entire thread about a lawyer costing an individual client millions of dollars by taking maximalist negotiating positions in a genuine effort to protect the client’s interests.

With the thread in mind, the questions prompted by the case study include: *was the attempt to contractually increase the other side’s overall liability a net positive to the business? Did it merit the increase in cycle times, and the attention costs associated therewith? Was the resulting friction in the commercial relationship worth it?*

I don’t know.

I can’t know. The answers are context dependent. Maybe an inciting incident or leadership change altered the business’s risk tolerance and this repapering exercise presented an opportunity to redress their risk profile. Not my circus, not my elephants.

Facts are annoying that way. So in a display of internet courage, I will hazard a guess that this business’s raison d’etre is not to maximize its counterparty’s potential liability. Just as I am fairly confident the business’s primary objective is not to minimize its own liability (winding down operations would be the surest route to unlock this dubious achievement).

From personal experience, telling a businessperson “well, there’s a risk” is essentially a content-free statement. Every business decision, every action and inaction, balances a variety of enterprise risks, only some of which are legal in nature. Attempting to eliminate risk, or minimize risk in a way that ignores net business impact, is one way the legal function becomes labeled the *Department of No* and the *Department of Slow*, with the primary complaint among our stakeholders being that in-house lawyers “don’t understand my business.”

It remains incumbent on the legal function to identify legal risks and characterize those risks properly. We need to intelligibly translate legal risk into potential business impact (probability, frequency, severity). Indeed, the dream is to price risk properly and integrate it directly into the business calculus. Which is another way of saying, our role includes helping to advise the business on taking smart risks.

Inevitably, we will still have to tell the business that which they would rather not hear—like new privacy legislation requires us to update many existing contracts. But we will find a much more receptive audience if we have consistently demonstrated we are allies invested in helping the business make money.

A credible (rather than incredible) bearer of bad news. The legal department needing more resources will be among the unpalatable truths that almost no one will be eager to accept.

