How to Reduce Litigation Costs in 2015 –
Applying Quantitative Analytics to the Litigation Process

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Panel

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Cost of Litigation

Comparison to *Fortune* 500 Profit and CEO Compensation

(*in billions*)
The Problem

• At the initiation of any dispute, you and your opponent will rarely, if ever, agree on the value of the case.
• If the disagreement is solely the result of posturing, a well-trained mediator (or trial judge who is committed to investing the time early in the dispute) may be able to get a deal done.
• Most likely, there is genuine disagreement as to what the case is worth, and the parties will have to wait until the record is more fully developed closer to verdict to attempt to resolve their dispute.
• Unfortunately, in most circumstances, that results in the parties having to incur significant legal fees.
So What Tools Do You Have Available to Manage the Costs and Results?

- Budgeting
- Early Case Assessment
- Decision Trees
- Mock Juries
- Shadow Juries
Budgeting
Creating and Maintaining Realistic Litigation Budgets

• The practice of law is NOT inherently and infinitely variable;
• Be involved in the staffing decisions that are the foundation of the budget;
• Don’t just ask for the bottom line number – demand to see and understand the backup that goes into creating the estimate of fees;
• Compare the fee estimate with similar historical matters – either internally or externally;
• Understand who was involved in preparing the budget;
• This is the time to consider alternative fee arrangements.
Early Case Assessment
Early Case Assessment

A disciplined, proactive case management approach designed to assemble, within 60-90 days: (i) sufficient facts, (ii) law and (iii) other information relevant to dispute. All of this information is then used to evaluate the matter, develop a litigation strategy and formulate a settlement strategy, if appropriate.
Decision Tree Analysis
What Is Decision Tree Analysis ... and Why Should It Be Used to Value Lawsuits?

• It is the analytical discipline universally used to make better decisions in the face of uncertainty and complexity
• It has been taught for decades in business and engineering schools ... and even in medical schools so doctors will make better life-and-death decisions
  – typing “medical decision analysis” into Google results in over 10 million hits
• It is relied on because it has been repeatedly shown that even very smart and/or very intuitive people are not great at “juggling” multiple uncertainties to reach sound conclusions
• In litigation, it allows for earlier and better valuation of cases ... and does so in a way that can be more persuasive to colleagues, clients, mediators and opponents — thus increasing the odds of earlier resolution and lower costs
The defendant lost $10,000,000 at trial and is now appealing the verdict. It argues that the trial judge committed reversible error (1) in denying its motion for summary judgment on the statute of limitations, and (2) in allowing into evidence statements from a non-binding Letter of Intent.

- If the Court of Appeals reverses on the statute of limitations, which you assess as a 40% chance, judgment would be entered for defendant.
- Even if the appellate court affirms on the limitations issue, you feel there is a 25% chance it would reverse on the evidentiary issue and send the case back for a new trial (though a 75% chance it would affirm the $10,000,000 verdict).
- On retrial, you feel there is an 80% chance plaintiff will again prevail.
- If plaintiff does, you feel a jury is twice as likely to award $5,000,000 on retrial as $2,500,000. (Assume these are the only two possibilities.)

Assuming the above assessments and ignoring (for now) costs ...

WHAT WOULD BE A REASONABLE SETTLEMENT?
Decision Trees Clearly Display All Important Issues, Plus Interrelationships & Consequences

- Court of Appeals AFFIRMS trial court's denial of motion re: statute of limitations
- Court of Appeals AFFIRMS trial court's admission of Letter of Intent statements; verdict affirmed
- New trial jury finds for PLAINTIFF
- New trial jury awards $5,000,000
- New trial jury awards $2,500,000
- Defendant Owes Plaintiff

CONTINUE TO FIGHT

SETTLE FOR ???
Principles for Creating a **Good** Litigation Tree

- **ORDER OF ISSUES**: the issues the judge and jury are likely to address are laid out, from left-to-right, in the order in which counsel feels they will be decided
  - guided by the law, prior appellate decisions, standard jury instructions, the likely verdict form, etc.
  - but also by the experience of counsel ... since jurors (and even judges) don’t necessarily decide issues in the order they “should”

- **DEPTH OF ISSUES**: the issues are either broken down or aggregated in the way counsel anticipates the judge or jury will approach them — *i.e.*, the most realistic assessment of case value comes from creating a decision tree that mirrors the way in which the judge and jury will analyze the issues
  - if the judge/jury will separately consider each of two sub-issues (even though they might be interrelated), then these two sub-issues should be broken out separately in the decision tree and assessed separately
  - but if the judge/jury will combine two sub-issues and only decide the overall question (even though in doing so they will give some thought to each of the sub-issues), then only the overall issue should be captured in the tree
There Is No Sound, Defensible, Way to Value a Case If Opinions Are Expressed Qualitatively

**CONTINUE TO FIGHT**

- Court of Appeals AFFIRMS trial court's denial of motion re: statute of limitations
  - reasonably likely

**SETTLE FOR ??**

- REVERSES; judgment entered for defendant
  - definite possibility

New trial jury
- awards $5,000,000
  - {2} $5,000,000
good shot
- finds for PLAINTIFF
  - {3} $2,500,000
certainly could
  - {4} $0

Defendant Owes Plaintiff

- Court of Appeals AFFIRMS trial court's admission of Letter of Intent statements; verdict affirmed
  - in all likelihood
- REVERSES; remands for new trial
  - quite likely
  - fighting chance
- finds for DEFENDANT
  - {5} $0
Percentages Are Not Precise or Objective

• They are subjective ... based on what counsel’s experience, expertise, and gut feel suggest are realistic appraisals of how the judge and jury will react to the relevant legal precedents, the facts of the case, and the witnesses and documents that will tell each side’s story.

