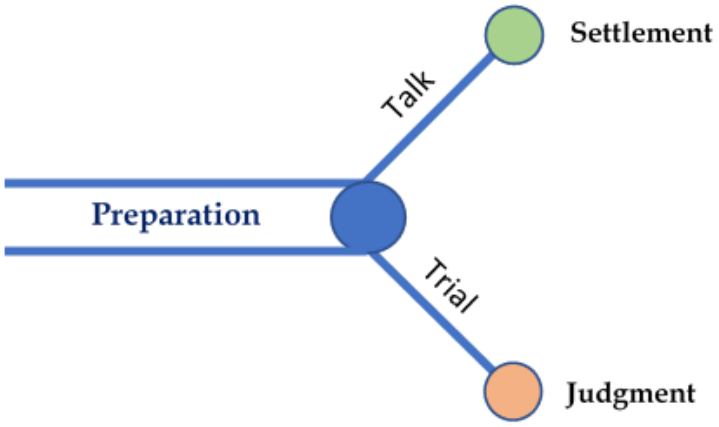
WIN BEFORE TRIAL:

What Lawyers and Clients Must

Know to Get ~~Good~~ *the Best* Outcomes Possible

by Michael Palmer



"The best strategists win without fighting."

Sun Tzu, *The Art of War*

Legal Access Press
P.O. Box 7
Middlebury Vermont 05753

ISBN
ISBN

Printed in the United States of America

TABLE OF CONTENTS

SECTION IV: PARTLY CLOUDY WITH SCATTERED SHOWERS: MEASURE YOUR BATNA (AND THEIRS) BY ESTIMATING THE FINANCIAL VALUES OF THE CASE

PREFACE

The object of trial is to defeat the other side. I win; you lose.

The object of settlement is to win as well. But here "winning" means something different. It means negotiating an outcome that is *better* than the likely net result of a trial.

In settlement, to win is to satisfy your client's interests—her wants and needs, what will make her happy—better than the likely outcome of trial. Winning a settlement is not about defeating the other side. In fact, if you set out to make the other side lose, you will likely lose too. In such a setting, the other side can win as well. That is, they *too* can do better than the likely net result of a trial for them. This magical aspect of settlement is, in fact, why most cases—over 95%--settle.

But how can we know that the proposed settlement is better for our client than continuing with litigation through a final executed judgment? What are the benchmarks?

Two things are the measure of whether you've won the settlement: 1) Your client's total package of interests and 2) the financial value for your client of an executed final judgment. You can't know whether the proposed settlement is a good one for your client unless you know how well the proposed settlement satisfies her interests compared with continuing litigation through an executed judgment.

Continued litigation is usually your best alternative to settlement, what negotiators call your BATNA (Best Alternative to a Negotiated Agreement). But this

BATNA is of little use in assessing whether to settle and on what terms if you do not know what it is worth—i.e., how well it is likely to satisfy your client's package of interests. Occasionally, lawsuits fulfill non-monetary interests such as the need for vindication or the desire to set (or overturn) a legal precedent. But most lawsuits are about money. And even most non-monetary interests can be translated into financial terms. In the method presented in this book, the object is to *measure* each side's BATNA in dollars and cents. Hence, we speak of the net present financial values of the lawsuit.

When we settle cases, neither side knows the outcome of continued litigation. We must wrestle with uncertainty. But we can do better than just a hunch or wild guess—especially in complex cases involving claims for large sums.

It is possible to prevail at trial and lose at the same time. Costs are always a factor in the win/lose calculus. That is why I use the phrase *net* financial value throughout this book. It is only after plaintiffs subtract the costs from the executed final judgment and defendants add them that either can know what the true value of the lawsuit is for them.

This book is an effort to help all litigation professionals and their clients get a better grasp of the two key elements for assessing proposed settlements: The parties' Interests and their respective BATNA's, the net present financial values of a trial. Having understood those elements from both sides' perspectives, the negotiator can then calculate the Zone of Possible Agreement as a basis for reaching a settlement that leaves each side better off than with the alternative of trial.

Oh, one more thing. If you learn the strategic approach to settlement presented here, your clients will thank you, and you and your firm will be more competitive and, not insignificantly, more profitable.

SUMMARY OF THE BOOK'S ARGUMENT

To get the best settlements possible,

1. Identify and prioritize the parties' respective packages of interests—the costs and benefits to them of the litigation and its potential outcomes.

2. Estimate the net present financial value of the lawsuit for each party.

3. Determine the target settlement terms and walkaway minimum for your client using her tolerance for risk in light of her package of interests and the net present financial value of the case.

4. Create a settlement plan in the context of an overall litigation plan.

5. Make good decisions and avoid bad ones.

6. Negotiate well.

Parts 1 and 2 (interests and value) are the foundation on which the settlement objectives are determined.

Part 3 and 4 concern the settlement strategy.

Parts 5 and 6 speak to the execution of the plan.

This book addresses parts 1-4. Part 5 will be addressed in Volume 2. Part 6 (effective negotiation) has been covered in the problem-solving negotiation literature that is an outgrowth of the theory articulated in Roger Fisher, William Ury, and Bruce Patton, *Getting To Yes: Negotiating Agreement Without Giving In.*

SECTION I:

“HOUSTON, WE’VE GOT A PROBLEM . . .

CHAPTER 1:

WE'RE NOT GETTING THE SETTLEMENTS OUR CLIENTS DESERVE

On January 30, 1986, Bill Cheeseman and two of his partners, representing W.R. Grace, Jerry Facher, lead counsel for Beatrice Foods, and Jan Schlichtmann and the rest of the plaintiffs' legal team gather at the Wendell Phillips Room of the Four Seasons in Boston to negotiate a settlement of one of the largest mass tort cases in the history of Massachusetts. Cheeseman had called the meeting. He wanted Schlichtmann to give him a number. 38 minutes later, Facher walks out, quickly followed by Cheeseman and his group. The case goes to trial. The result for the plaintiffs is not good. Unkind folks have called this Schlichtman's blunder. But Facher's and Cheeseman's behavior unnecessarily put their clients at risk as well. They rolled the dice—with their clients' money.[1]

In 1993, five-year old Valerie Lakey yells out for help when she becomes trapped on the drain of a wading pool in Wake County, North Carolina. But no one can rescue her. The powerful suction of the water recirculation system pulls out most of her intestines. For the rest of her life, Valerie will be hooked up to feeding tubes for 12 hours each night and permanently tied to colostomy bags. Her medical care, including as many as a dozen surgeries and a long line of specialists, will cost millions of dollars, not to mention the loss of any chance for a normal life.

[1] This scene is described at greater length in Jonathan Harr, *A Civil Action 277-280* (New York: Vintage, 1995).

John Edwards and David Kirby represent Valerie and her parents in the suit against the owner-operator of the swimming pool and other defendants, including Sta-Rite Industries, the manufacturer of the drain cover. Shortly before trial, the plaintiffs settle with all the defendants except Sta-Rite for slightly more than $5 million. The plaintiffs demand $4.7 million from Sta-Rite. Notwithstanding insurance coverage of $22.5 million, Sta-Rite offers $100,000. The case goes to trial. Three weeks later, the jury returns a $25 million verdict on compensatory damages alone. At this point, Sta-Rite agrees to settle for the jury verdict.

Anecdotes of this nature enliven the lore of the law. Experienced courtroom lawyers tell similar stories in every jurisdiction. But are such settlement blunders representative? Perhaps they are exceptions to our normal practice. Perhaps we almost always get it right when settling lawsuits. Alas, that appears not to be true.

The evidence is mounting that both plaintiffs and defendants routinely make significant mistakes when negotiating settlements. We reject settlement proposals that would have satisfied our client's interests better than going to trial. And we accept much less (or pay more) than the likely result of trial justifies.

A recently published study on settlement errors concludes that, in **61**% of the cases in which plaintiffs rejected a settlement offer and went to trial, the verdict was less than the offer.[2] Defendants were hit with a higher verdict in **24**% of the cases in which

[2] Randall L. Kiser, Martin A. Asher, and Blakeley B. McShane, "Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations," 5 *Journal of Empirical Legal Studies* 551, 566-567 (Issue 3, September 2008)

they refused to pay the plaintiff's final demand. By how much were the parties off the mark? On average, the plaintiffs received verdicts that were $43,000 below the defendant's final offer. But the defendants ended up paying an average of $1,140,000 more than the settlement demand they turned down.[3] And those numbers do not include the substantial legal fees and out-of-pocket costs that both sides incurred by going to trial.

These findings should trouble anyone routinely involved in litigation. Implicit is the conclusion that a substantial number of cases are settled at numbers that are either too high or too low. For example, in a breach of fiduciary duty case, the plaintiff demanded $300,000 and the defendant offered $35,000. The eventual verdict was $3,300,000. Had the defendant accepted and paid the plaintiff's settlement demand, plaintiff would have walked away with substantially less than the true value of the case, even after subtracting additional fees and the time value of money.

As I argue in other parts of this book, there are often good reasons for accepting less or paying more than the *financial* value of a lawsuit, reasons generally arising out of the interests of one or both of the parties. But when making such tradeoffs, we should know that is what we are doing. In too many cases, we do not have that knowledge.

[3] *Id.* Other studies have shown essentially the same results. *See* Samuel Gross & Kent Syverud, "Don't Try: Civil Jury Verdicts in a System Geared To Settlement," 44 *UCLA L. Rev.* 51 (1996); Jeffrey Rachlinski, "Gains, Losses and the Psychology of Litigation," 70 S. Cal. L. Rev. 113 (1996); Samuel Gross & Kent Syverud, "Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial," 90 Michigan L. Rev. 319 (1991).

CHAPTER 2:

WHY WE FAIL TO GET OPTIMAL SETTLEMENTS

Many are the reasons why cases fail to settle at optimal values for both sides. They include poor planning, poor understanding of a case by one or both parties, poor negotiating skills, bad timing, lack of an appropriate settlement strategy, getting caught in decision traps, ego contests, and more. As important as such factors can be, making laundry lists of settlement do's and don'ts is of little help. Such an approach leaves us feeling lost in a dense stand of trees, unable to find a path to the result we need.

The core reasons for our failure to reach the best possible settlements are five: (1) insufficient understanding of and attention to the parties' respective interests, (2) inability to accurately estimate the present financial values of the lawsuit (the parties' respective BATNA's), (3) failure to develop creative options that address the parties' interests in light of the likely outcome of trial, (4) negotiating poorly, and (5) falling victim to bad decision making. Some might add that the failure to develop an overall settlement strategy is the fundamental failing that exacerbates these particular shortcomings. I would not disagree.

This book addresses the first two topics: Interests and Financial Value. Of those two, the most time and effort is devoted to the second, financial value, because it is by far the more challenging—and rewarding—to get right. If litigation professionals and their clients did nothing else but get a more accurate reading of the present financial

value of the case, they would dramatically improve their ability to obtain good settlements.

Understanding Interests

Roger Fisher and William Ury launched a revolution in negotiation theory and practice with their 1981 book, *Getting To Yes: Negotiating Agreement Without Giving In.*[4] Although it is rich in other insights about negotiation, the book's key message is the proposition that we will get better results when we seek to satisfy interests rather than to assert positions. This *Getting To Yes* approach is often called interest-based bargaining. Its key method is to ask why we want whatever we say we want, looking behind the position to the need the position seeks to satisfy. Having discovered the underlying interests, we can then look for different ways (options) of satisfying them.

As valuable as the Fisher/Ury *Getting To Yes* method of negotiation is, however, lawyers and other litigation professionals have been reluctant to adopt it as a guide to settlement negotiations for two reasons: First, most trials culminate in damage awards (or defendants' verdicts). They are about money. As the quintessential fungible commodity, money satisfies most (though not all) interests. When negotiating about money, which is the case with most settlement negotiations, it is particularly challenging to find underlying interests that could be satisfied without paying money. Or so it seems.

[4] This book was an outgrowth of the Harvard Program on Negotiation, which has spawned dozens of related books, hundreds of scholarly articles, numerous workshops, and several nonprofit and commercial negotiation firms.

Second, we have an inadequate understanding of the term "interest" and what it means in any given lawsuit. If we inquire about our client's interests at all, we likely think of them superficially, i.e., in terms of what is most obvious. A client rendered a paraplegic by defectively designed machinery needs medical care and personal assistance—something money can buy. Since that interest readily translates into money, we may not give much attention to the client's need for vindication or acknowledgement of the wrong she has suffered.

Our inadequate understanding of the term "interest" also makes it more difficult for us to see that lawsuits are often about more than money—even when money is the only thing a jury can award. A deeper and more nuanced understanding should lead to greater facility in fashioning settlements that satisfy the interests of both parties. Section III of this book is an effort to improve that understanding.

Present Net Financial Values

If both sides had a crystal ball with which they could see the precise outcome of a lawsuit, a rational settlement would be easy and optimal. (Because parties do not always act rationally, such settlements would not, alas, be universal.)

Put differently, to get optimal settlements, we should do everything we can to find out what the present net financial value of a lawsuit is. This is not the same as estimating the final executed judgment. Rather, it is about estimating the present value of the final executed judgment *if there is a final executed judgment*.

It is common for plaintiffs and defendants alike to use a projected jury verdict as the sole basis for settlement negotiations. Plaintiffs project their dream verdict and demand that defendants pay that to settle the case. Defendants likewise base their offers on what they hope the verdict will be. It is seldom that either side explicitly factors in contingencies that could prevent the jury from ever hearing the case, various factors that could increase or lower that eventual verdict if there is one, the costs of getting a judgment, and the problem of actually collecting a final judgment. In my experience, lawyers rarely explicitly discount a verdict expected 36 months from now to its present value.

Yet to get an accurate reading of the net present financial values of a lawsuit for plaintiff and defendant (they are not the same), it is necessary to take all of these factors into consideration. It is not enough simply to assume that they will have some impact on the ultimate value of the case. We need a method with which to make them explicit in our analysis. Section IV presents one such method.

Settlement Values

The net present financial values of a case are not necessarily its settlement values. The settlement value of a case for the plaintiff is a function of the interplay between her interests—what she wants and needs—and what can be achieved through a trial (generally its financial value for her). The same is true for defendant. A plaintiff's desire for a quick settlement because she needs to save her house from foreclosure affects her willingness and ability to hold out for a settlement that closely approximates the best

estimate of its financial value from her perspective. A defendant's need to avoid negative publicity even from a case totally without merit may mean that the settlement value for him far exceeds what it would cost in dollars to try and eventually win the suit. Every lawyer who has ever been involved in the settlement of more than a few cases knows this difference. Defendants often refer to the nuisance value of a lawsuit, i.e., what they are willing to pay to make the case go away even though they deem it to have no merit whatsoever.

It is evident that the settlement value for plaintiff will likely be different from the settlement value for defendant (just as the financial values for each party are different). Indeed, it is this difference that makes settlements between rational actors not only possible but probable.