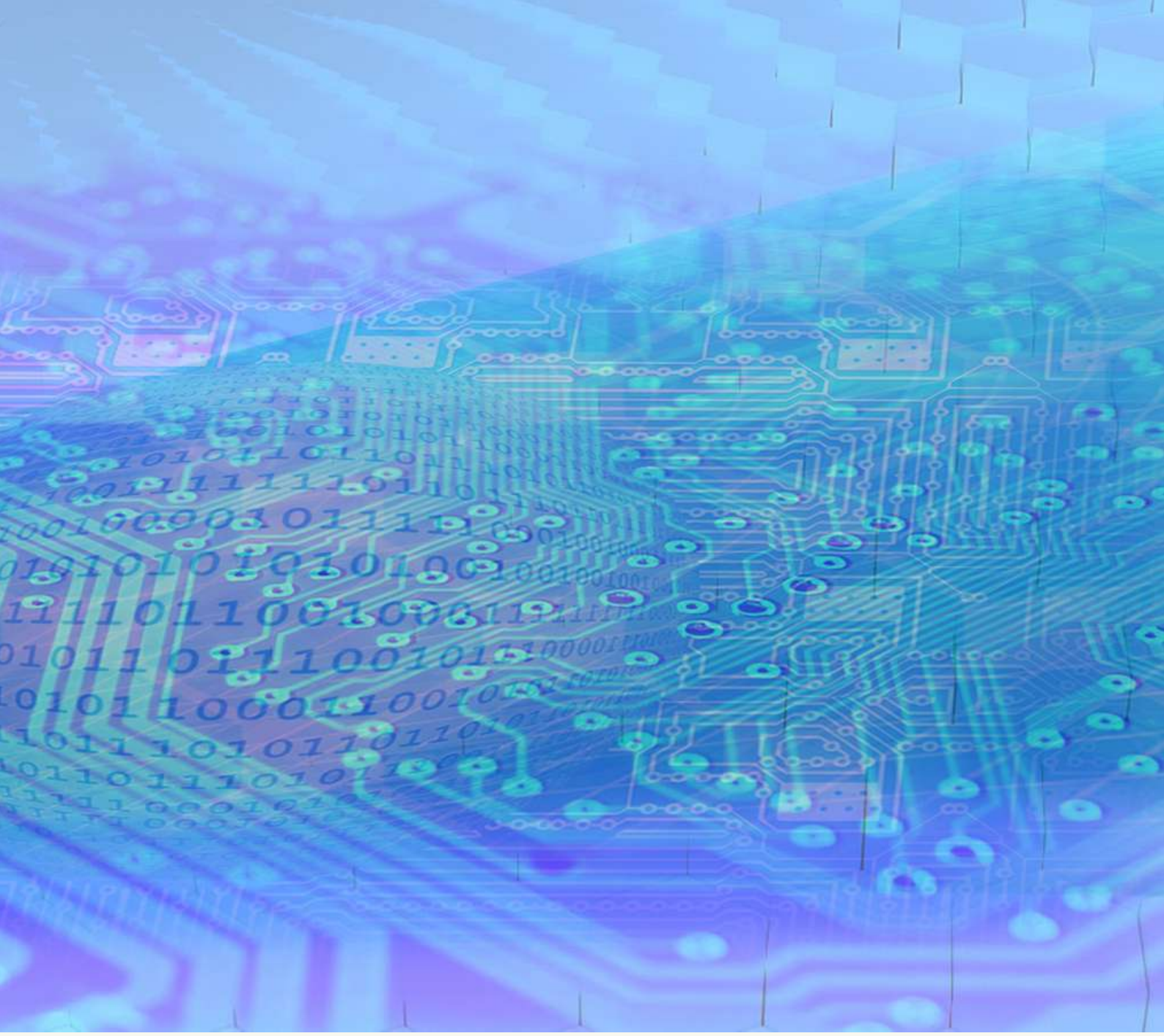
Informing the business that legal has been wasting money for years will not endear us to our audience in the right way—savings-centric narratives are a dead-end path of least resistance that reinforce the attractive fiction that the company should be spending less on legal. On the other end of the spectrum, pretending like legal is eternally perched at the apex of resource optimization and operational excellence is (likely) transparently laughable.

The middle road is to do the best we can to optimize the resources we have while also asking for the resources we need. Pick the low-hanging fruit (i.e., patent, preventable waste) identified in the process mapping/measurement exercise and present the resulting improvements to support the case for more resources to move beyond incrementalism. In the case-study example, reform the delay-inducing contract language and then cite the already improved cycle times in the petition for (i) the resources and (ii) cross-functional collaboration necessary to address the delays caused by slow approvals and signatures, the topic to which we will return next post.

I know. I remain a citizen of good standing in Obvioustown. But the middle path is rarely chosen because it requires being bold (asking for more money) while also being prepared (putting in the work to get the story straight), including being prepared to recognize where we are falling short (looking less than perfect). Most departments are situated near one of the extremes—too shy to ask for the resources we need (no value stories to tell) or too quick to do so without any meaningful effort to get our house in order (our stories are vague and incredible).

Some level of humility is an important part of credibility. But not too much. Technical, process, and cultural debt are not unique to legal. The law department's ways of working are unlikely to be the most inexplicable part of the collective goat rodeo. It often seems like the business makes money in spite of itself. Humility paired with competence and tangible progress towards improved *business* outcomes should be enough to convince persuadable stakeholders that additional resources will be put to good use.

Likewise, we should not apologize that increasing legal complexity drives up the costs of doing business. That's the problem we're responsible for addressing, not responsible for creating. Instead, we need to clearly articulate the business value at stake in a manner that reflects our roles as allies in driving superior business outcomes, including advising the business on taking smart risks. This does not guarantee we will secure the requisite resources (expect legal to still be chronically underfunded) but it does improve our chances substantially as we change perceptions about being the Department of Slow/No.