HOWEVER:

• They are a clearer way to communicate counsel’s degree of uncertainty.

AND WHEN COMBINED WITH A DECISION TREE:

• They allow sound conclusions to be drawn about case value and settlement strategy ... ones that can also be more easily explained to others.
Calculating Case Value Uses Basic Probability Math

Probability-weighted average value ("Expected Value") = $5,000,000

(.45 × $10,000,000) + (.08 × $5,000,000) + (.04 × $2,500,000) + (.03 × $0) + (.40 × $0) = $4,500,000 + $400,000 + $100,000 + $0 + $0 = $5,000,000
It’s Now Easy to Do Cost-Benefit Analyses

Several different outcomes are possible, each with a different probability:

1. The Court of Appeals AFFIRMS the trial court’s admission of Letter of Intent statements; verdict affirmed. This outcome has a probability of 0.39. The probability-weighted value for this outcome is: 

   \[(0.39 \times 10,000,000) = 3,900,000\]

2. A new trial jury awards $5,000,000 with a probability of 0.11. The probability-weighted value for this outcome is: 

   \[(0.11 \times 5,000,000) = 550,000\]

3. A new trial jury finds for the plaintiff and awards $2,500,000 with a probability of 0.06. The probability-weighted value for this outcome is: 

   \[(0.06 \times 2,500,000) = 150,000\]

4. A new trial jury finds for the defendant with a probability of 0.04. The probability-weighted value for this outcome is: 

   \[(0.04 \times 0) = 0\]

5. A new trial jury finds for the defendant with a probability of 0.40. The probability-weighted value for this outcome is: 

   \[(0.40 \times 0) = 0\]

The total expected value is: 

\[3,900,000 + 550,000 + 150,000 + 0 + 0 = 4,600,000\]
The Use of Probability Arithmetic Is Long-Standing — Even in the Law

• Lawyers have always valued claims based on (i) the strength of their liability arguments and (ii) the magnitude of damages realistically at stake:
  – the stronger the *affirmative* case and the *larger* the likely verdict, the more plaintiff required — and the more defendant was prepared to pay — to settle
  – but the stronger the *defenses* and the *smaller* the expected verdict in the unlikely event plaintiff were to prevail, the less defendant would offer — and the less plaintiff pushed for — to settle

• However, the calculations were rarely explicitly — or carefully — done
And Note: Garbage-In, Garbage-Out Is a Problem Whether or Not Decision Tree Analysis Is Used

- Garbage-IN results when counsel
  - fails to identify the issues the judge and jury will consider, or
  - fails to properly define those issues, or
  - fails to appreciate the evidence and arguments the trier will give weight to in deciding those issues, or
  - fails to realistically assess the chance of success on any of the issues

- Garbage-OUT results when counsel
  - fails to draw sound conclusions from their otherwise proper identification and realistic assessment of the various litigation risks

- HOWEVER, attorneys using decision tree analysis have found that:
  - the process of creating a good decision tree, combined with a balanced discussion of the evidence and arguments the trier might consider in deciding each issue, greatly reduces the likelihood of Garbage-IN
  - the correct use of basic probability arithmetic then eliminates the likelihood of Garbage-OUT
One Respected Jurist Has Found a Class Action Settlement Deficient for Lack of Such Analysis

In Reynolds v. Beneficial National Bank, 288 F.3d 277, 284-285 (7th Cir. 2002), Chief Judge Posner rejected a trial court’s approval of a $25 million class action settlement, explaining:

... the judge should have made a greater effort (he made none) to quantify the net expected value of continued litigation to the class, since a settlement for less than that value would not be adequate. Determining that value would require estimating the range of possible outcomes and ascribing a probability to each point on the range.

... our point is only that the judge made no effort to translate his intuitions about the strength of the plaintiffs’ case, the range of possible damages, and the likely duration of the litigation if it was not settled now into numbers that would permit a responsible evaluation of the reasonableness of the settlement.
Mock Juries
Types of Mock Jury Sessions

- Full scale;
- Limited to damages or other discrete issues;
- Focus groups and message testing;
- Online mock juries
Potential Metrics from Mock Jury Sessions

- Observation of deliberations of multiple panels;
- Selective theme testing on multiple panels;
- Dial Testing;
- Post-presentation questionnaires;
- Focus groups and message testing;
- Online mock juries;
- Whatever the feedback is, use it to fine tune your decision tree!
Shadow Juries
Shadow Juries

• Comprised of three to twelve individuals pulled from the potential jury pool who observe the actual trial;
• Allows the trial team to gauge how the trial is being viewed by the actual jurors in real time;
• Provide feedback on trial attorneys, witnesses, exhibits and the argument;
• The key is to have someone, separate from the trial team, to assemble the feedback, digest it, and reduce it to actionable items for the trial team;
• Provides a feedback loop for your decision tree!
Questions or Comments?