

The 2019 Litigation Finance Client Experience Survey: *What Law Firms Want*



ALM Intelligence





“Litigation funding provides critical resources to law firms for pursuit of meritorious claims on behalf of their clients.”

Executive Summary

Skyrocketing litigation costs aren’t just a problem for claimholders—they affect law firms too. A recent ABA survey indicates that 82% of law firms have turned away meritorious cases that were not considered “cost-effective.” Nor is discounting rates a sustainable solution.

The American Lawyer recently estimated that in 2018, discounted billing collectively cost firms in the AmLaw 100 approximately \$4.4 billion in revenue.

Litigation finance addresses this growing issue by providing law firms and their clients with the financial resources to maintain profitability and pursue valuable legal claims.

However, despite the hype that litigation finance is experiencing “explosive” growth, the number of lawyers actually using litigation finance is still modest. Many who could benefit from litigation finance either don’t understand how it works, don’t know what to look for in a funder, or have misperceptions about the industry.

This report is not about the size or amount of capital going into the industry. **It’s about clients.**

The American Lawyer and Validity Finance set out to look beyond the dollars and cents of the industry, asking what people think of litigation finance, what they worry about, what makes for a good funding relationship, what constitutes a fair investment agreement, how litigation finance can best serve them, and where the industry can improve.

So what did we learn?

First, litigation finance works. 98% of respondents who have used litigation finance found it useful and said they would use it

98%

of lawyers who have used litigation finance would use it again



again. Lawyers reported that funding helped them accept cases that would otherwise be cost-prohibitive, offer clients more diverse fee structures, and smooth out the billing/receivable cycle.

Second, it's not widely adopted—yet. Only 15% of respondents had personal experience using litigation finance, but the majority of those users anticipate using it again in the next 12 months. Of those who had not yet used litigation finance, 51% of outside counsel and 60% of in-house counsel were interested in doing so in the future.

Third, clients prioritize trust. 99% of lawyers who use or would like to use funding prioritize trust in choosing a funder. To evaluate trustworthiness, respondents focused on transparency, fair financing terms, and clarity of documentation.

Finally, misperceptions linger. Although respondents were familiar with litigation finance, they occasionally had outdated information regarding ethical issues or the types of funding available. A few respondents feared that the use of litigation finance might

15%

of respondents had personal experience of using litigation finance

undermine client confidentiality or result in surrendering control of litigation strategy to the funder.

These are sincere and legitimate concerns, particularly when working with an inexperienced funder. However, none of these should come into play when working with a reputable funder that has a successful track record. Privilege, confidentiality and client control of litigation strategy remain intact if the proper precautions are taken.

Despite some concerns, many lawyers view litigation finance as a useful tool that they have already incorporated or may soon incorporate into their practice.



“I think litigation financing can lead to a more efficient marketplace. I do not have a great concern that litigation financiers are funding a large number of meritless lawsuits.”

Methodology

ALM Legal Intelligence surveyed 330 lawyers on their perceptions and use of litigation finance—one of the largest surveys of American lawyers to date. Respondents included 285 lawyers employed by corporate firms and 45 in-house counsel. The fieldwork was conducted via online survey in January and February 2019.

66%

of lawyers have used or would use litigation finance

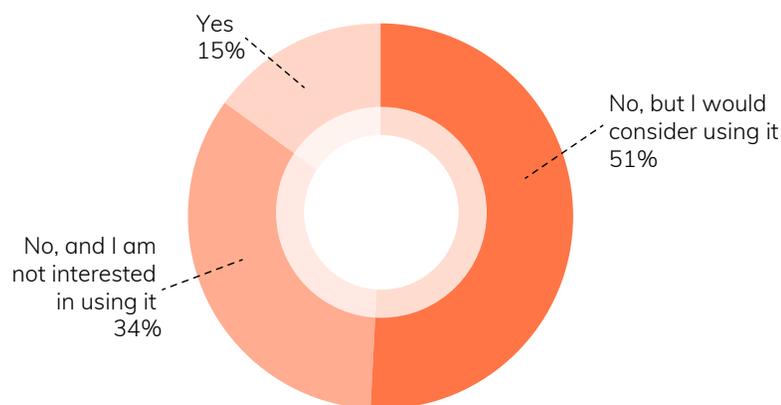
Litigation Finance Adoption

Litigation finance has expanded rapidly in the U.S. over the past few years as more lawyers realize it can help them de-risk large cases, offer clients varied billing options, and increase firm profits.