Because good settlements are a function of the interplay between the client's interests (what the client wants) and the net present financial value (a rational projection of what the client should be able to get), it is critical to know both the interests and the financial value for purposes of assessing the settlement value. Assessing the settlement value is a process of determining what the client is willing to give up (or pay) in order to satisfy key interests that may go unmet by focusing solely on the financial value of the case. As noted, most clients and lawyers implicitly make such adjustments during settlement negotiations. They will do a better job of obtaining an optimal settlement for their clients, if they make such considerations explicit and address them methodically.

SECTION II:

BEGIN AT THE END™

CHAPTER 3:

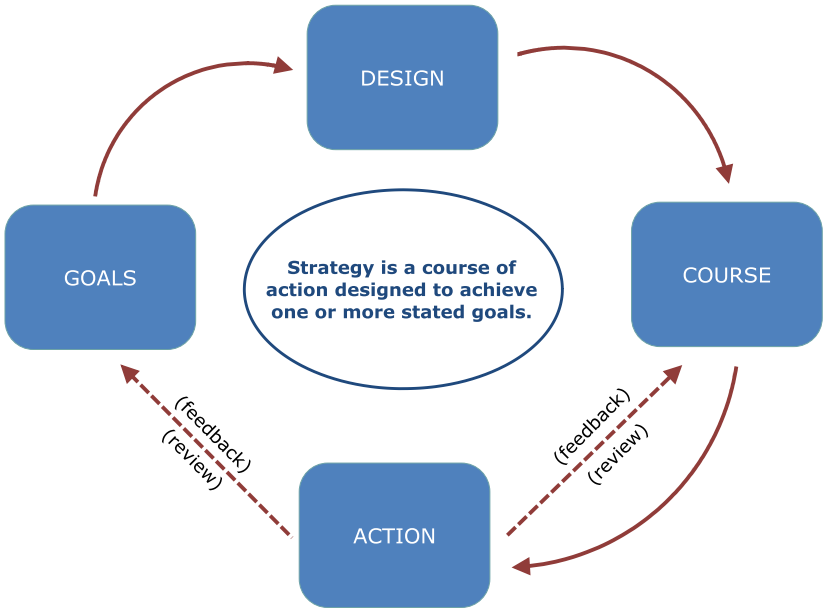
DISPUTE RESOLUTION STRATEGY: AN OVERVIEW

Strategic Thinking

A strategy is a course of action designed to achieve one or more stated goals.[5] To think strategically is to figure out one or more ways to reach a goal. All good strategies consist of four parts:

1. stated goal(s)
2. design
3. course
4. specific action

[5] Our word "strategy" comes ultimately from two Greek words, "στρατος/stratos (army) and "αγειν/agein" (to lead). From these two words, the Greeks coined "στρατηγός/strategos" (leader of an army, i.e. general) and "στρατηγια/strategia" (the office of command; a campaign; generalship skills). They built other words around these two roots as well. War was a big deal in ancient Greece.
While "strategy" is a vogue term in the business world, other than war itself, the field of litigation is probably closest to the circumstances that gave rise to classical strategic thinking, because litigation is not just about getting what the client wants. It is about getting what the client wants when an adversary is trying to prevent you from getting what the client wants. It is not by accident that many courtroom lawyers call litigation war, with only the faintest sense of analogy.
There are several excellent classic books on strategy, including Sun Tzu's *The Art of War* (also translated with the title of *The Art of Strategy*), the oldest known military treatise in the world, and Carl von Clausewitz, *Vom Kriege (On War)*, written after the Napoleonic wars and published posthumously in 1832. Nicolo Machiavelli's *The Prince* should not be ignored either. Another recent source of good strategic thinking in the adversarial context is the *Counterinsurgency Field Manual* written by Generals David H. Petraeus (Army) and James F. Amos (Marine Corps) (December 15, 2006).
Surprisingly few books or articles are available on litigation strategy as such, but the student of this subject should make sure to consult Frederick Whitmer, *Litigation is War* (Thomson West, 2007), which is heavily influenced by von Clausewitz.



Stated Goal(s)

Strategic thinking begins by saying where we want to end, what we want to accomplish. It is a stated goal, something put in words or pictures, spelled out. We are more likely to achieve goals that are expressed in writing than vague notions of where we want to go. We stand an even better chance if we add a picture or drawing to our plan. The better we articulate the contours and content of our goals and understand why they are important to us, the more likely we are to devise effective ways to achieve them.

Design

Strategic design is the opposite of happenstance. It is the expression of deliberation, vision. The design element shows the purpose in the plan. Design incorporates foresight. It is evidence that we have thought about how to achieve our goals. The design addresses the resources, costs, and consequences of taking one path to

reach our goal rather than another. The design also anticipates impediments, friction, and opposition. Design is the heart of strategic thinking.

Course

The course is the product of the design. It is the path, way, route, or set of things to do to get to a specific place. It is the layout of how we will get from here to there. Visual aids are useful here as well. The course is the overview, the general direction. It must be adaptable because unforeseen obstacles and problems will pop up as the participants move along the path.

Action

Implementation is essential. Designing a project that stays on the shelf is a waste of resources. Client interests must be discovered and understood. Depositions must be scheduled and taken. Motions must be drafted, filed, and argued. Documents must be requested, produced, and reviewed. And everything learned must be fed back into the strategic review to adjust intermediate goals, design, or course as necessary to best accomplish the ultimate goals.

You can have as many strategies as you have goals. They can be mundane, such as the strategy for getting a quart of milk for dinner tonight. They can have multiple sub-strategies, which is often the case in war, business, and, as it happens, litigation. They can involve one person or many. They may need to anticipate the

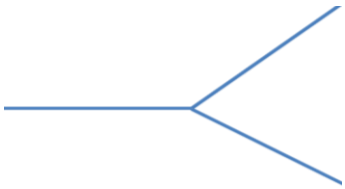
counterstrategies of opponents or competitors, which happens in chess, football, war, business, and, again, litigation.

We pursue many strategies without much conscious thought. Having picked up a quart of milk on numerous occasions, we don't need to think about where to go, how long it will take to get there, what the costs will be, or what, specifically, we must do. We just get in the car and go.

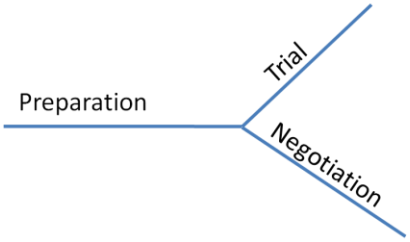
But the strategies needed to reach some goals—especially those involving opponents—require careful thought (design) as well as flexibility in implementation (course & action). Most lawsuits benefit from some degree of strategic thinking. Complex, high-stakes cases require it.

Litigation Strategy

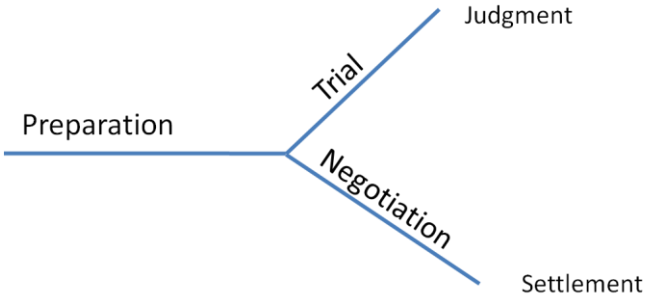
Done well, litigation is strategic. That is, it is a course of action designed to achieve stated client goals. As one big strategy, it looks like this:



The path to the fork is labeled "preparation." The fork paths are trial and negotiation.

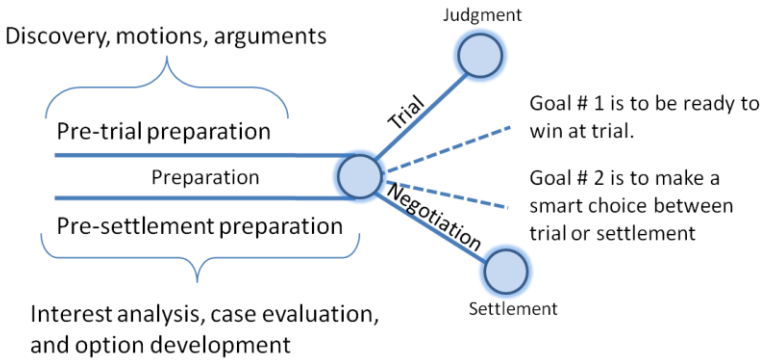


Thus, litigation breaks down into three major sub-strategies: preparation, trial, and negotiation. Each sub-strategy leads to a decision. At the end of preparation, we decide whether to negotiate a settlement or go to trial. Trial leads to a final judgment—a decision by a third party (judge or jury). Negotiation leads to a settlement—a decision that the parties control:



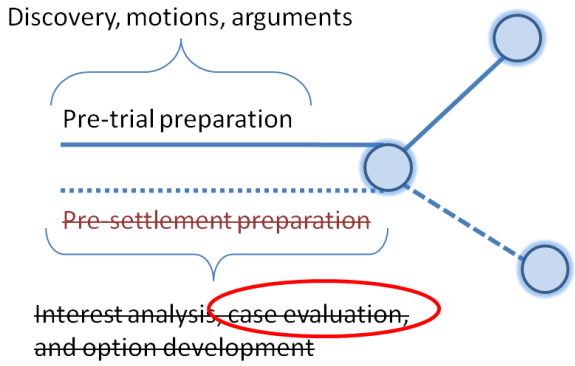
Litigation proceeds along the preparation path until the lawyer and client decide either to pursue settlement or proceed to trial. This is the pre-fork strategy. The decision at the fork, while not irrevocable, takes the case along one of two different paths. One leads to trial. The other to settlement.

Though interrelated, the trial and settlement strategies are separate. Each has a different goal, accompanied by a distinct set of actions that lead to that goal.



Every litigator is taught how to handle the pre-trial preparation phase of a lawsuit. This is where we spend our mental energy and the lion's share of the money. But we are not taught how to take care of the pre-settlement preparation, which should be running on a parallel track. We don't spend much time or resources exploring the parties' respective interests, estimating the financial value of the case, or developing options for settlement.

In short, settlement preparation is the stepchild of litigation strategy. And case valuation is one of its most challenging—and neglected—aspects.

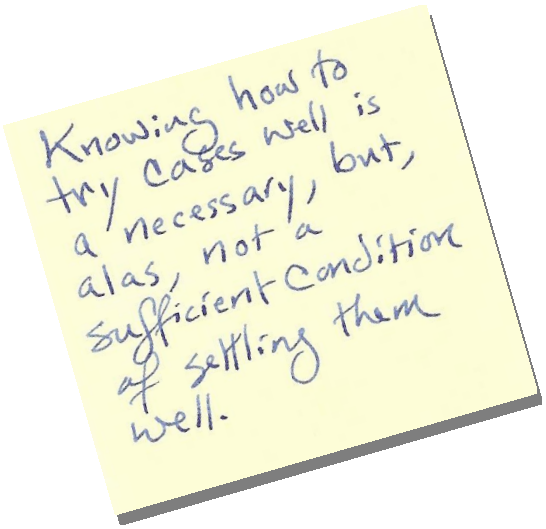


But we should spend time and resources preparing to make the settlement decision. Why? Because over 95% of all civil cases settle before verdict. And optimal settlements do not occur by accident. They are the result of good strategies.

Litigators, corporate clients, and mediators have been discussing the notion of Early Case Assessment in recent years. Much of what is subsumed under this title, however, amounts to little more than *Affective* Case Assessment, the evaluation of a case based on gut feel, emotional factors, intuition, and what we would like the outcome to be.

There is a role for affect—intuition, emotion, hunch, instinct—in litigation strategy. But we err when we allow our subconscious processes to be the only factors in case-related decision making. We need to use the analysis of evidence and data to check and balance what our gut is telling us.

In other words, to get Effective Case Assessment™ we need both Affective and Analytical Case Assessment.



CHAPTER 4:

THE SIX BASIC QUESTIONS OF STRATEGIC THINKING

All strategic thinking can be captured with six basic questions:

1. What do we want/need? (Mission)
2. What must we do to get it? (Means)
3. What constraints impinge on our ability to get it? (Limitations)
4. What will it cost to get it? (Costs)
5. What are the likely consequences of each alternative course of action? (Consequences)
6. When should we take which steps? (Timing)

These six questions can be labeled the (1) mission, (2) means, (3) limitations, (4) cost, (5) consequences, and (6) timing questions. In litigation, the mission is a function of the client's interests and the constraints imposed by the answers to the other four questions. The available means, the state of the law, the actions of adversaries, the costs, and the available time all shape what the final goals of the litigation can be realistically.

Mission

The mission we undertake and the goals we seek to reach are an expression of the client's interests. The client wants or needs to accomplish one or more specific ends. Those goals may be to obtain money, a court ruling on the meaning of a contract, the enforcement of a patent, the elimination of a competitor, the recovery of damages, the

clarification of rights, and more. The client may wish to prevent an adversary from getting what she wants.

It pays to spend time carefully considering the client's interests and the goals that are derived from them. Failure to do this work impoverishes settlement preparation as litigation strategy goes on autopilot, being little more than the usual discovery, motions, witness preparation, and the like.

Means

Clients have a variety of means with which to satisfy their interests. They may be ethical, unethical, legal, illegal, direct, indirect, confrontational, cooperative, costly, cheap, smart, dumb, coercive, persuasive, effective, or ineffective—and various shades of gray in between. In the litigation context, all such means have been employed with mixed results.

The lawyer has many tools and techniques available with which to pursue the satisfaction of the client's interests. She may not employ unethical or illegal tactics. But otherwise, if the client approves, she is free to spend money with abandon, make dumb moves, try to bludgeon the other side into submission, or do whatever else she thinks will work.

An optimal strategy, however, is one that is designed to achieve the client's goals as quickly, inexpensively, and completely as possible. Discovery, motions, and other activities that make up the trial preparation leg of litigation strategy are often a necessary part of the means for satisfying the client's interests. But the lawyer should

keep in mind that the object of a trial is to win, i.e., to defeat the other side. How well achieving that end meets the client's needs is another matter.

The means for reaching the client's goals almost always include negotiation in an attempt to reach an agreement that resolves the litigation. Negotiation employs cooperation and persuasion in ways that trial preparation and trial do not. To be a complete courtroom lawyer necessarily requires good negotiation and decision-making skills. It also requires having a deep and detailed understanding of the financial value of the case.

Limitations

No litigation strategy is free of constraints. Time, money, available professionals, their skills, the state of the law, the challenges of locating and assessing the available evidence, the demographics of jurors in our jurisdiction, the suitability of key witnesses, and, most significantly, the actions of our adversary—all impinge on our ability to help clients reach their goals.