Tech-First Failures – Value Storytelling (#6)

By Casey Flaherty

December 13, 2021

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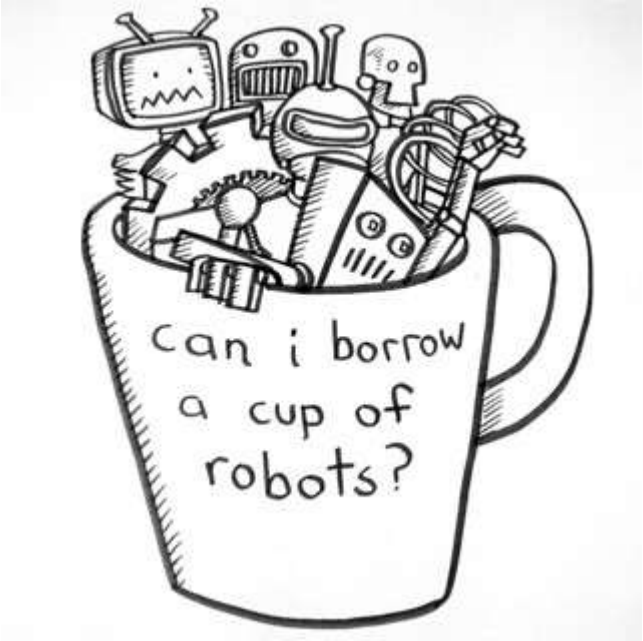
By D. Casey Flaherty on December 13, 2021



Tropes around tech utopianism are attractive fictions that promise quick wins and deliver long-term pain, ultimately undermining our efforts at effective value storytelling (series recap, plus prior screeds against tech-fixated magical thinking here, here, and here)

A new bombshell lawsuit against a contract lifecycle management provider offers a stark reminder of the promise and peril of CLM—and therefore an unfortunate but instructive example of how tech-first solutioning can go terribly wrong.

Bad contracting processes have consequences. At the center of the complaint is a ~$5m contract for CLM services and tech. The plaintiff claim they terminated the contract early for alleged uncured breaches thereof and then mistakenly continued to make ~$1.7m in payments to defendant.

Isn't it ironic (in the Alanis Morrissette sense of the word) that in a lawsuit centered around a disastrous effort to improve contract management a substantial percentage of the alleged damages are due to alleged failures in contract management.

The business value of better contracting is not in question. As discussed previously, a 20% improvement in contracting efficacy has, on average, 32x the business impact of cutting outside counsel spend by 20%. Tech has an important role to play. But tech should not be the star of the show, especially in the beginning.

When tech is not the primary problem (or the primary solution). The complaint begins its retelling in October 2019 when the defendant gave an in-person platform demonstration. In June 2020—seven months later "following a rigorous selection process"—the parties entered into the $5m contract only to terminate it in April 2021, ten months post execution. Suit was filed in November—more than two years after the demo (which is unlikely to have even been the beginning of this ill-fated journey).

Important for our purposes, the plaintiff specifically alleges only one tech-related misrepresentation giving rise to their claims (the ability to "apply a single contract amendment to multiple agreements simultaneously"). Beyond that, every issue raised in the complaint relates to the enormous amount of work required to properly implement CLM.

Characterized as inadequate in the complaint:

- Staffing
- Availability of key resources
- Status tracking
- Training
- Documentation
- Discovery
- Design
- Feedback
- Data mapping
- Data conversion
- Data migration
- Data validation
- Template harmonization
- Contract sorting
- Clause matching
- Implementation

- Integration

The tech is not the central grievance. The grava men of the complaint is the absence of expertise:

> “
>
> Many of these issues could have been resolved had [Defendant] provided a subject matter expert to lead discovery sessions with [Plaintiff] stakeholders.
>
> Unfortunately, [Defendant] never provided a subject matter expert to lead a discovery session, and most sessions (led by [Plaintiff]) involved multiple [Defendant] resources repeatedly asking the same questions of [Plaintiff]. In total, [Plaintiff] estimates that at least half of all discovery session time was ultimately worthless, particularly because [Defendant] continually asked for information that [Plaintiff] had already provided or covered topics that had already been discussed.
>
> Properly staffed discovery sessions could have prevented [Defendant]’s catastrophic decision to switch from running template harmonization and business requirements discovery in parallel to placing all emphasis on harmonization before discovery. This decision, agreed to by [Plaintiff] based on [Defendant]’s claimed experience and expertise, delayed the [contract management system] project for months. Only after considerable wasted time and effort did [Defendant] decide that its recommendation was unworkable.

The resulting extraneous effort is extraordinary. For example, the complaint alleges “Approximately 75 percent of [Defendant]’s deliverables needed reworking by [Plaintiff]. [Defendant]’s struggles with harmonization resulted in nearly 1,000 hours of wasted work by [Plaintiff] employees.”

Yet, according to the complaint, the lawsuit is all that remains of this effort: “The [contract management system] that [Plaintiff] and [Defendant] were working to build was designed to function using [Defendant]’s proprietary

software and platform; [Plaintiff] is left with nothing tangible to show for months of work."

There but for the grace of god go us all. I have not named names because the names don't matter. The trainwreck reflected in the allegations is painfully familiar to anyone who has been in and around major implementation projects—with blame flying liberally in every direction. The complaint is only one side of the story.

One-sided stories can be revealing without being accurate. I do not pretend to know what really happened. But I hear these accounts all the time, all across the spectrum, from both the client and vendor perspective. I've lived through a few such kerfuffles myself in prior lives. We all reside in glass houses, and I am not over here throwing stones.

Yet, I could not ignore the complaint. It makes manifest a contention I was struggling to articulate. I'd written most of this already, as the second half of last post. But I split that post in two, both in an act of mercy (the word count was crushing) and because I was failing to make a compelling case for *my thesis that we are too quick to to turn to tech*—as an avoidance mechanism for addressing process and culture. The complaint brings my thesis into the real world.

This is all too familiar. Again, I know nothing of the actual facts underpinning these allegations. But, unfortunately, I am an aficionado of the genre. The CLM nightmare is an exceedingly common legal-tech-horror plot device where no participant escapes unscathed.

Based on first-hand experience in previous roles, I often plead with potential customers to hold off on looking at CLM. I expressly recommend against starting with CLM despite the fact it is, literally, part of my day job to support a CLM company in going to market (Agiloft, LexFusion, and Factor were finalists for 2021 *The American Lawyer* collaboration award for a successful CLM implementation paired with managed services). It is incumbent upon me to ensure our customers are on the righteous path—we're in the trust business. But it is also my obligation to our member companies to set them up for success.

Indeed, I've so frequently warned against jumping straight to CLM, and had so many variants of the same dialogue, I decided I should write about it ("oh, I have a post on this" is a great way to shortcut repeat conversations, if you ever wondered where much of my writing originates—and why I consider the complaint above so impactful).

CLM done well is phenomenal. It warms my geeky little heart. But bad CLM is a Lovecraftian hellscape of needless suffering. Some differences are a matter of tech selection (poor problem/solution fit) but the most common demarcation between heaven and hell is whether the enterprise is ready for tech—i.e., whether we have done, and are ready to do, the necessary work on process and culture.

In the last post, I highlighted how our understandable reluctance to be transparent about our technical, process, and cultural debts impedes value storytelling (series recap). Herein, I want to emphasize why much our technical debt is a consequence of poor sequencing. We start with tech instead of process and culture because tech "seems" simpler.

As a continuation of last post where I tackled delays caused by onerous liability language, I again lever off the superb case study from my friend Alex Hamilton's must-read *Sign Here* (reprinted with his generous permission).

