

CASE VALUATION

LITIGATION RISK ANALYSIS

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What it would look like to “go to court” is always relevant to decision- making at the fork in the road: Should a litigant settle or advance down the adjudicative path?

Lawyers generally accept that assessing risk is an inherent dimension of their work, guiding the evaluation of the case, progress through litigation, and engagement in settlement discussions. Many lawyers tend to assess and convey litigation risk informally: They rely on intuitive assessments delivered with vague or qualitative language, i.e. a “good chance”, a “fighting chance”, a “pretty sure bet.” This approach doesn’t necessarily mean that they aren’t engaging with the legal and evidentiary issues at hand, but they are stopping short of making projections and assigning economic value to the case based on risk and uncertainty. “A good chance” of success might translate to a probability of 51% to 80%!!!!

In an age when informed decision making by the parties is considered an entitlement and standards of profession responsibility demand technical proficiency and reasoned documentable case evaluation at early stages of conflict identification’ As a result, a working knowledge of systematic risk assessment methods and tools is essential. It is vital that the modern lawyer be both an assessor and advisor of risk using the best analytics information possible. That lawyer will be better able to provide full and transparent assessment – to the client, and even third-party neutrals who may be facilitating settlement discussions.

Assessment must include two components:

1. Increased accuracy of projections: by breaking the analysis into separate distinct risk factors, with separate attention to liability issues and damage calculations; by assigning percentages to predictions of success for each factor; and by compounding probability where factors represent independent risks.

2. Expanded consideration of factors that “have value” in the analysis: By assessing hidden and internal costs rather than just the classic litigation costs – and by assigning financial value to qualitative interests.

Decision analysis methodology forces counsel to break down complex litigation into smaller questions or factors, forcing the lawyer to consider each aspect of the case. Mark Victor (Victor, “Litigation Risk Analysis”) advocates the use of a three-stage analysis process to be applied in the litigation context: (1) Identify all the uncertainties in a legal case that may impact either a finding of liability or an award of damages; (2) determine all the reasons for a favorable or unfavorable finding for each; and (3) make a prediction for each identified uncertainty.

The third step—assigning numeric probabilities to outcomes – is essential to the decision analysis final output (predicted results). Breaking down the complexity of a lawsuit through these steps allows for the application of deliberative judgment to each component part.

Let’s expand this step by step process for a moment:

Step One: Measure Risks of Liability

This first stage of risk analysis breaks down the legal claim into its component parts and identifies areas of uncertainty in the applicable law, evidence, or a combination of these elements. Questions to be asked are: what are the elements of each cause of action? Is the applicable law settled or uncertain, and if the latter, are there risks surrounding the legal test to be applied? Once the elements are fully outlined, strengths and weaknesses need to be examined from an evidentiary perspective. What evidence is available (or anticipated) to prove each element of the cause of action? Once the elements of the claim and risk factors (legal and evidentiary) are identified, a numerical probability of success is assigned to each uncertainty. Independent variables should be aggregated, by multiplying the probabilities. This will produce an overall assessment of the probable finding of liability.

The assignment of a numerical probability must necessarily consider the questions of defenses: Are there any dispositive defense or procedural applications available that may summarily bring the action to an end? What are the elements of each defense? Is the applicable law settled or uncertain? What evidence is available to prove each element of the defense? What is the probability of the elements of the defense being proven?

To avoid various cognitive biases to hijack analysis, keep asking yourself one simple question: “**Assume that the jury (or judge) just returned an adverse verdict. How did they arrive at that conclusion?**”

Step Two: Project Damages.

This step focuses on assessment of remedies. What remedies are available given the causes of action or defenses available? What are the estimated damages, determined by reference to each itemized damage and the probability of proving that claimed damage? Decision trees are graphic models that are especially helpful in working through projections such as a weighted average across a range of high, medium, and low damage assessments.

Step Three: Aggregate- multiply steps 1 and step 2

This step focuses aggregates projections for liability and damages. The overall probability under liability and the overall projection of damages is now multiplied for a realistic reference point on expected legal outcome.

Identifying risk factors requires a deep understanding of the liability and evidence issues and how those issues inter-relate. These factors are uniquely within a lawyer's realm of expertise. Once these uncertainties are identified, assigning numerical probabilities is essential -but while inherently unstable in a litigation setting, the compounding of risks to capture their cumulative impact is a reality check that quantifies and weighs the lawyer's actual characterization of risk. There is nothing to economically analyze if the legal parameters are not set first.

Identifying a range of damages is another matter. A more nuanced outcome can be achieved by utilizing a High/Medium/Low range with a resulting weighted average. In this way, it may be possible to incorporate a range of outcomes into a single prediction that does not dilute the overall analysis. A weighted average consolidates different outcomes into a reasonable number. The challenge here is to select damage numbers that represent an educated decision based on observations and outcomes in other cases or based on the evidence in the case under analysis.

A SPECTRUM OF TOOLS TO SUPPORT LITIGATION RISK ASSESSMENT

1) Decision Trees discussed above.