In designing a course of action to satisfy our client's interests, we must, therefore, make ourselves aware of the limitations under which we are working. We must also consider which goals are realistic given those limitations. And we must determine what impact those limitations (and others we may not yet know about) will have on our ability to achieve those goals.

All courtroom lawyers know the constraints that the law and the facts place on what plaintiffs realistically can hope for and defendants must accept. In some cases, our

strategies may include efforts to obtain a change in the law. Or special effort may be required to find the expert witness who can debunk the plaintiff's case. The client's needs, resources, and risk tolerance all influence what she can get.

Juror demographics may limit recovery potential in some jurisdictions. This may dictate forum shopping as part of either side's strategy.

After the law and facts, however, the activities of opposing counsel are likely to pose the greatest hindrance on getting what your client wants. A plaintiff wants a large jury award. The defendant wants the jury to rule that there was no liability at all. Each is working to prevent the other from getting what it wants. A strategy that does not anticipate and preemptively respond to the other side's counterstrategy is not even half a strategy.

This is true for both pre-trial preparation and the trial but also for pre-settlement and settlement negotiations. That settlement requires cooperation does not mean that your opponent will be cooperative in all aspects of negotiation. She may be willing to give you something you want if it costs her little and she gets something meaningful in return. Jointly expanding the pie requires cooperation. But when dividing the pie, each side is likely to go into competitive mode. A good settlement strategy will foresee where the other side's interests lead it to resist your efforts or to impose barriers to agreement.

Time and financial resource limitations also shape litigation strategies. Pressure to settle on the courthouse steps or before the jury comes back severely restricts what is

possible. It makes sense, therefore, to anticipate the impact of the client's financial resources or time constraints when devising a settlement strategy.

Costs

The cost of getting what the client wants should not outweigh the benefits. Whether (and when) to pursue settlement will, to a great extent, be a function of cost/benefit analysis.

Costs come in various forms. Money is obvious. But you should also consider lost opportunity costs, the impact on emotional well being and happiness (hedonic costs), reputation issues, potential damage to a corporate brand or good will, the indirect costs of spending time on the lawsuit, and the costs of damaged business relationships.

A comprehensive litigation strategy will reflect careful consideration of the various costs associated with one or another potential course of action. The client's chosen course should be the one most likely to satisfy the most important of her interests with the least cost possible.

Consequences

Every possible course of action has potential unintended consequences.

Filing a lawsuit will likely elicit an answer with a laundry list of affirmative defenses. But it may also bring forth a counterclaim that costs the plaintiff more than

any possible recovery could offset. (This is why malpractice carriers advise against suing clients to collect fees.)

Much of litigation seems to prove Newton's Third Law of Motion: We file a motion. They file a brief in opposition. They pose interrogatories. We stonewall. We ask a leading question. They object. They want a prospective juror seated. We move to exclude for cause. The ping pong game is almost boringly predictable.

But, as the balls bounce back and forth, other things may be happening as well. And they may go unnoticed until their negative effects on our client's interests can no longer be changed. Intemperate remarks made in the heat of a discovery dispute may close the door on a settlement opportunity. The decision to rebuff a settlement proposal may leave a fierce opponent in the case who causes damage far exceeding a potential recovery.

In the settlement context, making an unreasonably high demand or low offer can have the effect of blowing the settlement negotiations altogether. This happens in countless negotiations and mediations across the country every year. Keeping all our cards close to the vest in a mediation may have the unintended consequence of convincing the other side that we have no cards to play.

Accordingly, when devising a strategy it makes sense—as good chess players do—to project the likely consequences of any tactic as far into the future as feasible. We will easily see what we intend to happen. But we may have more difficulty with the

unintended consequences.[6] It helps to work with others in a group to think through the possible consequences and to write them down before we commit.

Timing

"There is a tide in the affairs of men/ Which taken at the flood, leads on to fortune/ Omitted, all the voyage of their life/ Is bound in shallows and in miseries."[7] What is true of battles and life is true of lawsuits, too. Knowing when to make the right moves can be as important as deciding which moves to make.

But a settlement strategy is not entirely a unilateral affair. The other side must play too. It is not enough, as in battle or trial, to know when to press an advantage. We must also know when the opponent will be most favorably disposed to craft a settlement agreement that best serves our client's interests..

Litigators frequently tell themselves that making the first overture to settlement discussions is a sign of weakness. It signals, so they believe, that they think they will lose if the case goes to trial. Paradoxically, it will be more difficult to negotiate a settlement if the other side senses that we are negotiating from a position of weakness. That's what we believe. And the belief has foundation in reality.

But the solution to the problem is not to cede control of the settlement strategy to the other side by default. Rather, it is to thoroughly know your own case (including its financial value) and the parties' respective interests and to be prepared to fashion an

[6] Some of the reasons for this blind spot will be discussed in Volume II of this work in a section on Making Good Decisions.
[7] William Shakespeare, speech by Brutus in *Julius Caesar,* Act IV, Scene 2.

agreement that serves those interests as well or better than the likely total outcome of trial. As John Kennedy said in his inaugural address, "Let us never negotiate out of fear, but let us never fear to negotiate."

To negotiate out of strength does not mean that you delude yourself into thinking that your case is better than it is. Rather, it means that you thoroughly understand how good and bad both sides of the case are, what is likely to happen at trial and on appeal, what the other side's needs and vulnerabilities are, and what you might be able to accomplish through a negotiated settlement as a result. The Roman military strategist Publius Flavius Vegetius Renatus famously wrote, "Let him who desires peace prepare for war."[8] We might add, let him who desires peace prepare for diplomacy as well. It is as important in this process to understand the other side's interests and likely view of the case as it is to understand our own.

In this regard, a competent litigation strategist will anticipate when the case will be ripe for settlement and will be prepared to respond to settlement overtures from the other side whenever they occur.

When is the best time to discuss settlement? That depends. If you are the defendant, you may want to have the plaintiff in a high level of uncertainty about contingent events such as the outcome of a motion for summary judgment. The more unknowns remain, the lower the present financial value of the case. Conversely, the

[8] "Igitur qui desiderat pacem, praeparet bellum; qui uictoriam cupit, milites inbuat diligenter; qui secundos optat euentus, dimicet arte, non casu." (Therefore, let him who wishes for peace prepare for war; who desires victory should carefully train [his] soldiers; whoever wants favorable results should rely on skill, not chance." *De Rei Militari,* Prologue, Book 3. Renatus's statement may be the origin of the Latin adage, "If you want peace, prepare for war. " (Si vis pacem para bellum.)

plaintiff may want to wait until after the pre-trial motions have been resolved to discuss settlement, preferring the risk of losing everything to the need to accept a lower number given major uncertainties.

There is no pat answer to the question about timing, therefore. But we know two things about when to engage in settlement talks: First, be prepared. Second, be alert to the mood of the other side. *Carpe diem*. Be prepared to seize the moment when the time is ripe. Take the case at its flood and make the most of the work done on the pre-trial preparation leg of your case strategy.

CHAPTER 5:

ADVERSARIES AND CLIENTS COMPLICATE STRATEGIES

If what we want adversely affects them, they will try to keep us from getting it. Litigation strategies would be easy were it not for the other side. As banal as this observation is, it is worthwhile to ponder its significance for strategic thinking.

To find out how the other side can mess up our litigation strategy, ask: What would I do if I were representing them?

This inverse golden rule is not sufficient, however. I may not be as experienced or skilled as they are. If I am concerned that they may be planning actions that I would not know to undertake, it makes sense to bring in a respected lawyer who has experience handling the opposite side of this kind of case.

Just like us, the opponent is likely to engage in a course of action consisting of defensive and offensive moves. We thrust. They parry. We file a motion for summary judgment. They marshal the evidence showing that material facts are in dispute.

The defensive moves are largely predictable. We should be able to think through what they say and do in response to our initiatives with relative ease. And we should, therefore, be able to factor them in to our overall strategy. If we do our work well, we should be able to make their arguments as well as they can.

Our inclination is to focus solely on our course of action, what we want, and what we need to do to get it. Just as talking comes more readily to most of us than

listening, so too do we find it difficult to do the hard work of preparing the other side's strategy. It takes discipline—and practice.

The other side has a variety of means to limit our ability to carry out an optimal strategy. Part of that strategy needs, therefore, to contain our contingency plans for the course we will pursue when they try to keep us from getting what we want.

Clients Complicate Strategies Too

Professors occasionally joke that teaching in college would be a great gig if it weren't for the students. Lawyers routinely have cause to voice similar complaints about clients.

Our job, of course, is to help clients satisfy their litigation-related interests as well as possible. But they sometimes seem to be one of the obstacles to their own success.

Personal injury lawyers frequently have clients with unrealistic notions about the financial value of their claims. But corporate clients also have difficulty understanding the vicissitudes of the litigation process. Because they have justice on their side, they should prevail. Or so they sometimes think.

The client's misconceptions about their chances in litigation can lead them to push their attorneys into pursuing a course of action that is unlikely to give the client what she really wants. In other words, the client's ignorance is a constraint on good strategy.

Determining the correct strategy is in part a function of the client's interests—what she wants and needs. She must necessarily be involved to the extent of providing information about those interests and their relative importance to her.

CHAPTER 6:

COMPETITION AND COOPERATION IN THE LITIGATION CONTEXT

All life consists of varying combinations of competition and cooperation. Litigation is no different.

The pre-trial/pre-negotiation phase is characterized by competition and minimal cooperation. The opponents contend about most things and cooperate to the extent necessary to engage in discovery and placate the judge. This is non-violent war. Any unnecessary cooperation is treasonous. (This does not mean that the lawyers must be uncivil or even that they should not appear to cooperate. Indeed, Machiavelli might counsel us to convey the appearance of cooperation without the substance.)

The trial leg of litigation is characterized by more competition and even less cooperation. At trial we cooperate only to the extent the judge requires us to do so, for example, by giving each other a list of the order of witnesses. Here too, competition does not necessarily translate into incivility. Indeed, to be effective in front of the jury or judge, the very punctilio of courtesy may be required.

Settlement negotiation is another matter entirely. Done well, it is an unusual mix of cooperation and competition. We must cooperate to create a pie to divide; but we compete over who will get the largest part of the pie. We cooperate to set up settlement talks. But we contend with each other over tactical matters such as when and where they take place. We cooperate by listening to each other; but we compete for the better and more persuasive arguments.

The better the cooperation in settlement negotiations, the better the outcome—for both sides. But we must proceed cautiously in order not to give the other side an advantage. We must be willing to cooperate on the process while maintaining a firm grip on the substance of our settlement strategy. We must beware the risk of making concessions as a reward for the other side's cordiality, while being congenial ourselves.

It is this need for cooperation that makes it so difficult for skillful courtroom attorneys to switch to settlement negotiations in midstream. It is hard to turn on a dime and have a productive, cooperative conversation with an opposing lawyer who just last week was viciously trying to cut off our head . . . or some other body part.

The answer to the risks of cooperation in a competitive setting is not to avoid the settlement process until absolutely the last minute. Knowing that we have a responsibility to engage in settlement negotiations in almost all cases at some time during the litigation (some courts now require it), we should build the process into our overall litigation strategy. Having a good settlement strategy can help us make the transition for combat to table with confidence. Using the services of a good mediator is another way to get into the cooperative mode without appearing to be weak or without disclosing a competitive advantage (or disadvantage) we wish to keep confidential.

SECTION III:

FIND OUT WHAT YOUR CLIENT (AND THEIRS) REALLY WANTS: UNDERSTANDING THE PARTIES' INTERESTS

CHAPTER 7:

TWO WAYS OF THINKING ABOUT LEGAL PROBLEMS

Jenney calls through the door that Carson Samuels is on line 2. Roberta Garcia picks up the phone, "Hi, Carson. Ready for a rematch on the links?"

"I'm afraid that'll have to wait. I need to see you about a problem we have with a customer."

"Sure. I've got some time around 4:30 this afternoon. Can you come in then?"

Carson Samuels is vice president of sales at Northeast Cans, which manufactures custom-designed cookie tins for specialty foods. After taking a seat in Roberta's office, Carson explains the situation. "We have this long-time customer, Georgia Fruit and Nut, Inc., that orders custom-made cookie tins every year. They haven't paid for this year's order. She claims that we did not make them to her specifications. But we did. Our sales clerk took the order over the phone and wrote down the dimensions on the form during the call. They never sent us any written purchase order. But we made and shipped the cans. Now she says they're the wrong size and she won't pay for them."

"You're positive you got the order right?" Roberta asks.

"It's written down and my clerk says she's certain that she took it down accurately."

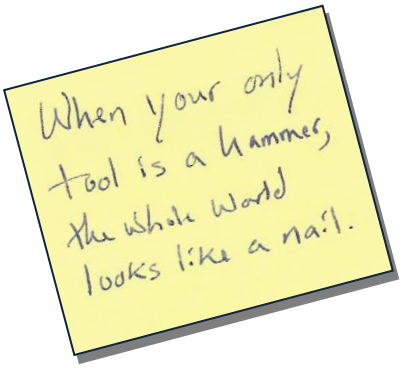
"When did they call to complain about the cans?"

"That's just it," Carson replies. "They never did. It wasn't until our accounting department called to remind them that they were past due that they said peeps about this."

Thinking Like a Lawyer

In law school, we learn to "think like a lawyer." Prospective lawyers analyze stories in terms of their facts, sort facts according to legal rights and remedies, and construct arguments in which relevant facts lead to legal conclusions.

When meeting with Carson Samuels, Roberta Garcia focuses her attention on the facts. She goes through a mental checklist to determine whether the facts support a cause of action. She may also gently cross-examine Carson to test particular facts. That's what litigation lawyers do.



If the case goes to trial, Northeast Cans' extra-judicial interests do not matter. Northeast Cans' financial condition is irrelevant. The impact of an uncollected account on Carson's future at Northeast Cans is likewise inadmissible. What the client wants, needs, hopes for, would like to have happen, or even wants to say have no place in a court of law. Like Joe Friday of *Dragnet* fame, we are after "just the facts, m' am."

99% of a lawyer's time and effort in every lawsuit is spent finding the facts, researching the law, drafting and arguing motions, preparing for trial, presenting the case, and handling any appeals.

That is, it *would* be 99% if every case went to trial.

Thinking Like a Client

When Carson meets with Roberta about GF&N's failure to pay for the cans, Carson is thinking, "I sure hope Roberta can help me get out of this jam. This is the second time this year that we've had a mix-up on an order. This time, it's a $65,000 order. If I have to report a loss on this, my yearly bonus is in jeopardy, maybe even my job. And if we sue GF&N, one of our best customers, they won't be buying any more cans from us anytime soon. We're desperate for new customers. We can't afford to lose existing ones."

Roberta hears none of Carson's internal monologue. From the moment she realized this was a collection case, she started peppering him with questions to elicit facts to determine whether Northeast Cans has a cause of action against GF&N. She has not encouraged him to share anything else. And, frankly, Carson is a bit shy about sharing his predicament.