Case Study: The Split Test

In 2018, we helped four companies update their contracts to deal with new privacy legislation that was about to come into effect. We noticed that the four projects were taking wildly different times to complete—some were quick, while others dragged out:

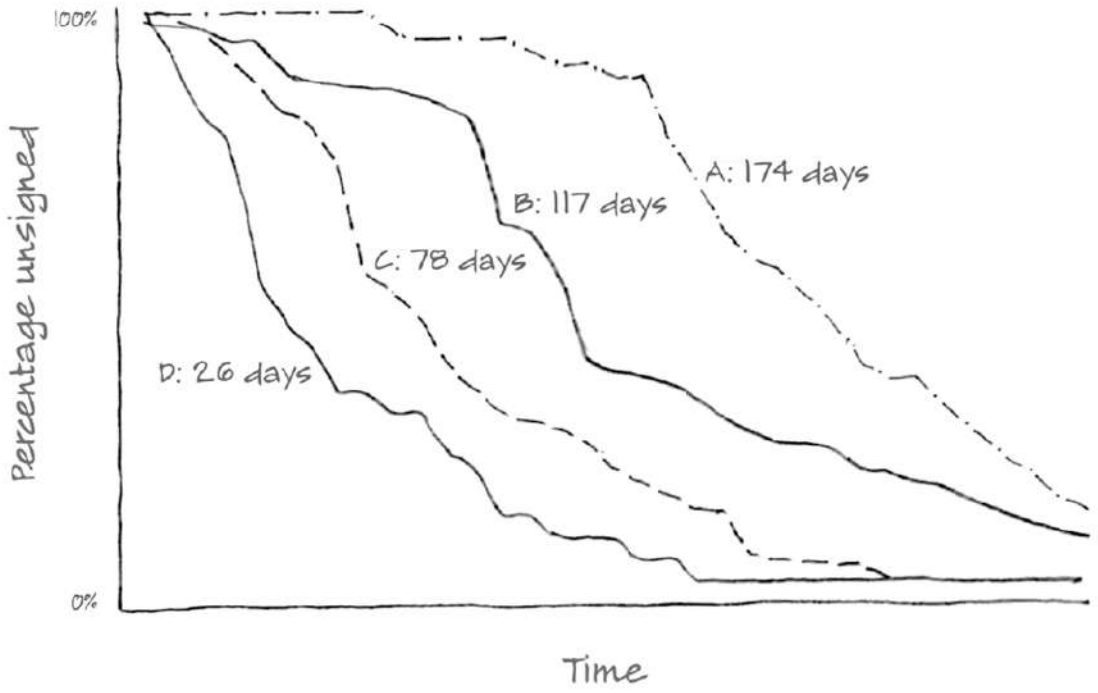


Figure 2 - Burn-down chart of projects

Project D was closing amendments almost seven times faster on average than Project A (26 days on average compared to 174 days).

The range was so surprising that we dug deeper. The team identified two differences between the projects: how good the clients were at getting approvals, signatures, etc. (unsurprisingly, large enterprises struggle) and how reasonable the first draft was (specified by the client). A statistical analysis suggested both factors were affecting the time to complete the projects.

The difference between Project B and Project D stood out. The only difference between the projects was one additional provision asked for by the Project B client to increase the other side's overall liability. That one provision (not required by the change in law) caused the average time to close an amendment to take over four times longer.

Dreams are good except when they are nightmares. The second finding in the case study—delay caused by approvals, signatures, etc.—seems like a gift to legal ops nerds and in-house innovator types (you know, my people). For many, the friction of securing approvals and signatures screams out for the new hotness in legal tech: CLM is having a moment with smart money investors for comprehensible reasons. There is considerable opportunity to drive business value by making contracting tech enabled.

But as Lucy Bassli observes in her excellent four-part series on *Legal Evolution* introducing her own book, *CLM Simplified* (near the top of my reading queue): "There's a lot to do before jumping to technology."