Despite this growth, a modest 15% of respondents report having personal experience using commercial litigation finance, which means it remains an under-utilized tool. That may change—many lawyers are interested in trying funding, with more than half of those surveyed indicating they would consider using it in the right circumstances.

Of the lawyers who have used funding, 98% of law firm respondents and 100% of in-house respondents would do so again, indicating that the benefits of litigation finance are well established among those most familiar with it.

Have you ever used commercial litigation finance?



One of the main reasons lawyers are satisfied with litigation finance is that it helps ensure their fees and costs are paid on time.

Nearly half of law firm respondents praised the collaborative nature of the process, with one respondent saying their legal arguments had been improved by the funder's due diligence of the case. Another respondent praised the funder's "careful strategic thinking."

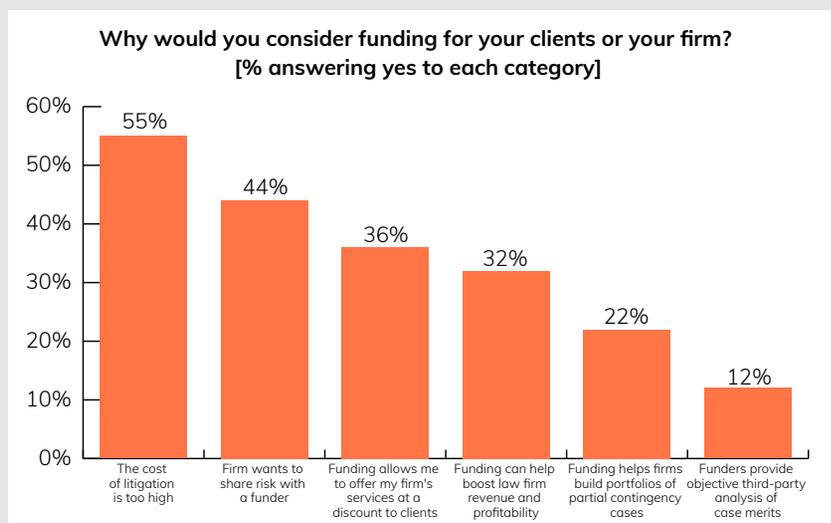
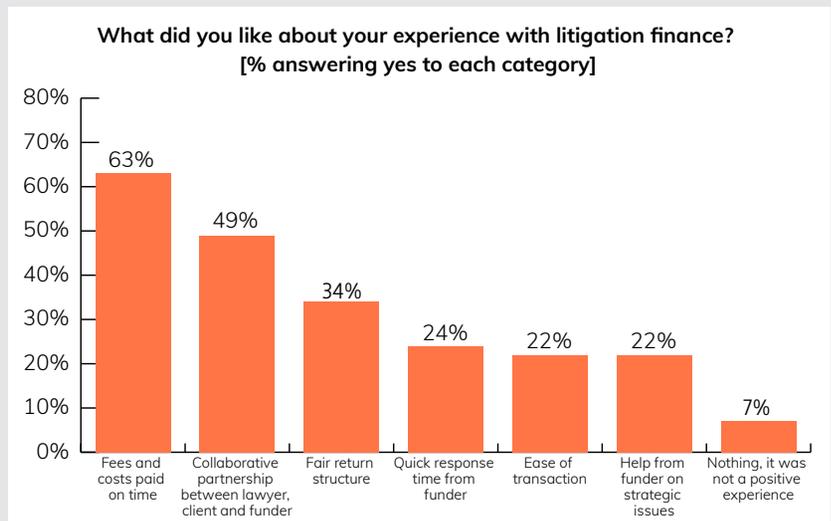
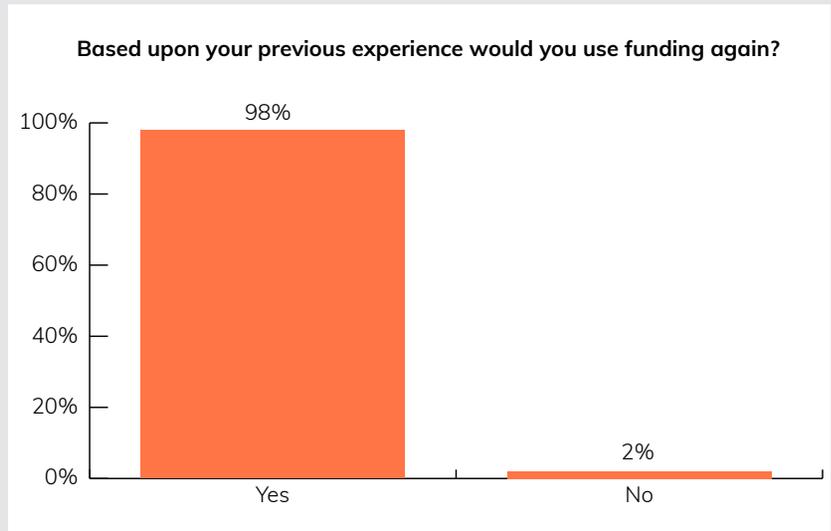
“ Litigation financing provides clients with different options aside from a full-contingency model.”