Carson undoubtedly wants to know whether he has a "legal leg to stand on." He would not be in Roberta's office otherwise. But he is not here to buy a lawsuit. He wants and needs a solution to his problem.

What Caused the Leukemia?

Across town Annie has come to see Jim Sarkowtiz. She tells him that her son Josh died of leukemia last year. "After Josh's death," Annie explains, "I was talking with

other parents who live within three miles of the Coldwater Springs town well number four. I found out that 7 other children have contracted leukemia in the last six years. Four have died. Some of us think it must be because of the chemicals and stuff that Watchtower Products, Inc., and Sheepskin Luggage Corp. dumped on the ground."

"Did you see them dump the stuff?" Jim interjects.

"No, but some people who live in the area have said it's a common practice. They've been doing it for years."

"Do you have any idea, what kind of chemicals we're talking about?"

Annie does not know. How could she? But she is convinced that Watchtower and Sheepskin probably caused Josh's death and the deaths of four other young children.

"Well, I'm going to have to look into it before I can determine whether you can file a lawsuit. We need to know what chemicals we're talking about and whether there is any relationship between the chemicals and leukemia. And we have to find out if we can prove that the Watchtower and Sheepskin actually dumped these chemicals in the vicinity of the town wells. I'll get my investigator working on the matter and get back to you in four to six weeks.""

Three months later, Jim gets back in touch to give Annie the results of the investigation.

"You appear to be right," he says. "A lab analysis indicates that the well water has high concentrations of trichloroethylene or TCE, which is a known carcinogen."

"A what?" Annie asks.

"Oh, I'm sorry. It causes cancer, including leukemia. And Sheepskin uses it in its tannery operation. Watchtower appears to be using it to clean some of its equipment as well. We located a few witnesses who have seen both companies dumping barrels of liquids. I think we have enough to file a lawsuit. Can you come in next week to go over the complaint we want to file. I want to make sure we get the facts right."

Annie agrees to come in on Tuesday at 4:45, after she gets off work.

Jim does not know that Annie is not primarily seeking money. She is devastated by Josh's death. He was the joy of her day and the hope of her future. She will never see him march in the school band or play on the basketball team. A part of her has been ripped away. She aches. Money will not bring him back or stop the pain.

Her misery is compounded by her belief that Watchtower and Sheepskin have caused Bobby's death by dumping chemicals close to the town water well. What can possibly ease her pain?

No amount of money will bring Josh back. In fact, she was reluctant to go see a lawyer because she does not want to cheapen Josh's life by turning it into a pile of money. No, Annie is not seeking money. She wants someone at each company to apologize, to acknowledge that what they have done is wrong. That's what she really wants.

Carson and Annie each need and want something that courts cannot give them. Carson is worried about losing a customer and possibly his job. Annie is looking to

have whoever caused her son's death take responsibility for it in a meaningful way. Courts don't do apologies, and they don't restore damaged relationships.

CHAPTER 8:

CLIENTS THINK IN TERMS OF THEIR INTERESTS

Humans are multidimensional, which is to say we have multiple, sometimes conflicting, interests.

An interest is something that is important to us, something that matters. To be disinterested is not to care one way or the other.

Interests are expressions of specific aspects of who we are at any time. To speak of interests is to articulate different shades of what we need, what we want, and who we would like to be.

Annie's misery is compounded by her belief that two large corporations have caused Bobby's death by dumping carcinogenic chemicals close to the town water well. She has been deeply harmed.

From Annie's point of view, the lawsuit is about vindication and restoration of dignity even more than about money.

If we translate Annie's story into her interests (needs and wants), we start to see ways the defendants can help her in addition to paying her a large sum of money. She has a burning desire, for example, to hear someone take responsibility for her son's death or to be persuaded that it was not the result of misconduct. She needs someone to apologize. This is vital to her peace of mind. She may also need to be reassured that the pollution has been stopped and the ground water cleaned up. This would satisfy her

need for vindication as well as a need to feel that her participation in the lawsuit had accomplished something important.

Annie may not be able to articulate these interests. But they strongly influence her decisions nonetheless.

Similarly, Carson has his own personal concerns; but he also is thinking about the needs of Northeast Cans. It has to collect the debt. On the other hand, it does not want to alienate a long-standing customer. Carson has no idea how to solve this dilemma, particularly since he has no personal relationship with the new president of GF&N.

Or consider Calvin Washington's case.

Calvin Washington was convicted of armed robbery when he was 23 years old. With his rap sheet, it was a cinch he would do hard time upstate. But the judge said nothing about getting beaten and raped.

The court clerk has just spoken with the assignment partner about whether a young lawyer at Dewey & Howe would represent Calvin in the *pro se* civil rights suit he filed against the state. It's Gloria Swenson's turn.

After reading the complaint, Gloria arranges to visit Calvin in prison, where she goes over the details of what happened. She learns that Calvin had several times told guards about threats he had received. He also tells her that there have been many other incidents of rape and violence and that the warden hasn't done anything about it. Instead, he just locks everyone like Calvin up for 23 hours a day in protective custody.

Armed with these facts, Gloria drafts and files an amended complaint. She is confident that she can persuade the jury to return a significant damage award.

Is Calvin primarily interested in money? Well, yes, it might be nice. But he has nowhere to spend it where he is. And a large award might even subject him to extortion and more brutality inside.

Let's hear what Calvin has to say: "Listen, m' am, I appreciate what your trying to do for me, but it's not really helping. You don't realize. I'm locked up for 23 hours a day. I get one hour of exercise time and every three days, I get to take a shower. I never see anyone except the guards that bring the food and pick up the tray. It's almost like being in the hole. I think I could handle general population if the guards would do something to shut down the gang activity in here. I need protection but not a prison within a prison."

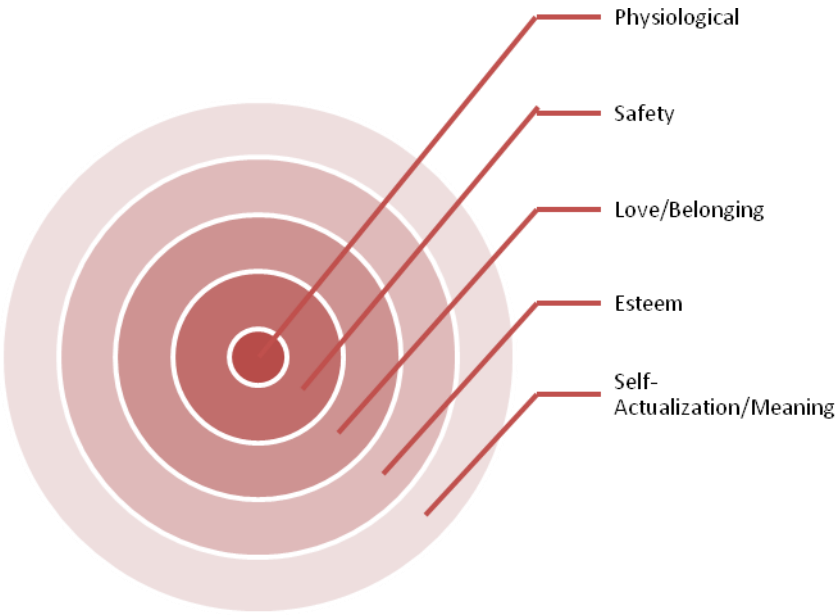
Calvin wants to be safe from predators without having to be locked up 23 hours a day in protective custody. To help Calvin achieve *his* definition of success, Gloria must find ways to achieve that goal if possible.

CHAPTER 9:

THE INTEREST HIERARCHY

We see *our* interests as needs, those of our opponents as mere wants.

To get beyond this overly subjective state, it helps to use Maslow's hierarchy of needs for general orientation. [9]



1. Food, water, clothing, shelter, and other **physiological needs** must be satisfied first.

2. **Protection** from predators and other sources of harm follows closely.

3. Everyone needs to be accepted. Once the other primary needs have been taken care of, we want to have assurance that we fit in, that we belong. **Love** may not be all we need, as the Beetles sang, but it is a fundamental part of our household of needs. Friendship and sexual intimacy arise because they satisfy the primal need to be loved and accepted.

---

[9]This graph is based on Abraham Maslow's famous hierarchy of needs. *See* Abraham Maslow, "A Theory Of Human Motivation," *Psychological Review, 50*, 370-396 (1943); Abraham Maslow (1954), *Motivation and Personality*. (New York: Harper, 1954); Abraham Maslow, *The Farther Reaches Of Human Nature*. New York: The Viking Press, 1971); Abraham Maslow, & R. Lowery (Eds.), *Toward a Psychology of Being* (3rd ed.). (New York: Wiley & Sons, 1998).

4. "I am somebody," Jesse Jackson taught poor people on the South Side of Chicago to say. It became a mantra. **Respect**—including self-respect—is vital to our well being. Damage to self-esteem is often a major part of torts leading to lawsuits, which is one reason apologies are so powerful in the settlement context. Confidence and achievement come into play here.

5. When the Army adopted the slogan "Be All that You Can Be," it was tapping into our basic need to make the most of our abilities. Like other organisms, humans seek to realize their own potential. Morality, creativity, problem-solving, and the ability to accept and deal with facts become part of our **self-actualization**.

Each level of needs must be reasonably satisfied before the individual pays much attention to the next level. If food and water are scarce, dignity, self-respect, social acceptance, and the meaning of life barely matter. In that state, we focus all our energy and resources on satisfying our primary needs.

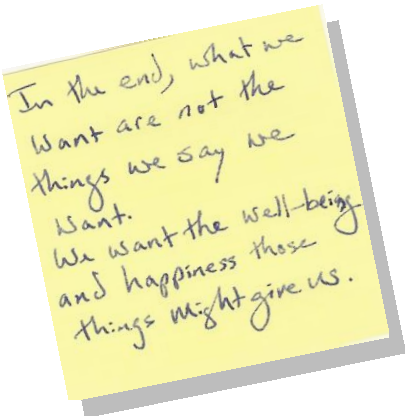
If, on the other hand, food, shelter, protection from predators, and a steady income are secure, we notice them less. Love, acceptance, self-esteem, and fulfillment of our sense of self become the focal points of our activity.

There are several ways to group these types of interests. We can think of them as primary (physiological and safety) and secondary (love, esteem, self-actualization). The need for love and self-esteem are deep and lasting. Other interests, like a desire for an ice cream cone, are superficial and transitory. We have interests in tangibles (money) and intangibles (justice).

CHAPTER 10:

INTEREST CATEGORIES

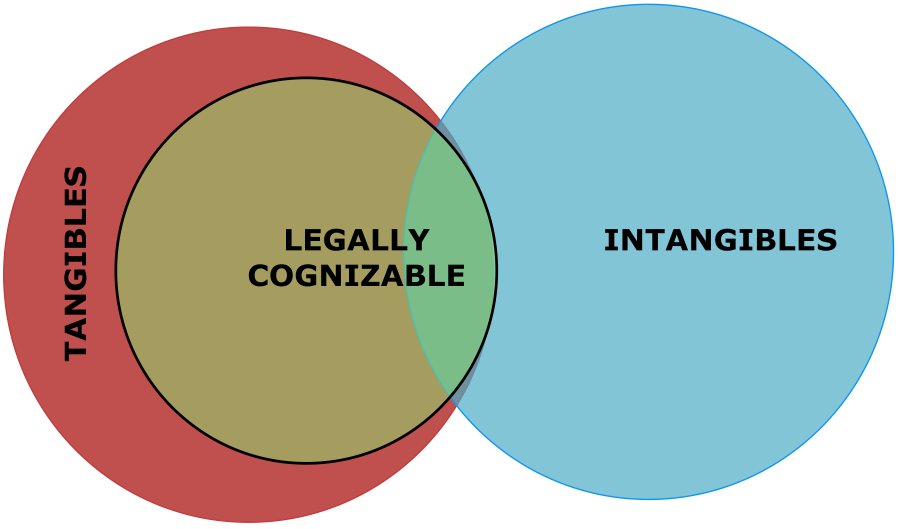
In the litigation context, tangible and intangible interests can each come in two varieties: Legally cognizable and non-cognizable. Thus, we can have four basic combinations of interests:



1. Cognizable tangible interests
2. Non-cognizable tangible interests
3. Cognizable intangible interests
4. Non-cognizable intangible interests

Damages represent a legally cognizable tangible interest. An order dismissing the plaintiff's case is likewise tangible. Rights are legal. Injunctive relief is legal. Remedies that courts can provide concern mostly interests in tangible benefits.

Courts have little power to help litigants with non-cognizable interests, most of which are intangible. The need for acceptance, love, respect, self-esteem, and meaning are intangible interests. Typically, they are not legally cognizable.



CLIENT'S INTERESTS

Calvin Washington is looking for money as compensation for the rape and beating he claims the prison officials could have prevented. He also wants to be protected from further physical damage and to be spared the mental anguish of living in fear of attack. Courts have the authority to order the prison officials to take steps to satisfy Calvin's tangible and intangible interests.

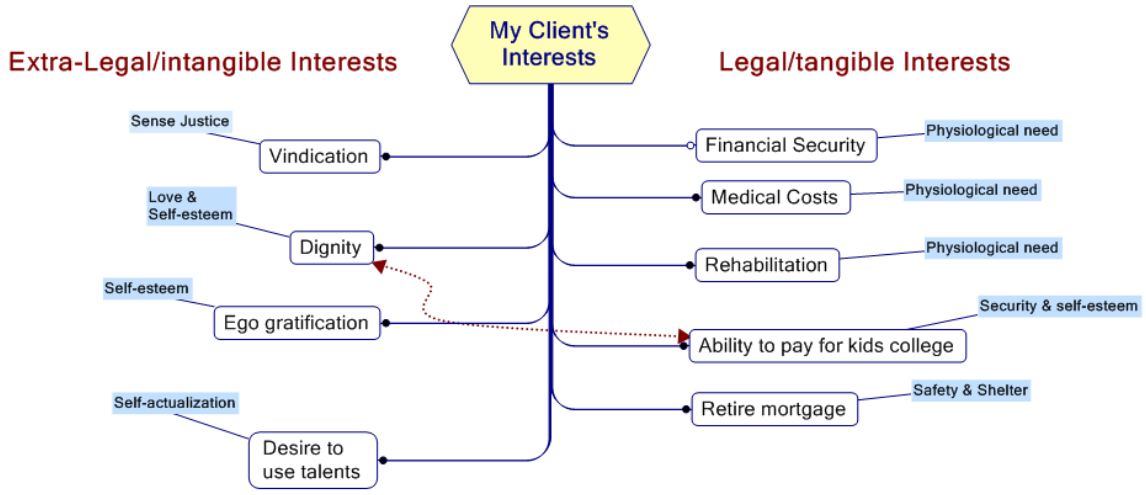
In addition, Calvin would like to have his self-respect back. Being accepted in the prison community would be nice too. Discovering some meaning in his deplorable confinement would also help. Courts can order none of this. Their authority to order prison officials to do anything that would help Calvin in this regard is limited. But the prison officials themselves may be able to work with Calvin to help him realize some of his higher-order, intangible interests.