Or as Gartner predicts:

> **By 2025, corporate legal departments will capture only 30% of the potential benefit of their contract life cycle management investments.** Organizations that fail to consider how a technology might advance operational capabilities or improve business outcomes are less likely to achieve a return on investment than those that do. Many legal departments pursue technology roadmaps, lacking sufficient regard for business requirements and end users' needs. They also often neglect crucial context regarding the investment strategy necessary to inform trade-offs in a solution's design and gain end users' acceptance.

Slow is smooth; smooth is fast. To put it bluntly, most current contract processes are terrible. This is often no one's fault because it is often no one's responsibilities. Contract processes frequently grow organically, with everyone doing their best to solve local problems as they arise. Expediency introduces kludges and compromises. Process, cultural, and technical debts accumulate and compound.

We need not blame anyone for the mess to recognize it is in fact a mess. Acknowledging the mess is a key first step. Yet acknowledgment can bring accountability. Naming a problem is an act of ownership.

Gravitating to tech-first solutioning is understandable. Tech is fun. Tech genuinely solves many problems. And centering tech can allow us to reframe our mess as a matter of absence (we need just one more thing) rather than as a morass of clutter and disrepair. And while procuring tech can be painful, procuring tech is often considerably less painful than addressing process and culture debt, especially when process and culture cross departmental lines. Unfortunately, implementation must follow procurement, and that is when our debts become due.

If we try to automate rubbish, we, at best, get automated rubbish (though, more likely, partially automated rubbish, if we produce anything salvageable at all). There are few quick tech fixes. We must pay down the process and cultural debt first and then find tech fit to purpose. But the inverse is exceedingly common. We are inclined to start with tech, assuming we will work out our process along the way. This is a terrible plan that tends to end poorly.

Tech magic is an appealing story. But it is appealing because the *deus ex machina* allows us to skip over the hard parts. That's fine for fiction. But quality nonfiction makes complicated truths digestible rather than trafficking in palatable lies. Value storytelling is only good if it can persuade people of that which they are not already persuaded and then survive contact with reality.

Tech ≠ Process ≠ Culture. Returning to the case study. If the delay in execution is being caused by a manager studiously ignoring the approval requests in their inbox, it does not matter whether the requests came from a flesh-and-blood member of the in-house legal team or was automagically generated by a new CLM system. The request will be ignored just the same.

The process question is whether this person really needs to sign off. In a narrow sense, the answer is likely yes because that is what the approval matrix says. Digging down another layer, however, it is astounding how often approval matrices prove ill-suited to the present configuration and circumstances of a company, even when well crafted at the time of inception.

But changing an approval matrix moves us from the technical to the cultural, where politics can become fraught. Some managers will be delighted by a story in which they have ascended to the point where the threshold for their attention (i.e., sign off) must be correspondingly raised. But others will be triggered by the prospect of surrendering control.

And that is if the approval matrix is the issue. In many scenarios, we genuinely need senior stakeholder sign off, and the senior stakeholder is the bottleneck. The cultural challenge becomes convincing the senior stakeholder(s) to consistently prioritize our ask over many other important items clamoring for their scarce attention. A tall, and sometimes impossible, order.

Resist temptation. So why waste a crisis? Why not use slow cycle times to bolster a request for additional resources (as we did here), especially if we are confident that a CLM project is inevitable and worthwhile? Because we are setting ourselves up for failure that could haunt us for as long as we remain in seat.

Good CLM is incredibly labor, attention, and expertise intensive. It demands considerable cross-functional collaboration. Bad CLM is not just a resource suck. It is also a branding catastrophe. The high business impact and high visibility of contracting means a CLM disaster can do lasting damage to our credibility as competent allies in driving business value.