Software is now available to help with the simple task of drawing a decision tree diagram. SmartDraw (www.smartdraw.com) , Legal Design Lab (www.legaltechdesign.com) Klein Dispute Resolution Services "Create a Decision Tree" (www.klenmediation.com) – Note that this tool reduces the liability assessment to one overall prediction, and the damage assessment to a range with three possible outcomes. The result that is produced is very basic but does allow the user to see a simple risk analysis composition. **PP 1**

1a) Tree Age Pro2 (www.treeage.com) This product is reportedly self-help software, offering the ability of individuals to model a case, analyze the model, and calculate the expected value of the case through identifying the possible outcomes. Caution: It has been reported that most files cannot bear the cost of a full TreeAge assessment.

1(b) Litigation Risk Analysis, Inc. (US) (www.litigationrisk.com) Marc Victor was a pioneer in applying decision analysis to legal problems. His site contains templates on a few selected case types. He offers consulting services to legal professional clients using decision tree analysis. **PP 2**

1(c) Win Before Trial and the Mediator's Assistant (US) (www.winbeforetrial.com) The author, Mike Palmer, is credited with developing a case valuation methodology including proprietary Excel-based software, the Dual View Case Assessments to calculate the net present expected value of a case from the perspective of both side of the file. One feature of this product encourages counsel to consider and value risks such a reputational risk, or value costs such as emotional strain or psychological time having to pursue litigation. Unlike other traditional decision analysis, Palmer introduces a range of probability calculations into his liability assessments as well as a weighted average into his damage assessments.

2) Data-Mining With or Without Probability Analysis

2(a) Case Evaluator on Westlaw (US) and LexisNexis Verdict and Settlement Analyzer (US)

Case Evaluator is a litigation management tool created by Thompson Reuters Westlaw for use in the USA. The tool makes use of legal databases in the US to generate reports which can be used to evaluate potential cases, analyze verdict trends, develop negotiation and settlement strategies, and obtain information about medical and other expert testimony in similar cases. This data also includes trends in Plaintiff verdicts, Defendant verdicts and settlements, as well as median, average, and maximum settlement amounts.

The Canadian version is named 'Litigation Quantum' but does not include settlement data and is reportedly functionally narrower than Case Evaluator

LexisNexis Verdict and Settlement Analyzer analyzes settlement and verdict data from over 1.2 million verdicts and settlements (according to product information) to identify trends, and assist in risk assessment, case valuation, and litigation planning.

Is only available in the US.

2(b) Lex Machina, Litigation Analytics (US) and Premonition. LexisNexus. Similar to Verdict & Settlement Analyzer, but its tools are built around PACER, EDIS, and OSPTO

2(c) Loom Analytics (Canada) A new entry into the data collection arena (2017) currently limited by the fact that there appears to be no publicly available data on either successful or rejected settlement offers. Last reported only available in Alberta, BC and Ontario.

2(d) Picture It Settled (www.pictureitsettled.com) is a predictive negotiation planning technology that focuses primarily on data and projections derived from settlement data. The software is designed to help the user plan a monetary negotiating strategy that induces cooperative responses from the other side. It provides three tools for users: probabilistic evaluation of cases using predictions of high, medium, low, and zero outcomes weighted by probability and anticipated costs, and two tools that use data from (reportedly) 20,000 negotiations to assist negotiators in designing and determining starting numbers, quantifying strategic moves over given minute time frames that would encourage the negotiations to continue to move towards a target settlement number. The settlement data is somewhat dependent on anonymous case settlement information.

2(e) Internal Risk Analysis Models. Some organizations design their own internal risk assessment models usually relying on internally collected data – this includes the use of confidential settlement data not available outside that organization. These organizations are the “repeat litigation players” such as insurance companies and more recently, the litigation-funding businesses. These models rely on “Big Data”. In the area of personal injury claims well over 70% are catalogued and economically evaluated through the medical diagnostic coding (billing) system called ICD 10 and Procedure Terminology Codes called CPT-4.

These programs are designed to bring uniformity to claim payout, cost control, and hence determination of premium charged for insuring risk.

Examples:

ALLSTATE uses a program called COLOSSUS

STATE FARM uses a program called TEACH

Other popular programs (reportedly over 84) use INJURY IQ, DECISION POINT, CLAIMS OUTCOME ADVISOR, INJURY CLAIMS EVALUATION, MYND, AIM & ICE.

This article is based in large part and as a digest of the extensive research conducted by Michaela Keet and Heather Heavin reported in www.indisputably.org/?p=13030.

It is also based on the prior research for a lecture given by this author to the Florida Academy of Professional Mediators January 9, 2016 “Effectively Engaging Mediation Participants Without Stepping Over the Line” , in person interviews with Marc Victor, (www.litigationrisk.com) ,and actual use of “Picture It Settled” (www.pictureitsettled.com) and LexisNexis “Verdicts and Settlements”