Northeast Cans needs to get paid. Georgia Fruit & Nut wants the suit dismissed. Those are baseline, tangible interests that a court can address.

Northeast Cans also has interests in keeping a good customer, enhancing its own reputation, and developing new business. GF&N has interests around maintaining a reliable supply of high-quality cookie tins, securing a competitive price, and promoting its products to new markets. Courts cannot order the parties to help each other to satisfy any of those interests. But Northeast and GF&N can work with each other to do so.

As we saw in Annie's case, extra-legal interests can sometimes be more important to a client than the legal ones. Her interest in an apology relates to her need for restoration of the balance of equities (justice), which at the moment, is more important to her than some vaguely possible award of money several years down the road. If the defendants approached her properly, Annie would actually be willing to trade money for the respect she feels the two corporations owe her.

The following chart provides a framework for understanding our clients' various interests:



The line connecting "dignity" with "ability to pay for kids college" shows that the two kinds of interests are related in direct and indirect ways.

Lakey v. Sta-Rite

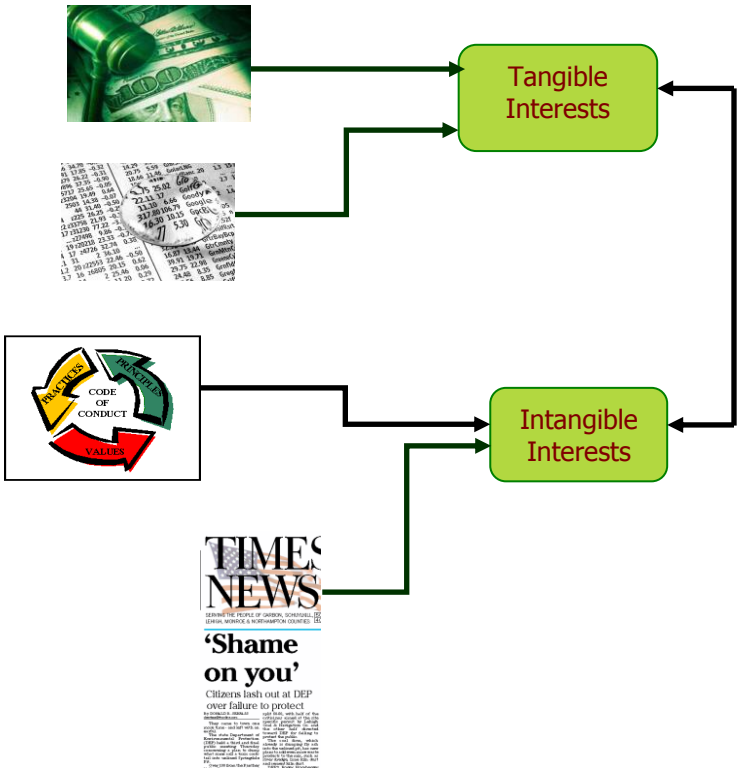
Remember the *Sta-Rite* case mentioned in chapter 1? In that case Valerie Lakey had been horribly and permanently injured by the suction of a wading pool recirculation system. Sta-Rite's last pre-trial offer was $100,000 in response to a demand of $4.7 million. A few weeks later, the jury returned a verdict of $25 million.

On one level, for Sta-Rite at least, this case was just about the money. They rolled the dice and lost. Stuff like that happens.

But a prudent adviser might have seen it differently. Does Sta-Rite have any other interests at stake here?

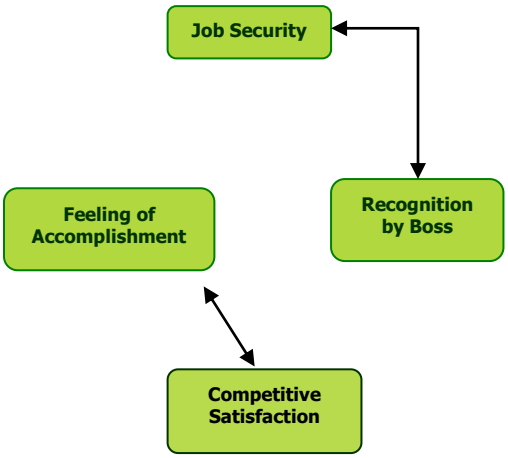
Sta-Rite's tangible interests include the defense costs, the damage award, and a potential impact on its stock price of an adverse judgment.

In retrospect, the intangible interests may be even more significant. One such interest is the impact on Sta-Rite's reputation. The case has been written about widely, and Sta-Rite, now owned by Pentair, Inc., never looks good. In many stories, Sta-Rite comes off as a callous company that elevates profit over people. This image is inconsistent with the values projected in Pentair's code of conduct.



If Sta-Rite's lawyers and executives focused solely on the legal side of the case, they likely missed its potential impact on other interests. And, as the following graph indicates, damage to these intangible interests could also have an impact on the more tangible concerns of profit and stock price.

Employment cases are often the result of a mix of interests that have been neglected or violated. In other words, they can be about more than what they are about on the surface.



Job security is a primary need. (Maslow level 1.) If they must, people will put up with poor working conditions to assure that they have a paycheck. But their higher-order needs of acceptance, esteem, recognition, and meaning are still there. The success of the *Dilbert* comic strip is testimony not only to the importance of these interests, but also to the neglect or violation of them in many workplaces.

Lawyers handling employment litigation would do well to spend time exploring whether damage to higher-order interests are at the foundation of claims that are nominally about some legally cognizable claim.

CHAPTER 11:

RESPECT AND JUSTICE

As the late Irving Younger would occasionally observe, courts are in the decision business, not the justice business. Justice, if it happens at all, is a byproduct.

Yet among all the intangible client interests that arise in litigation, the need for respect and justice may be the strongest. If lawyers are to help clients reach settlements that satisfy as many of their interests as possible, including their need for justice, it behooves them to understand where this interest comes from and why it takes on existential proportions.

Respect and justice concern who we are and who we are in our social group.

Annie's desire for an apology burns within her with a much greater intensity than any thoughts about getting money from two mega-corporations. To outsiders, that statement may seem contrived or unrealistic. We have been taught by generations of rational-choice economists to think that the only self-interest is a material one. And Jim Sarkowitz himself sees large dollar signs when he looks at Annie's case. To him an apology or justice in an abstract sense has no real value. But notwithstanding the skepticism, social psychologists confirm the reality of Annie's priorities, because they are about who she is.

"[P]eople care whether their treatment (and not simply their outcomes) is fair because fair treatment indicates something critically important to them—their status within their social group."[10]

As John Rawls noted, we believe we are entitled by virtue of our humanity to be treated in a way that fosters positive self-regard.[11] Put differently, we have a right not to be insulted.

When a faceless corporation blithely and irresponsibly dumps carcinogens on the ground close to a town water well, it has profoundly insulted the human dignity of those who are harmed. It is saying, in effect, "We are all powerful. You are worthless pieces of garbage to us. We can do whatever we want to you." At least, that is how the Annie's of the world perceive the matter.

Put differently, Annie believes that Watchtower and Sheepskin have nothing but contempt for her. And, as Francis Bacon put it 400 years ago, "contempt is that, which putteth an edge upon anger, as much or more than the hurt itself."[12]

Annie needs an apology for the same reason anyone who has been insulted needs one: as a means for restoring status. In her case, the need is deep, because the insult has been of the most profound kind, the killing of her child.

Lawyers often gloss over such needs because courts are virtually powerless to deal with them effectively. In the movie version of *A Civil Action*, Jan Schlichtmann

---

[10] Dale T. Miller, "Disrespect and the Experience of Injustice," 52 *Annual Review of Psychology* 530 (2001). [summarizing view of group value theory.]
[11] John Rawls, *A Theory of Justice* (1971).
[12] Francis Bacon, "Of Anger," *Essays*.

responds to the lead plaintiff's impassioned demand for an apology by saying, "Money is the way corporations apologize." It's not, of course. In a way, to try to gloss over the insult with money is only to add more insult to the injury. In *A Civil Action,* neither corporation apologized to any of the plaintiffs. And no settlement was reached until all sides had been exhausted. Having been put through the litigation meat grinder with little acknowledgement of her real needs, the embittered lead plaintiff became almost ferociously intent on extracting every dime she could.

It did not have to be that way. If Jan Schlichtmann and the other lawyers—for plaintiffs and defendants alike—had been alert to the plaintiffs' intangible needs, the case might have had a better outcome for everyone.

The need for respect as an expression of one's status in the group is both ancient and deeply ingrained in our genetic structure. In honor cultures it is expressed as honor, an almost tangible thing. Homer's *Iliad* is a story about the consequences to the Greeks when Agamemnon violated Achilles' honor by stealing Briseus, the prize Achilles won in battle. The poem begins with the word "rage," which is the anger that sizzles within Achilles over Agamemnon's tort. The late anthropologist Roger Gould documented the same phenomenon in a variety of cultural settings.[13]

As some scholars have pointed out, "[p]unishment is the principal means by which group members degrade the status of the rule offender and affirm the status of

[13] Roger V. Gould, *Collision of Wills: How Ambiguity About Social Rank Breeds Conflict* (Chicago: The University of Chicago Press, 2003).

the group's rules and values."[14] Notice, however, that it is the status of the *group's* rules and values that are affirmed, not the dignity and status of the victim. To achieve that requires creative settlement work.

The opposite of respect, in many settings, is not disrespect, but humiliation and shame. As some of our keener scholars have observed, it is responsible for some of the most otherwise senseless violence.[15]

Another key interest that arises in connection with respect and justice is the need for **voice**. "People believe they are entitled to have their say and to be listened to in their dealings with others, whether these dealings are formal or informal."[16]

Randall was locked in an intense battle with the bank over a loan transaction gone bad. "I just want to have a chance to tell my story to the judge," he pleaded. It broke his heart to learn that no one but his lawyer would hear what he had to say. His day in court would not be anything like what he thought it should be.

On the other side, when litigants feel they have been truly heard in court, they find it far easier to accept an adverse ruling. The courthouse in my county is named after a judge who mastered the art of giving voice to everyone in his courtroom. They felt truly respected. Alas, such experiences are not as common as we would like.

---

[14] Dale T. Miller, supra, at 542 (citing Braithwaite 1989 and Garfinkel 1956)
[15] *See, e.g.*, Evelin Lindner, *Making Enemies: Humiliation and International Conflict* (Westport, CT : Praeger Security International, 2006); Silvan Tomkins Institute, *Managing Shame, Preventing Violence: A Call To Our Clergy* (Video available at http://www.tomkins.org/home/); William Ian Miller, *Humiliation, And Other Essays On Honor, Social Discomfort, And Violence* (Ithaca: Cornell University Press, 1993).
[16] Dale T. Miller, supra, at 531.

CHAPTER 12:

DISCOVERING YOUR CLIENT'S INTERESTS

All who think long and hard about professionalism agree: Substance must transcend technique. No word captures the nature of professional substance better than "respect."

The basic way to discover a client's interests is to develop an attitude of respect. To respect your client is to see her as a complete person.

> "Professor Wilkins . . . really gets what it means to be a student . . . He's empathic and compassionate."[17]

How would you feel if your clients said, "She really gets what it means to be a client?"

Your client is an integrated human being who cannot be reduced to a basket of interests.

Why then should you seek to disaggregate her interests and articulate them one by one? First, we will understand the client as a whole better if we examine her interests individually. Analysis enlightens. Second, unless we identify the interests separately, we can overlook important interests for the work at hand. We (both lawyer and client) assume we understand, when we have only vague notions. Third, it is only by examining the interests separately that we can put them in order of priority and weigh

[17] Sara Lawrence-Lightfoot, *Respect* 158 (concerning David Wilkins, HLS Professor of Civil Procedure).

their relative importance. If we neglect this step, we risk being tugged and pulled by whatever interests momentarily are most salient or have touched an emotional nerve.

OK. So, you've decided that you have a duty to discover your client's interests. And you even believe the road to success, however defined, runs through an understanding of interests as well. How do you go about doing it? How can you find out what your client's interests are?

There are five basic ways to discover your client's interests:

1. Listen
2. Ask
3. Watch
4. Infer
5. Imagine

To interview—to see between—is to develop a common understanding. It is a communication process in which the interviewer learns information from the other person in a dialogue.

Listen First, Ask Questions Later

It is important not to ask questions before you have heard your client out. Otherwise, your questions will distract your client from saying what is on her mind. You may lose important information about her interests (as well as other facts) because she now is going down another road. Unless you are highly accomplished at asking open-ended, non-suggestive questions, you will subtly indicate what you want to hear, and the client will try to accommodate. Now is not the time for leading questions.

After introducing herself and explaining that the court has appointed her to represent him, Gloria Swenson says to Calvin Washington, "Would you like to tell me what happened?"

"Well, I was told by some guys on D Block that one of the gangs was planning to jump me."

"Uh, huh."

"So, I don't mind admitting I was pretty scared. I went to the guard on my tier and told him I needed protection. He just said, 'Is that so?' And I said, "Yes, so please do something about it."

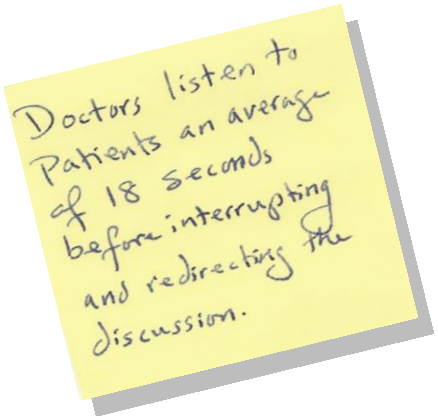
Gloria looks at Calvin and nods, indicating that she understands, but says nothing.

Calvin continues, "I'm not sure if he's going to do anything, and I don't hear nothing. At lunch I go up to another guard, Jonesy, and tell him the same thing. He just shrugs. Man, I don't mean nothing to them pigs."

"Please continue," Gloria adds after a brief pause.

* * *

Even in this truncated retelling, there are several places where the experienced litigator is tempted to ask questions: What is the name of the guard? Who tipped you off? Who was making the threat? Did either guard write anything down? And so on. If we want to hear Calvin's story, it is wise to resist asking such questions at this time.



Listening without asking is an art:

- When conducting the initial interview, make notes about interests the client reveals as you take down facts. Flag these notes for follow-up later.
- Encourage the client to tell her story as completely as she wants for as long as she wants.

- Never interrupt with comments indicating that something the client wants to say is not important to the lawsuit. Listen to every irrelevant comment the client cares to make. Resist the urge to censor or edit.
- Do not evaluate or comment substantively on anything the client says.
- Prompt the client to continue talking with gestures, murmurs (uh huh, OK, etc.), and short statements of encouragement (e.g., can you tell me more about that?).