It's not just that it's almost always cheaper to do it right the first time. After CLM-related trauma, the appetite to fix CLM missteps, let alone start over from scratch, is nearly nonexistent. CLM, even bad CLM, tends to be sticky. Poorly designed systems endure, causing us chronic pain. We should not start down the path unless we are prepared to go all the way because, otherwise, we may find ourselves trapped in the in-between—a situation far worse than the one we set out to improve.

Better not to do it than to do it poorly. There is nothing special about legal's preference to seek refuge in technology in an attempt to avoid addressing entangled process and cultural debts. Legal is not the primary pushers of contract automation. The infatuation with CLM can originate with

sales or procurement or anywhere else that might be justifiably frustrated with the contracting status quo.

But legal remains a CLM stakeholder. As stakeholders, our posture should be "*yes if*" rather than a "*yes and*." *Yes*, we should pursue this *if* it will be properly resourced, including the cross-functional collaboration required to address process and cultural debt. Much of this work should precede the search for technology because finding fit-to-purpose technology requires properly defining the problems we are working to solve.

The literature on tech-first failures is ample. And the conclusions are always the same. For example, I commend this report by A21 and the accompanying presentation entitled *Technology is not the answer: Why "digital" is not the most important aspect of your digital strategy*. The summary: "answers as to why digital strategies succeed or fail are complex, but… people, culture, leadership, and organizational alignment are more important for digital transformation than data and technology." (*also see* this report from McKinsey citing culture as the most significant barrier to digital transformation)

CLM is extreme, not unique. Bad CLM is extreme with respect to the damage it can inflict on the business and law department brand/resources. But CLM is not unique. Tech-first solutioning and the resulting trip down the innovation rabbit hole are all too common.

Again, tech presents a palatable story. The idea that we can just plug, play, and reap the benefits is another one of those attractive fictions. It enables us to perpetuate the illusion that nothing is wrong with our current state. Rather, we are simply augmenting what we already do well through additive technology that was not previously available. Palatable. Also inaccurate and on a collision course with reality.

Tech remains essential. Tech is not an essential starting point. Indeed, it is often the wrong starting point. Our penchant for technological moonshots is often grounded in a misunderstanding of the outsized impact of reducing low-end friction through low-tech solutions, like taking less onerous starting positions in our contracts or streamlining processes. But, ultimately, tech is a necessity.

The productivity imperative I outline here demands a level of industrialization that incrementalism cannot deliver, as Jason Barnwell explains in his magnificent post on *Legal Evolution*:

> We will need more capacity and new capabilities that mere conservation of resources cannot deliver. **Our evolutionary path needs improvements on how we do work today that range from whole-multiples to orders-of-magnitude.** This is transformation.
>
> Transformation is system-level change. Transformation can start with point solution investments. These help us explore, validate hypotheses, and create investment cases. But system effectiveness is limited by the least capable component upon which the system depends. If your computer has a very fast processor but inadequate memory and slow networking, the processor cannot contribute at its full capacity. Legal work has a similar challenge. We need many elements to evolve simultaneously to produce coherent complements. We must start walking in the same direction to transform.
>
> ….
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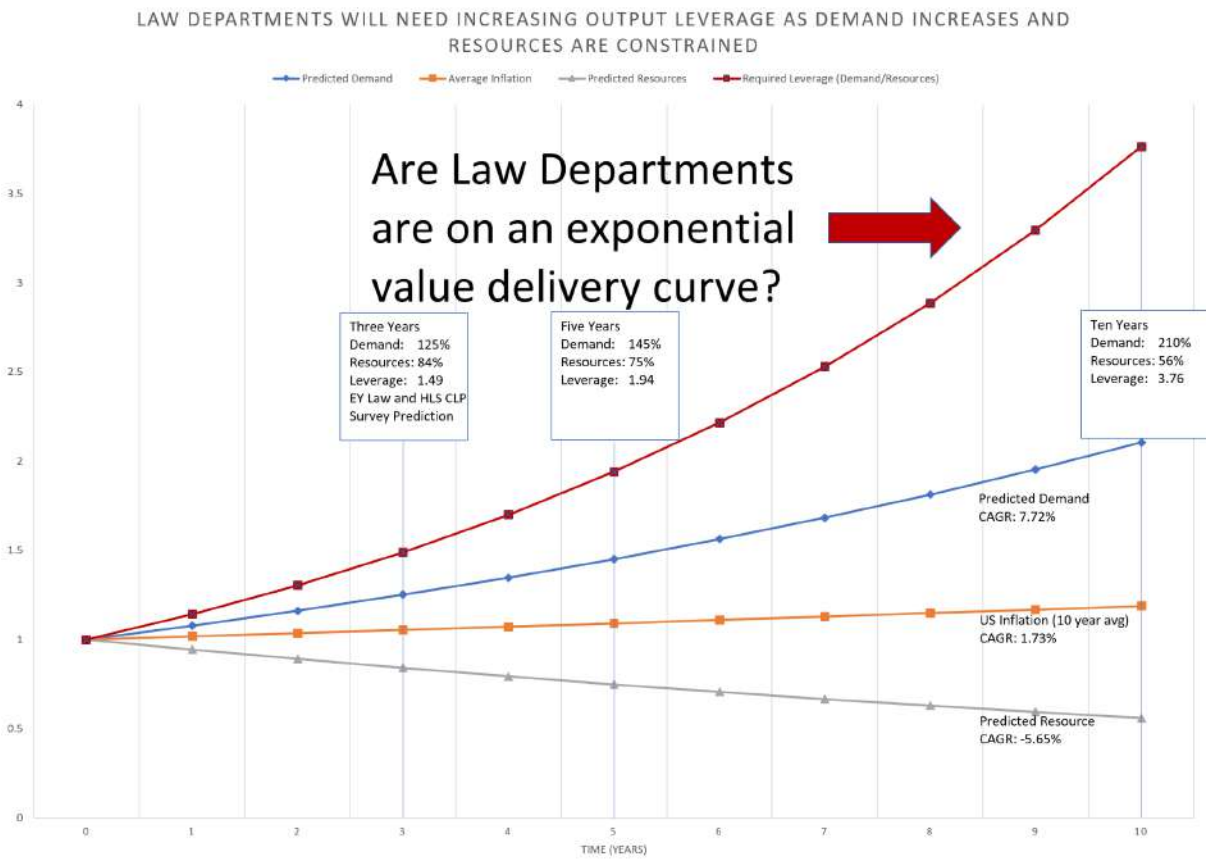
> As shown in Figure 1 below, treating these as compounding curves and projecting them out suggests law departments must manufacture almost 4 times our current leverage within the decade. I believe this understates the necessary leverage…



….

Integrating with client decision-making processes and scaling to demand is getting harder as **the business substrate converts to digital and the legal substrate remains analog.** Modern organizations are increasingly data-driven. This requires influencing business decisions with data and hypotheses that help ask the right questions. These businesses can generate an **astounding amount of work volume built upon machine-based leverage** as they transform. See Post 210 (open source practices result in 1000x gain in productivity).

Because our clients are pursuing value creation in increasingly complex business spaces accelerated by machines, the net impact on legal includes:

- Increasing work volume (number of units)
- Increasing complexity (unit cost)
- increasing velocity (unit clearing time)

Demand will accelerate because many clients are chasing an exponential growth curve. And I suspect we are underestimating the true cost of demand growth because we are not factoring in increasing complexity and the requirements for rapid clearing times. Increasing complexity typically requires more effort to do the same work because the solutions are harder. And faster unit clearing times typically require more peak capacity to allow parallel effort.

Translated to the physical realm we are trying to operate a modern city with 19th-century transportation infrastructure. This will not work.

I expect 10x leverage scenarios by the middle of the decade driven by demand with increasing complexity and velocity characteristics.

Tech is necessary. Not sufficient. But necessary.

Tech must be part of our story. Yet never the whole story, if we want the story to end well.