Despite these benefits and the extraordinarily high ratio of repeat users, 7% of respondents offered some negative feedback about their experience using funding. Their complaints centered on slow process and response time, and onerous documentation. As one commented, "the underwriting process is too long and complicated."

“ Offers potential of above-average return for law firms.”

For the 51% of law firm respondents who haven't used litigation finance but plan to in the future, the top three reasons are 1) to help clients mitigate the prohibitively high cost of litigating, 2) to share litigation risk with a funder, and 3) to offer clients flexible or partial contingency billing for the firm's services, in turn making the firm more competitive in pitching clients for new business.

“ Careful strategic thinking by funder.”





“Litigation finance allowed us to survive a very rough spot at no cost to the client and leaves us with a possible additional upside.”

Leveling the Playing Field

Many survey respondents praised litigation finance for increasing access to justice by allowing meritorious cases to proceed regardless of financial resources.

Other respondents applauded the fact that litigation finance can offer plaintiffs the best legal counsel while mitigating risk for law firms. Some respondents also noted that funding reduces the financial pressure on plaintiffs who might otherwise be forced to settle a case for less than its actual value.

Many outside counsel seemed to believe that high legal costs and uncertainty deter corporations from pursuing meritorious litigation. A number of respondents said financing could benefit these risk-averse companies by alleviating the risk of receiving zero recovery after making a significant investment in litigating a claim.

Choosing a Funder

Respondents almost unanimously agreed on the importance of trust among the claimholder, counsel and funder, and of fair funding terms.

Those priorities were closely followed by a desire for clarity and simplicity in documentation, and for a funder who can offer innovative, customized solutions to clients.

Clients also prefer to work with a funder who has a successful track record and who takes the time to get to know both the client and the case to be funded.

99%

of lawyers prioritize trustworthiness when choosing a funder

Seventy-two percent of respondents who had litigation finance experience wanted evidence that a funder was well-capitalized and could meet its financing commitments. A significant number also sought a funder who could act as a sounding board throughout the litigation process.

72%

of respondents with litigation finance experience wanted evidence that a funder was well-capitalized

Recovery Rates

When choosing a funder, it is important to consider how much of the recovery a client will receive. Unfortunately, both claimholders and lawyers may lack context for evaluating the quality of the terms a funder offers. This is particularly true for those who have little or no experience using litigation finance.