Physicians are now being taught to listen to patients without interrupting. Most don't.[18] The failure to listen to the patient can lead to incomplete, poor, or faulty diagnoses. It can also convey a lack of respect in which the patient feels she is nothing more than an object, a feeling that does not further the healing process.

By listening empathetically, you not only learn about interests; but you might also learn things about the facts of the case you otherwise would have missed. Most important, you will have demonstrated respect of a kind that solidifies the attorney-client relationship in a way nothing else can.

Ask and You Shall Receive

Asking comes next. Once you are satisfied that the client has volunteered in her own language everything she wants to share, then you can ask follow-up questions.

But asking is an important tool in discovering interests. The key question is "Why?"

[18] *See* Howard B. Beckman, M.D., and Richard M. Frankel, Ph.D., "The Effect of Physician Behaviour on the Collection of Data. *Ann Intern Med*. 1984; 101: 692-6.

Asking "What do you want?" elicits positions. In responding to that question, we quickly make an inventory of everything we think would make us happy and announce the conclusion:

"I want this damned lawsuit to go away." or

"I want those SOB's to pay for what they did."

Answers like these provide a good place to start, but they do not give us much with which to understand the full range of interests involved. To uncover this additional information we have to ask "Why?"

"Why do you want the lawsuit to go away?"

"Because it's a pain in the neck. It takes time away from what I should be doing. It costs money. It exposes us to negative publicity. It might give other potential plaintiffs ideas. Want me to go on?"

"Well, yes, actually. I'd like to hear whatever you can share."

"OK. You asked for it. I've been through lawsuits like this before. No one wins except you lawyers. It just keeps grinding away but nothing happens. We have to put things on semi-hold until this gets resolved. It makes it difficult to launch new ventures. We have to be extra cautious about what we say and do because it might be used against us at trial. Wrongful discharge lawsuits like this are a real pain."

"I know it may seem obvious, but tell me: Why are you concerned about giving other plaintiffs ideas?"

"Well, frankly, our HR department has not been up to snuff in the past. We've done a considerable amount of remedial work, but some of our past practices expose us to similar claims from other disgruntled employees. I just don't want to see a string of copycat suits, regardless of how meritless they may be."

"So, I'm hearing that you not only want this lawsuit to go away, but you also want to get it resolved in such a way that others will be discouraged from trying their luck as well."

"You got it. Crush this bastard. Make an example of him."

Asking "Why?" forces the client to analyze the relationship between the position (get rid of this lawsuit) and the desired state (discourage copycat lawsuits). The more we peel the onion, the more we discover what is really driving the position. It is a process of articulation, a spelling out. This helps the client and the lawyer size up the relative importance of the various interests.

The following questions also help flesh out the client's interests as well as their relative priority:

What are the costs of getting what you want?

What are the consequences of getting what you want?

Having spelled out the costs and consequences, are you still sure it's what you want?

What ways can you get what you really want?

What are the consequences of each of those ways of getting what you want?

The last two questions begin to prompt the client to develop a list of options for a potential settlement agreement, which is the subject of the next chapter. But they are also useful in getting a more complete understanding of the client's interests.

The more important the lawsuit, the more important it will be to explore questions such as the above in detail. A small claims action presents less need for an extensive analysis.

Watch

You listen. You ask. You also need to watch. The client's body language can tell you what she may be unable to convey in words. It can also signal when the client may

be saying one thing (what she thinks you want to hear) while actually thinking or feeling something quite different.

Like listening, detecting the meaning of body language is an art. It starts with making ourselves aware that the client's physical gestures, posture, demeanor, tone of voice, and general presentation tell us something meaningful. We receive this information subconsciously, of course. But a lawyer who wants to discover his client's interests (and those of other lawyers and parties in the lawsuit) will practice being alert to physical expression, just like an expert poker player learns to spot tells.

We often feel the effects of someone's body language even if we do not verbalize it. Students of kinesics (the term for the scholarly discipline) have identified several gestures and postures that we should know about:

> A client who shakes her legs or wets her lips frequently may be under **stress.**
>
> Crossed or folded arms sometimes indicates **rejection** or a desire to keep one's distance. (But it might mean that the client is cold.)
>
> **Aggression** is shown through clenched fists, leaning forward, tensing muscles, or stiffening posture.
>
> Nervous head movements, hunched shoulders, repeated massaging of temples indicate some level of **anxiety**.
>
> Someone who frowns or places her hands on her hips is giving signs of **defiance**.

Infer

We can build hypotheses about our client's interests by making reasonable inferences from her circumstances and actions. Most clients will tell us about their

interests if we listen, ask, and watch properly. But adversaries seldom will disclose their interests voluntarily. Inference may be the best channel for discovering them.

Circumstances provide obvious clues to interests. People in a flood-ravaged town need clean drinking water, shelter, and protection from predators. It would be silly to ask about these things. If you represent Watchtower in Annie's lawsuit on the other hand, her interests might be less obvious. Money springs to mind. But if we think about her loss, we might also infer that she has a strong interest in restoration of her dignity.

Actions sometimes speak louder than words. When trying to infer another's interests, it helps to pay attention to what they do. Professional diplomats develop a keen sensitivity to what representatives of other countries do and say. Talleyrand, upon being told of the death of a Turkish diplomat, is said to have remarked, "I wonder what he meant by that."[19]

Imagine

If all else fails—or even if it doesn't—put yourself in the other person's shoes. What would be important to you if you had lost your child to leukemia or your company were being sued for wrongful discharge or you were the vice president of a company looking to collect on a $60,000 invoice?

[19] There are different versions of this legend, including one that attributes the remark to Metternich upon hearing of Talleyrand's death. The actual remark does not appear to have been contemporaneously documented.

This technique can lead to false conclusions. We may project our own needs and insecurities on to the other person, thereby imagining interests she does not, in fact, have. Accordingly, we should seek to confirm our suppositions whenever possible.

The Emotional Window

Emotions are windows on meaning. By understanding a client's emotional state, we gain access to her interests. We can tell not only what is important but in what ways as well.

Emotions are generally a manifestation of the state of our sense of self or identity or our interest in some tangible thing.[20] We feel confident when we are in equipoise and generally consider ourselves to be accepted and protected. An instant later our entire organism can shift into a state of alarm as we perceive ourselves to be threatened by a snake, a tiger, an impending automobile accident, or anything else that could do us serious harm. Our emotional antennae help us become aware of the effects of our own behavior and that of others *before* we think about them.

Because conflicts routinely contain some challenge to our identities, our responses to a given conflict can contain many different emotions, some of which such as anger, fear, shame, and grief are powerful enough to overwhelm us.

---

[20] For a more in-depth discussion of emotions and conflict, *see, e.g.,* Daniel Goleman, *Emotional Intelligence: Why it Can Matter More than IQ* (New York: Bantam, 1995); Douglas Stone *et al., Difficult Conversations: How To Discuss What Matters Most* (New York: Viking, 1999). *See also* Roger Fisher and Daniel Shapiro, *Beyond Reason: Using Emotions as You Negotiate* (New York: Viking Penguin, 2005).

In our culture, men are socialized to suppress and deny the existence of any emotion that reveals weakness. Men are allowed to express anger and rage, something that has been permissible, it seems, at least since Homer's *Iliad*. But men who show fear, shame, grief, depression, or even affection or tenderness are treated with scorn.

As a result, we are emotionally illiterate—i.e., without letters—when it comes to identifying what we are feeling. Because our society has been dominated by males, women are not much better off than men when it comes to naming emotions. If you doubt this, try making a list of 25 emotions within three minutes. Yet our language has hundreds of words with which to express emotional nuance.

Generally, we recognize or identify only that for which we have words. If you don't have a vocabulary of emotions, you may see them (in yourself and others) only in the broadest categories such as anger, sadness, hurt, fear, and humiliation.

It is common for clients to feel and show emotions of sadness, hurt, anger, fear, shame, and doubt in connection with the lawsuit and the issues it presents. Not only is it important to be alert to the nuances and intensity of these emotions. It is also helpful to encourage the client to talk about them:

> "Carson, can you tell me how you feel about the prospect that Georgia Fruit & Nut has not paid for the cans?"
>
> "Annie, how did you feel when you learned that Watchtower and Sheepskin dumped poisonous chemicals that may have caused Josh's death? How do you feel now?"
>
> "George, would you share how you felt when you learned that Jennifer was suing Power Widgets for age and sex discrimination?"

Then sit back and listen. It may require a bit more prompting because Carson may not have allowed himself to surface his feelings.

At first, you may feel uncomfortable asking a client to talk about her feelings. We are fact people. And, as noted, males in our culture are uneasy about emotions. We are afraid (!) we will be seen as getting all touchy-feely.

But you can and will overcome that if you try. Think of your client's emotions as *facts* that are important to your successful representation of her interests.

There is no point in evaluating emotions. They just are. So think of attention to emotions as akin to taking an inventory. This is part of the client discovery process.

The goal is to get the client to share as much as she can and is willing to share. You do not want to choke off anything that she might tell you.

If she is reluctant to talk about her feelings, there is no need to push. You can learn a lot by listening and observing. But it will help both you and your client to make emotions explicit at some point.

Déjà vu All Over Again

It's an iterative process.

Keep in mind that interests develop and shift during the course of litigation. And clients focus on different interests as time's arrow moves across the sky. Today, the client thinks she wants to "sue the bastards" for all they're worth regardless of the expense. Six months and $50,000 later, having received no vindication and having no prospect in sight of anything other than more legal bills, she may have a more

temperate view of what is best for her. Our job as counselors is *also* to help clients obtain a greater perspective on their own interests, to see things they may at the moment be suppressing or otherwise are unaware of.

CHAPTER 13:

ASSESS YOUR CLIENT'S RISK TOLERANCE

Having been chased for days across largely barren land dotted by cactus and sage brush, Butch Cassidy and the Sundance Kid find themselves cornered at the top of a cliff. On one side is a fast-approaching posse of Pinkerton detectives eager to kill them. On the other is a sheer drop hundreds of feet into a river strewn with rocks and small boulders. Their goal is to survive and remain free. Their odds? With the Pinkertons, close to zero; only slightly better with the gorge. But with the Pinkertons the outcome is known; the gorge is an unknown. They might get a break. Who knows?

The smart play is clear to Butch, but Sundance hesitates. When Butch asks why he's not willing to jump, Sundance shouts back, "I can't swim." "Are you crazy?" Butch shouts. "Why, the fall alone is likely to kill us both." Having cleared that up, they both take a running jump over the cliff . . . and the movie continues as they emerge unscathed downstream.

Risk Tolerance Defined

"Risk tolerance" refers to the degree of willingness to act despite uncertainty about outcomes.[21]

Risk tolerance is not a static quality. Scientists tell us that some of us have a greater tolerance for risk generally than do others. But circumstances can lead even risk-

[21] The term "risk" is often used to designate the possibility of a bad outcome. But, of course, risky situations are pregnant with good—even great—outcomes as well. If the outcome were certain—i.e., we knew exactly what would happen—we would not speak of risk.

averse people to take big gambles because they perceive they have few or no other viable options. That was the situation in which Butch and Sundance found themselves at the precipice. The known (Pinkertons = arrest or death) was less desirable than the unknown (jump over the cliff = likely but not certain death). Sundance was hesitant not because he could not tolerate the risk, i.e., the uncertainty about the outcome. Rather, in his mind, he was looking at too certainties—death by gunfire or death by drowning. Two options with equally bad (or good) outcomes can render us unable to choose.

The personal inclination each of us carries around to shun or embrace risks is **subjective risk tolerance**. The ability to take risks that are foisted upon us by the circumstances is **objective risk tolerance**.

Subjective Risk Tolerance

Subjective risk tolerance is all about our own personal comfort level and the degree to which we need thrills. What frightens some of us entices others as an opportunity to live on the edge, literally. Nick Tasler, one of the students of this subject, calls the two groups risk managers and potential seekers.[22] Approximately 75% of us tend to be risk managers; the remaining 25% are potential seekers.

The terms "risk manager" and "potential seeker" do not carry the negative connotations of "risk averse" and "risk seeker," the terms most commonly used in

[22] *See* Nick Tasler, *The Impulse Factor: Why Some of Us Play it Safe and Others Risk it All* 103 *et seq.* (New York: Simon & Schuster, 2008). Tasler discusses the difference in neurological makeup of risk managers as compared with potential seekers. *See id.* at 13-47.

research on this subject.[23] To call someone (e.g., a client) risk averse suggests that she is a scaredy cat. She doesn't have any guts. And the term "risk seeker" implies a daredevil, someone who is imprudent, perhaps even reckless.

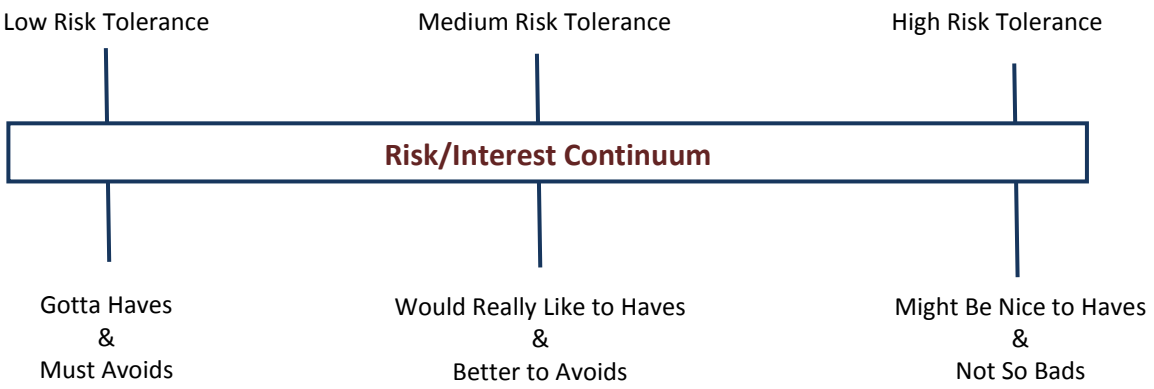
Whatever term we use, we need to be aware that some people tend to shy away from and others to gravitate toward risky endeavors. Understanding our own and our client's inclinations with respect to subjective risk tolerance can help us considerably when it comes time to set target settlement terms and minimal walkaway conditions.[24]

Normally, a client's combined subjective and objective risk tolerance will push her to settle within the Zone of Potential Agreement (see Chapter 27) or perhaps at an even less favorable point. The closer a settlement proposal gets to satisfying the client's high priority needs (gotta haves and must avoids), the less tolerance a rational client should have for the risk of losing everything at trial. The less the client objectively needs to win the trial (i.e., as her interests move toward "might be nice to haves" and "not so bads"), the greater will be her objective risk tolerance and concomitant ability to reject settlement proposals, even those within the Zone of Potential Agreement. There is, therefore, a risk/interest continuum that is illustrated by the following chart:

---

[23] The field of research on this subject, which with related topics is called Prospect Theory, is quite large. Daniel Kahneman and Amos Tversky's started it all with their seminal article, "Prospect Theory: An Analysis of Decision Under Risk," 47(2) *Econometrica* 263-291 (March 1979). This work has revolutionized large parts of economic thinking by debunking the myth of the *homo economicus* or rational utility maximizer.