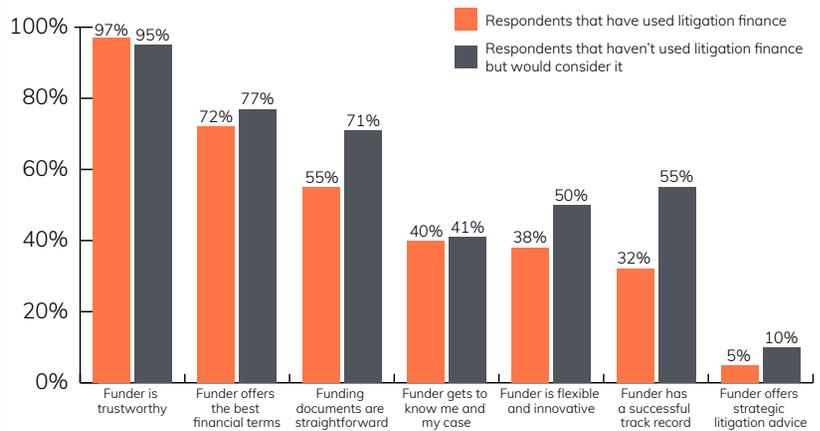
71%

of lawyers think fairness means the client should receive 50% or more of case proceeds

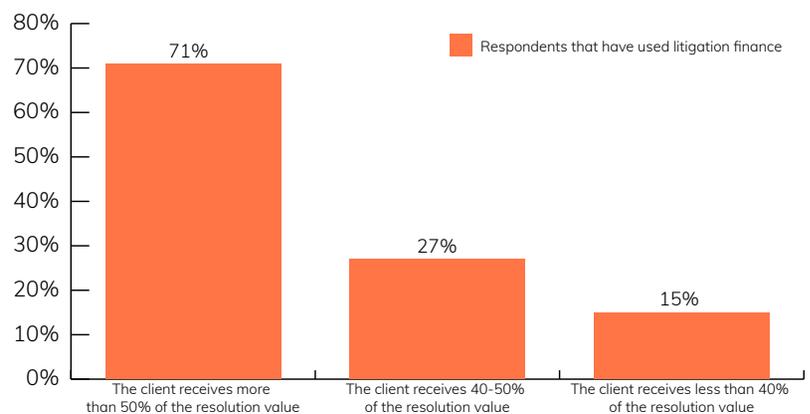
Almost three-quarters of outside counsel believe a fair return structure means the claimholder should receive 50% or more of the resolution value. Yet two-thirds of respondents reported being dissatisfied with the fairness of the return structure in the financing deals they had participated in. This suggests significant variation in client recovery rates, and that some rates seem unfair to lawyers.

“Funding helps to ensure the availability of legal recourse in many situations where it would otherwise simply be impractical to litigate or pursue claims. Opening up the legal market to allow for more participation is a good thing in my book.”

In choosing among funders, how important are the following? [% selecting 'Extremely important' for each category]



If you were to use funding in the future, what return structure would you consider fair to the client? [% answering yes for each category]





I would consider defense litigation funding to de-risk further defense of cases where we feel strongly that we would prevail.”

Is Funding a Fit?

Forty-two percent of respondents interested in using finance said they are waiting for the “right case.”

However, responses also indicate that lawyers sometimes have a narrower than warranted perception about the types of cases eligible for finance. Using litigation finance for a plaintiff’s case is intuitive, and that’s how 98% of respondents with litigation finance experience have used it.

That said, other uses are gaining traction. Funding is available for cases at any stage of litigation, and can also be used to quickly monetize a final judgment rather than going through the asset recovery process.

A number of firms have financed one or more portfolios of cases. Contrary to popular perception, finance is also available for defense work on a single case or portfolio basis. Two percent of respondents who had used finance had used it for a defense case. One survey respondent said such defense funding could potentially help corporate clients avoid unreasonable nuisance settlements.

42%

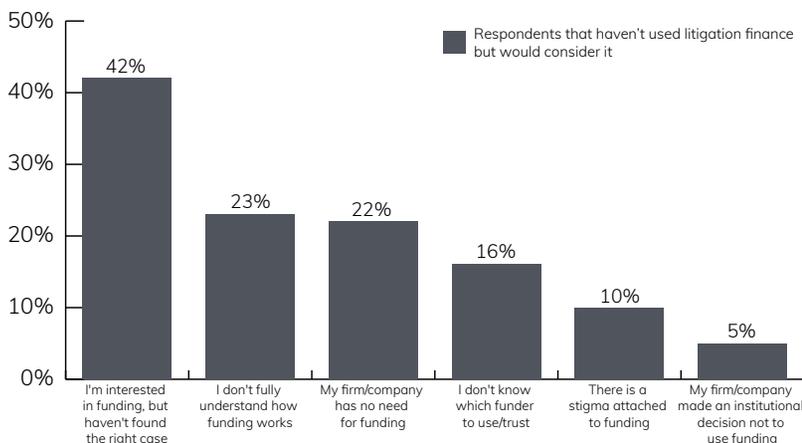
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Addressing Concerns

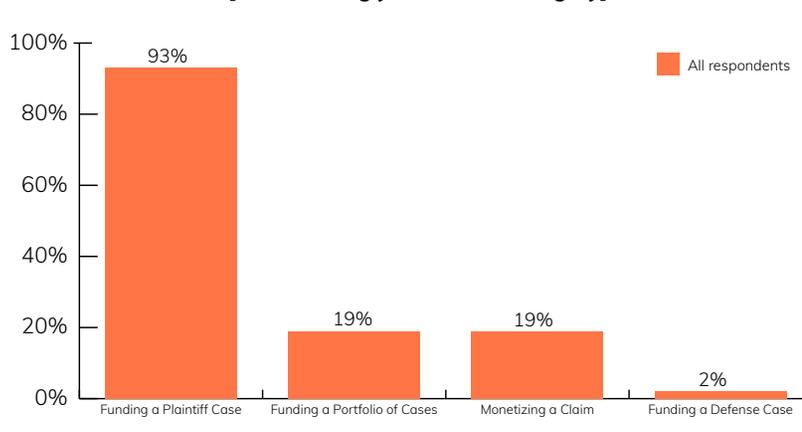
Ethics and Control

Litigation finance is a relatively recent addition to the American litigation landscape. As with any new innovation, it takes time for people to gain familiarity with it. For example, 61% of respondents with no personal experience using litigation finance

Why haven't you used funding?
[% answering yes for each category]



What type(s) of litigation finance have you used?
[% answering yes for each category]





still have unanswered questions about its ethical or regulatory implications.

Among respondents who had never used litigation finance, fear of ceding control topped the list of ethical concerns, followed by fear of undermining client confidentiality or inadvertently waiving attorney-client privilege.

These fears represent unfortunate misperceptions. Reputable funders will not seek to control or influence a client's litigation strategy unless specifically asked to express an opinion. Law firms may be—and should be—wary of funding companies that attempt to usurp control. Likewise, client

confidentiality can be fully protected in a litigation finance transaction if the funder and client take the appropriate precautions.

The majority of these concerns seem to dissipate once a lawyer gains experience using funding.

73%

of lawyers with experience of litigation finance had no ethical concerns about using it

Assessing Funding's Impact on American Litigation

Reputation

Almost 80% of respondents had a positive or neutral view of the litigation finance industry, while only 22% had a negative view.

Although a relatively modest 15% of respondents reported personally using litigation finance, 51% indicated finance had been used to litigate against at least one of their clients. Interestingly, there was virtually no correlation between those who expressed a negative attitude toward the litigation finance industry and those representing clients who had been sued by a plaintiff using litigation finance. In other words, most respondents view litigation finance as a neutral tool that can be very useful in appropriate circumstances.