[24] Nick Tasler (*The Impulse Factor, supra)* is part of TalentSmart, which administers the Impulse Factor Test at its website, with which you can learn more about your own subjective risk tolerance. (http://www.talentsmart.com/products/surveys.php).



There is a widespread perception that plaintiffs have a lower risk tolerance than defendants.[25] There is, of course, nothing peculiar about the people who become plaintiffs and the companies that end up as defendants that predisposes them to a particular degree of risk tolerance. Rather, the circumstances in which they find themselves give rise to a lower level of risk tolerance. For most plaintiffs, succeeding in the lawsuit at hand is their only shot; they cannot average wins and losses over numerous cases and, therefore, cannot afford to gamble more than necessary. Defendant corporations can.

Objective Risk Tolerance

For settlement analysis purposes, objective risk tolerance is perhaps the more important of the two. Occasionally, the interests of a client leave her little choice but to take a gamble with trial even though the odds are not strong in her favor because the other side's last offer does her no good. Effectively she will be no worse off losing at

[25] *See, e.g.*, Randall L. Kiser, Martin A. Asher, and Blakeley B. McShane, "Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations," 5 *Journal of Empirical Legal Studies* 551, 555 (Issue 3, September 2008).

trial than she would be accepting the final proposal. She is in a Butch and Sundance situation.

There are two settings in which objective risk tolerance permits or requires a client to go to trial notwithstanding the relative high risks of failure. The first I call **risk necessity**; the second, **risk affordability.** Risk necessity is illustrated by E.G. Sawyer's story.

E.G. Sawyer and Risk Necessity

E.G. Sawyer was an affable salesman who developed a serious alcoholism problem following a disappointing marriage.[26] He became so dysfunctional that his boss finally persuaded him to check into a local hospital for treatment with Antabuse to help him conquer his addiction. At the treating physician's direction, the hospital staff administered three times the maximum daily amounts of Antabuse. Not long afterwards, he began to have headaches and his blood pressure went up. After about two weeks of treatment, a nurse found him unconscious. He was in a coma.

The medical staff in the intensive care unit saved E.G.'s life; but he suffered extensive brain damage. He could not walk or talk without great difficulty. This formerly active golfer was essentially confined to a wheel chair unable to do anything for himself. He communicated by means of a plastic spelling board. Having no financial resources, he depended on friends to help him with his daily needs and a social worker

[26] The following summary of facts is a condensed version of portions of John Edwards, *Four Trials* 1-48 (New York: Simon & Schuster, 2004).

who came by once a week to clean him and the apartment up a bit and empty the plastic cartons filled with E.G.'s urine. His was a pathetic existence.

At least four local lawyers in Buncombe County, North Carolina, passed on the chance to represent E.G. against the hospital and the treating physician. Juries in Buncombe did not return verdicts against local doctors or their beloved hospital. This was a hopeless case that would cost large sums of money for expert witnesses, assuming any could be found to testify. The lawyers who said no were acting prudently.

But by several twists of fate, a lawyer eventually took the case shortly before the statute of limitations would run out. It languished. It was handed off to another lawyer who owed the first lawyer a favor. And eventually the file landed on the desk of John Edwards.

John Edwards was not then the powerhouse trial lawyer he later became. He had been practicing for only seven years, working mostly on small potatoes claims. He had never handled a medical malpractice case. But he threw himself into this one and mastered the facts, the law, and enough of the science to work with the experts. He prepared the case; he and his partners handled the trial together.

There were abundant indications that this was a low-percentage case. The lawyers who had turned it down were not stupid. The stinginess of juries in Buncombe County was another warning sign. At a settlement conference, the judge called Edwards's $1.5 million settlement demand "ridiculous" and told counsel for the

defendants that they need not even respond to it. On the one side was a respected doctor and a beloved hospital; on the other was an alcoholic who the defense claimed had caused his own problem by sneaking alcohol into the hospital.

Edwards knew not only that $1.5 million was fair; it was also the minimum amount that would rescue E.G. from the hell hole in which he was living and provide him with minimal proper care. Anything less would just not meet E.G.'s needs.

And so the case went to trial. As with all trials, there were moments that did not go well for the plaintiff. But the testimony of the experts was strong. And the jury was visibly shocked when E.G. was wheeled in for his testimony, given by tapping out letters on his touch board. Following his closing argument, Edwards felt guardedly optimistic. But then, what did he know. He'd never done a case like this before.

After the jury retired to deliberate, the defendants made their final offer: $750,000. E.G. immediately tapped out the words "take it."

Let's pause here for a moment to ask: What would you do in this situation? What would your advice be to E.G.? Would you agree with E.G. and tell him to take the bird in hand? Given the odds against a high jury verdict, that seems to be the prudent course.

But consider E.G.'s situation. What good is $750,000 to him? After deducting expenses and legal fees, the amount being offered was barely enough to take care of his basic needs for shelter and food; but it would not cover his ongoing medical care and other expenses that accompanied his condition. If E.G. accepted the offer, he would not

be even half-way out of his hellish existence. Edwards's pre-trial analysis was still correct. $750,000, as much as it was and seemed to E.G., would not solve his problem.

In short, E.G.'s interests put him in a situation of *risk necessity*. Like Butch Cassidy and the Sundance Kid, he had little choice but to jump, however unlikely a high jury verdict might be. His objective risk tolerance required him to take a chance. I have no way of knowing what a carefully calculated net present financial value would have been at that moment in the trial. But it did not matter. Even if there was only a slim chance of getting the jury verdict he needed, E.G. had to hold out for that chance.

E.G. may not have realized that fact at the time. But John Edwards did. He knew that E.G. would fall short of what his objective needs required if he accepted the $750,000 offer. So he did something remarkable—especially considering his youth, inexperience, and precarious personal financial situation. He carefully and patiently explained to E.G. that $750,000 was not what he needed and not what he deserved. "And let me tell you something," he added. "The jury knows it too."

E.G. thought for a while, and then he typed the following words: "I trust you."

Of course, the story has a happy ending. E.G. rejected the settlement offer. The jury came back after about four hours and handed in a verdict sheet stating that E.G. Sawyer was entitled to recover $3,700,000.

The outcome did not justify the decision to reject the settlement. Rather, E.G.'s dominant interests—his risk necessity—coupled with Edwards' intimate knowledge of the state of the case at that moment justified the decision.

Two Clients, Two Cases, and Risk Affordability

Suppose your client was molested on four occasions by a pedophile priest 20 years ago.[27] Trial is a week away. The defendant has virtually conceded liability but vigorously disputes any compensatory damages beyond $15,000 to $20,000 (for psychotherapy) and contests any basis for punitive damages. You assume a 95% chance of establishing liability. You figure there is a 5% chance of a jury verdict of $8,000,000 (including the punitive component) and a 95% chance of a verdict of $15,000. Because this is a contingent-fee case, the remaining costs will not exceed $500.

The defendant has offered to settle for $393,037.50, which is precisely the net present financial value of the case for the plaintiff. (.95 X ((.95 X 15,000) + (.05 X 8,000,000)))-$500 = $393,037.50.

What advice should you give your client? Accept the settlement or go to trial?

In general, the smart advice would be to accept the offer. Maybe you could push to get a higher number, but there probably is not much haggling room left. No, *as a rule*, this is a no brainer. Your client will net somewhere around $240,000. He should take the money and announce that justice was done. This should have been the goal of the average client with this case from the outset.

But let's look at this scenario from the perspectives of two different clients, one of whom (James Robinson) is filthy rich while the other (Martin Saunders) is a virtual pauper.

[27] These two fictional examples were inspired by a series of virtually identical pedophile cases involving the same priest, the verdicts in which have ranged from $15,000 to $8,000,000.

James Robinson is very well off. $240,000 will not make any difference in his standard of living. For him this case is about principles or, rather, what he sees as the lack of them in the church hierarchy. That is his driving interest, the reason he came to you in the first place. He is outraged that the bishop hired the pedophile with full knowledge that he had molested young boys in other parishes. The bishop now claims that he relied on a church psychologist who told him the priest "had been cured." Your client says that an example must be set. "Even if we lose, the public must hear the whole sordid story. I wouldn't settle for $400,000 or for $4,000,000."

What is the settlement value (not the financial value) of this case? What kind of settlement goals, if any, should you help your client set? Can the case be settled at all to his satisfaction?

Jim Robinson can afford financially to go to trial despite the low likelihood of recovering a large number. But he cannot afford emotionally to let the bishop off even for what to most of us is a significant amount of money. He would need something other than money to find a settlement acceptable. In other words, financially Robinson can afford to take a high risk of a low number. Emotionally, he cannot afford to accept the settlement offer.

Now let's look at the situation of Martin Saunders. Martin lives on a subsistence income and has no home to call his own. If he can net $240,000 out of this case, he could buy a decent house, set aside a fund for taxes, insurance, and routine maintenance, and

perhaps have something left over for a pleasant trip. Such a settlement would have a great impact on his standard of living.

In the latter case, the settlement calculus changes drastically. Even though the Net Present Financial Value is identical, the settlement value—the value of a specific settlement to Martin Saunders—is altogether different. He would gladly accept the settlement offer.

This pedophile case with the two different plaintiffs illustrates that there is a difference between the expected financial value of a lawsuit and its settlement value—what it is worth to the client. The financial value is a function of the potential range of damages multiplied by the probabilities of various outstanding contingencies (liability finding, ruling on motion to dismiss, etc.) net of costs. The settlement value for the client is a function of the financial value in the context of the client's interests. (This is true on each side.) Much of the time financial value and settlement value will overlap, if they are not identical. But occasionally, as in the Jim Robinson case, they do not.

Jim Robinson could afford to focus on his higher-order interests of vindication, justice, and making sure this sort of thing never happens again. For him, the case *was* therapy in a sense. For Martin Saunders, it was almost entirely about the money. Because he is struggling to take care of his lower-order interests (physical health and safety), he cannot afford to indulge his moral outrage.

The dominance of higher-order interests over money in the hypothetical with the first client may be extreme, but the phenomenon is not rare. In the movie version of *A*

Civil Action, the lead plaintiff tells Jan Schlichtmann that she wants someone to be held accountable and an apology, not money. Schlichtmann tells her that money is the way corporations apologize. She never got the apology, and the money was nowhere near adequate as a substitute.

The situation of the wealthy pedophile victim above illustrates what I call *risk affordability*. (Again, this is not subjective risk tolerance.) "Risk affordability" means that the client's circumstances allow him to go to trial even though the chance of winning is low.

The companion term, "risk necessity," refers to circumstances in which the client is almost compelled to go to trial despite the small likelihood of winning a high damage award because a settlement within the Zone of Potential Agreement does her little good. As E.G. Sawyer's case illustrates, when a client is faced with risk necessity, a financially rational settlement would not satisfy her minimal top-priority interests. She would be just as well off losing the case altogether as she would be if she accepted a financially reasonable settlement offer.

Those whose circumstances lead to risk affordability can afford to roll the dice; those with risk necessity cannot afford not to.

The occurrence of risk affordability or risk necessity may be unusual, but it is probably not rare. In any event, for devising a settlement strategy it is probably more important to know when the opposing party's circumstances give rise to risk affordability or risk necessity than even to know when it affects your own client. Your

own client will let you know that she can afford to go for it or, conversely, *must* take the low-percentage shot. We are less likely to be alert to this situation when it affects the other side. But, in devising a settlement strategy, knowing when the other side has an abnormally high objective risk tolerance (risk affordability or risk necessity) can help us make better decisions about what settlement proposals to make or whether it makes sense to pursue settlement at all.

CHAPTER 14:

DON'T FORGET THE OTHER SIDE'S INTERESTS

Trials are about persuading the fact finder.

Settlements are about persuading your opponent.

Therein lies the critical importance of understanding your opponent's interests.

At the end of a life of power in business and government, Robert McNamara came up with eleven rules. McNamara's Rule # 1: *Empathize with Your Enemy*.

When we share our respective stories in settlement negotiations, we tend to tell our story as if it were the only story. Because their story is *their* story, it is the wrong story.

However, our adversary is not easily persuaded that she should abandon her story. So we turn up the volume, hoping that the louder (or smarter or more determined) we speak, the more likely it is that the other side will give in and acknowledge ours as the true story.

Given this pattern, it is a wonder that lawsuits ever settle. As a rule, what drives parties to settle is a combination of the cost of trial and the risk of losing. We realize at some level that a neutral observer might find some merit in the other side's case and that we run the risk of losing altogether. Bird-in-the-hand thinking sets in. Suboptimal deals result.

We are likely to be most persuasive in our negotiations if we thoroughly understand our opponent's interests—perhaps even better than they do. The loan

officer has no incentive to approve a settlement which his supervisor might criticize even if it is rationally the best outcome for the bank. If we understand that, we are less likely just to keep shouting about how reasonable our position is. Instead, we can step to his side in an effort to help him find a solution that protects his interests.[28]

Perspective taking is both an intellectual and an emotional process. Intellectually, we imagine ourselves in the shoes of the other person. Emotionally we feel what it is like to be her. The latter is empathy.

The advocate needs to be skilled both in intellectual and emotional perspective taking. Not only will this help us better understand how a neutral third party might see the dispute; but it will also equip us with the understanding and knowledge to be more creative and persuasive in trying to work out a settlement with the other side.

[28] The technique of stepping to their side is described in William Ury, *Getting Past No: Negotiating in Difficulty Situations* (New York: Bantam, 1993).

SECTION IV:

PARTLY CLOUDY WITH SCATTERED SHOWERS: MEASURE YOUR BATNA (AND THEIRS) BY ESTIMATING THE FINANCIAL VALUES & RISKS OF THE CASE

SECTION OVERVIEW

The penultimate goal of case valuation is to determine what the non-partisan decision makers (judge and jury) will do with the lawsuit. (The ultimate goal is to learn how those decisions and the costs we incur to get them translate into money.) Ideally, we would like to get inside the minds of the judge and jurors to learn what they will think and do. But we have difficulty forecasting their decisions. Why? Because we lack organized information. And we have an imperfect understanding of how judges and jurors make decisions. (Hint: Decisions are not the result of linear and logical thinking.)

Complexity and uncertainty are the major hurdles in case value. The best way to reduce our uncertainty and to manage the blooming, buzzing world of case-related data is to use an organizing structure within which we can compile the data we have, gather new data, evaluate the significance of what we know, and, using that evaluation, estimate the likely outcomes of key court decisions. This section presents a method for doing that.