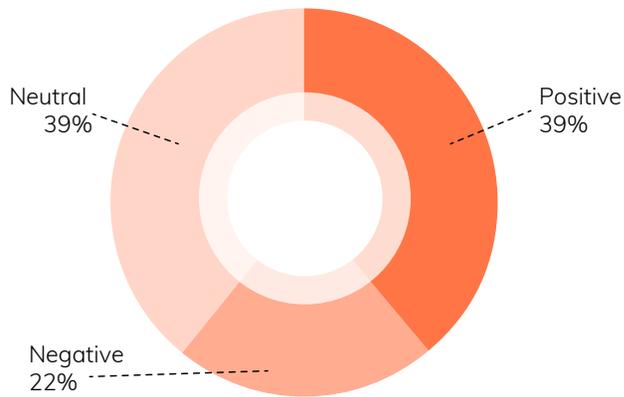
Respondents who expressed negative views tended to focus on objections to the very idea of litigation finance—with one respondent calling it “jackpot justice.” Others expressed their personal judgment of particular individuals involved in the finance industry. According to one respondent, those involved in litigation finance tended to be “failed lawyers who inherited the huckster gene.” Another wrote “it’s an industry populated by slimy individuals.”

Disruptive Force

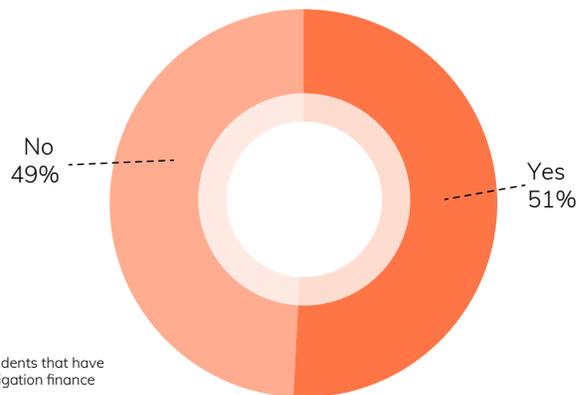
Many respondents recognize that the availability of litigation finance has the potential to shake up the legal industry. Some 44% of respondents expected the availability of litigation finance to impact the number and type of cases that are litigated.

Meanwhile, 33% of respondents expected litigation finance to change how law firms manage risk and profitability, given that it allows firms to reduce their liabilities on contingent cases while potentially securing bigger payouts for clients.

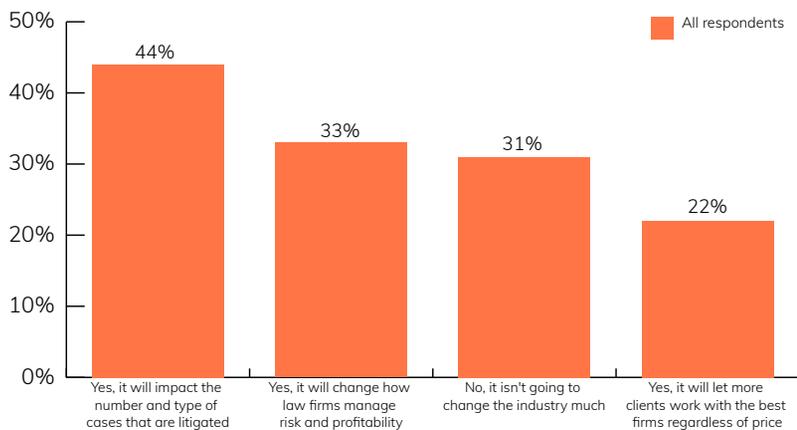
What is your view of funding? [all respondents]



Has funding been used in a case brought against your client?



Do you think litigation finance represents one of the key disruptors for the legal industry in the next few years? [% answering yes for each category]



ALM Intelligence



VALIDITY

Validity is a commercial litigation finance company that provides businesses, law firms and individuals with non-recourse financing for a wide variety of commercial disputes.

With \$250 million in financing, Validity believes that capital and legal expertise combine to help solve legal problems on behalf of clients. Validity's mission is to make a meaningful difference for clients by focusing on fairness, ethics, innovation, and clarity.

For more, visit www.validity-finance.com