The net present financial value of a lawsuit for each side is a function of prospective decisions with respect to liability, damages, and dispositive contingencies adjusted by the costs of obtaining a final judgment. (Plaintiffs subtract and defendants add costs.) The four main components of case value are:

1. Liability
2. Damages
3. Dispositive Contingencies

4. Costs

Prospective case valuation necessarily involves estimating probabilities and dollar amounts. We estimate the likelihood that the court will find the defendant liable to the plaintiff, the range of likely damages the court might award, the likely outcomes of any remaining dispositive contingencies (motion to dismiss, change in law), and the range of likely costs for each aspect and phase of the case.

Having obtained the correct values for each component, we can calculate the net future financial value of the case and then discount that number to the present using a standard business calculator.

Obtaining the correct values for each component is the obvious challenge in this process. How can I even guess the likelihood that the jury will find the defendant liable or how much damages it might award? Does it make sense to predict rulings on dispositive motions or developments in the law? And costs are often a function of what the other side does. I can't know how many depositions they will take, what motions they will file, how many witnesses they will call. Isn't it somewhat disingenuous to pretend that I can see into the future on such matters? After all, I don't have a crystal ball.

Well, this section lays out the basics of that crystal ball. It explains what you need to know and can do to increase confidence in your valuation of the case.

The method described in this section enables professionals and their clients to increase their confidence level by examining appropriate aspects of a case in increasing

degrees of detail. The degree of effort and resources it is wise to expend on case valuation—like much in life—depend on what is at stake. The amount in controversy in a garden variety fender bender may not justify spending more than 20-30 minutes to produce a ballpark case valuation. A major anti-trust case that could destroy (or save) the company probably justifies spending days, perhaps weeks drilling down into the substrata of the case to find out its risk components and financial values. Either way, the *Win Before Trial* method enables the practitioner to dig down to the level of detail and analysis needed to estimate the financial value of the case at a satisfactory confidence level.

Having determined that the net present financial value of a case (for each side) is a function of the four components listed above, we now have the challenge of figuring out what the values of each of those components are. To discover these values, we need to know the likely effect on the decisions of the judge or jury of four different types of factors:

1. The evidence;
2. The arguments supported by the evidence, law, and general notions of morality and responsibility;
3. Non-dispositive contingencies (i.e., events as a result of which evidence or arguments might be excluded); and
4. Extraneous factors (e.g., biases, prejudices, advocacy skills, etc.)

The method for estimating the values of the three court-decided components is built around those four factors:.

1. Compile and organize data in the four groups of factors.

2. Evaluate the potential effects of the assembled data on the probability of each outstanding court decision.

3. Estimate the likely outcome for the judge's/jury's decision on liability, range of damages, and any remaining dispositive contingency.

4. Identify the remaining types of costs yet to be incurred as litigation goes forward and estimate the probable dollar amounts for each.

To do case valuation well, you must (a) understand the basics of decision-maker psychology, i.e., how jurors think, (b) understand the rudiments of estimating probabilities, damages, and costs, and (c) gather, organize, and analyze case-relevant information methodically. This section constitutes a primer on all three and is divided into three corresponding parts.

PART I

DECISION-MAKER PSYCHOLOGY: WHAT JUDGES AND JURORS FEEL AND THINK WHEN THEY DECIDE YOUR CASE

CHAPTER 15:

FEEL, THINK, ACT: THE PRIMACY OF STORY

Norma Kwaitkowski in Juryland

Norma Kwaitkowski drives to the courthouse full of anticipation. She has never sat on a jury before and is eager to see Perry Mason pull a rabbit out of a hat. After sitting around in a room with nothing to do for half the day, she finally is chosen for a case in which Company A is suing Company B about the failure of some electrical connectors because company B's plastic resins contained a compound that caused a corrosive substance to leach out under hot and humid conditions and thereby to cause a short-circuiting on some occasions in delicate circuitry that led to the failure of key equipment in . . .

Ms. Kwaitkowski's eyes have started to glaze over, and the lawyers haven't even finished their opening argu . . . sorry, statements. Once the case begins, the plaintiff's lawyer calls a witness who establishes the contractual relationship. The lawyer goes through the written contract in meticulous detail, pausing for a bit on the section dealing with specifications. Then the lawyer calls a witness who talks about Company B's sales literature for the resin. Then the lawyer calls a witness who describes the product that Company A was making and why it was a critical component of the electronic circuitry of the Whizbang Gadget. Then the lawyer . . .

Ms. Kwaitkowski has started to repent having looked forward to jury duty. She is having difficulty making sense of what she is hearing. But she is trying her best to put

it together somehow. As best she can determine, Company B sold Company A something called a "resin" that didn't work right or had some bad stuff in it or something, and Company A is saying that the bad stuff caused Company A to lose money.

Company A's expert on electrical equipment is on the stand, talking about various formulas and specifications and requirements and what you have to look out for. But Ms. Kwaitkowski is thinking about the pot roast dinner she is planning for the family gathering next Sunday.

To Evaluate, Think Through the Trial

Perhaps the most important aspect of estimating the financial value of a lawsuit is the assessment of how a judge or jury will likely view the evidence and arguments on liability and damages. To do that well, you need to understand how jurors perceive the facts of lawsuits and how juries make decisions. How will your case play in Peoria? Can you do anything to make it persuasive? Does it have elements that will engage jurors at the emotional level so powerfully that, after thinking about the evidence, they will want to rule in your client's favor? Are you and other lawyers on your team capable of presenting your case in a way that persuades the jury?

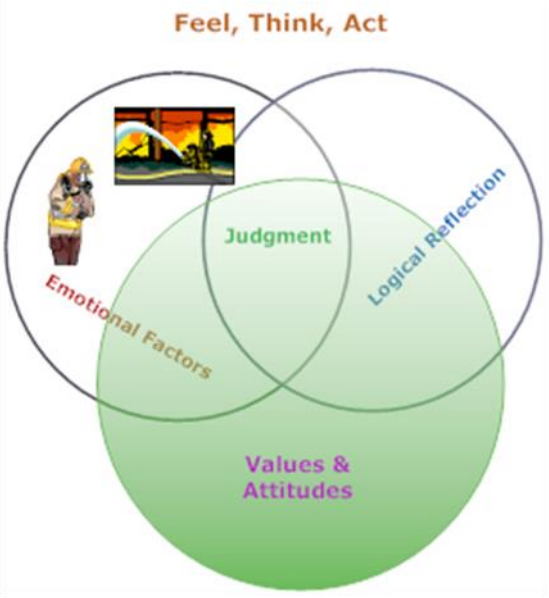
This chapter is about story telling in the courtroom. The purpose is to emphasize the importance of understanding how a jury or judge is likely to see your case and to illustrate the importance of story. The process of evaluating a case tracks that of tying it.

We must try to project the impact the evidence and argument will have on the jury. But the jurors do not think in terms of evidence and argument. They think in stories.

Accordingly, you need to know what story you will tell with the facts and arguments that support your case. Knowing whether you have a cogent, coherent, and compelling story is a major part of case valuation.

Feel, Think, Act

Most jurors—like most people—feel first, think second, and act (intend) third. They want to find meaning in the courtroom proceedings, to make sense out of them. They need some overarching theme with which to do that. They need a story that is coherent and internally consistent. It must hold together around a theme. The evidence must support, not contradict, it. Jurors enter the story emotionally, reflect on it cognitively, and finally determine their response through a combination of feeling and conscious reflection.



But trials proceed inductively. The evidence dribbles out piece by piece, at times in no particular order. It's as if we were to see a movie in the order that the scenes were first shot, not after they have been properly assembled in the editing room. We seem to expect jurors to hold on to the bits of evidence and, acting as their own editors, assemble them into the correct story.

Imagine that a client starts telling you her story and you *never* get to ask any question to clarify or find out missing information. That is the predicament in which we place jurors in court. Except that too often we don't tell a coherent story from start to finish.

A few jurors may think inductively and analytically. They may suspend judgment and wait until the end to piece things together. But most are like you and me. They tend to perceive through feelings first. Such jurors (and judges) desperately need a frame of meaning for what is going on in court. If the lawyers do not supply one, they will provide their own from their own life experiences.

That is why I told the story of Ms. Kwaitkowski. The object was to get you to feel something, to engage at an emotional level, to identify with the plight of jurors. I wanted you to get some feeling for what it might be like to hear days of testimony about arcane subject matter presented in a logical but boring manner.

When Jurors Snooze, You Lose

The case that Ms. Kwaitkowski heard was highly technical and involved one giant corporation suing another giant corporation. Unless the lawyers for the plaintiff

can find a way to make it meaningful and understandable for Ms. Kwaitkowski, the plaintiff will lose. We don't need to know more about the facts than that. The plaintiff has the burden of proof. If Ms. Kwaitkowski and her fellow jurors *feel* nothing, they will not get to the thinking part, and their decision will be to rule by default for the defendant. Under those circumstances, that decision has almost nothing to do with the merits of the case.

How Scheherazade Kept Her Head

The king had a bad habit. He would marry a virgin, sleep with her on their wedding night, and then have her beheaded the following day. It seems his first wife had betrayed him, and since then he did not trust any other wife.

By the time he met Scheherazade, the king had killed three thousand women. It was dangerous to be young, beautiful, and desired by the king. Scheherazade's father begged her not to marry the king. He did not want to lose his daughter. She wasn't keen on the idea of a one night stand either.

But Scheherazade knew something that neither her father nor the king knew.

We Interrupt this Story for a Commercial Announcement

This story is incomplete. We don't know what Scheherazade knew. But we want to know. We don't know what happened next. But we are dying to find out. Scheherazade's story has drama, tension, conflict, excitement—even sex—all the

elements of great stories. It keeps the reader or listener interested, always wanting to know what comes next.

If you're not familiar with the story, you want to know what Scheherazade knew and how she came to keep her head when 3,000 women before her had met their demise at the hands of a bloody executioner. If I were to stop now, you probably would look up the story somewhere else to find out what happened. Because you—like everyone else, jurors included—need closure.

But you also need drama. I could tell you the bare facts about Scheherazade, and you might or might not find them of passing interest. But they would not likely keep you on the edge of your seat.

In fact, the desire to know what comes next is what makes commercial interruptions such as this one tolerable. On the one hand, they distract. But on the other, the listener, reader, or viewer is left hanging just before the interruption and will stay tuned to see what comes next.

The Story Continued—What Scheherazade Knew

Scheherazade had read hundreds of history books in the king's library. Her father was the king's right hand man, the *vizier*. She had access. And she was smart. She knew the stories.

Scheherazade persuaded the king to let her tell him a story on their wedding night. She drew the story out until the wee hours of the morning when she had the king in the palm of her hand. He was so pleased with the story that he asked her to tell him

another. "There is no time," she said. "But tonight, when we come together again, I'll tell you another."

The king could not wait until nightfall to hear Scheherazade's next story. Again she kept the suspense rising until early in the morning. Again the king asked for another. And again, Scheherazade put him off until the evening.

This went on for 1001 nights. During that time Scheherazade gave birth to three sons. The king fell deeply in love with her. And he acquired the wisdom and knowledge that Scheherazade shared with him through her stories.

What did Scheherazade know that allowed her to keep her head? She knew how to tell a story.[29]

Do Over

Let's back up a bit for a second swing of the bat in Norma Kwaitkowski's case. The plaintiff's attorney begins his opening:

"Ladies and gentlemen. This case is about the failure of Amalgamated Resin Corp. to do its part in defending our country. You see, my client, Superb Connectors, Inc., was asked by Transcendent Defense Corp. to supply an electrical connector to be used in a new weapons system, The Artillery Shield. The Artillery Shield plays a vital role in protecting our troops in combat. It uses sophisticated electronic circuitry that must perform well under extreme weather conditions. No matter the heat, rain, or

[29] See Richard Burton (translator), *The Arabian Nights: Tales From a Thousand and One Nights* (New York: Modern Library, 2001).

humidity, the electronic equipment must work. Otherwise, The Artillery Shield will become a worthless piece of metal, more a hindrance than a help.

"Super Connectors supplied a critical connector for the circuitry, made out of a high-grade plastic. Superb Connectors told Amalgamated Resins everything about the heat, rain, and humidity in which the connectors would need to function. My client also told Amalgamated Resins that the connector would be a critical component in a piece of weaponry that would save American lives. But Amalgamated Resins sold Superb Connectors a plastic resin with a corrosive substance that leached out of the connectors under humid conditions, causing a short circuit that, in turn, caused The Artillery Shield to malfunction . . . "

This may not be the most effective way to tell the story. It may be too hokey or too long. It may lack punch. But it *is* a story. It includes parts that engage the jurors emotionally. It is not just about a plastic resin that did not meet the arcane specifications set forth in a turgid purchase order. It has life and context and even some drama. The jurors will want to know what happens next. Don't you?

The Big Picture

We must also keep the big picture in mind. Analysis looks at parts; stories build the parts into a whole. An indispensable step in case evaluation is the construction of a compelling story out of the available evidence. The story must be arguable. That is, it must cohere and be consistent. It must make logical sense. And it must be compelling. In other words, it must connect with the judge or juror emotionally. These three aspects

of story correspond to the three factor groups (evidence, arguments, and extraneous factors).

Without the story, the jury is looking at isolated pixels in a digital photograph presented one after another. It's like having all the pieces of a jigsaw puzzle but no clue about how to put them together. The advocate must put them together in a way that makes sense and persuades.

The Shorter the Better

In distilling the story out of all the evidence and arguments, the advocate's challenge is to find the shortest, most compelling story possible. It can even be encapsulated in one sentence, such as Johnny Cochran's famous line in the O.J. Simpson trial: "If it doesn't fit, you must acquit." When the prosecution presented gloves tied to the crime and claimed they belonged to the defendant, Cochran had Simpson attempt to put them on. He could not get his hand in them. This was an iconic moment and a major setback for the prosecution. One of the major lines of defense was that the police fabricated and planted evidence in an effort to frame Simpson. Cochran was now able to sum up all of the evidence related to police misconduct and to hammer home the burden of proof in one line: "If it doesn't fit, you must acquit." In fact, "it doesn't fit" was the story.

The value of condensing the story into one or two lines is that the advocate can repeat it in many settings like a refrain. In estimating the financial value of a case, you

need to investigate whether your client's case lends itself to this kind of powerful story telling.

The Basic Plot Lines

A courtroom advocate must simultaneously attend to two basic tasks. She must (a) tell a compelling story and (b) touch all the legally required bases to prove or refute liability and damages.

These two tasks intersect and overlap: Ideally, we use the evidence and arguments to buttress the story, to substantiate it, to support it. But the story comes first. Without a compelling story, there is no case (or defense) even if all the technical requirements of a cause of action have been met. Why? Because we think in stories. It's the way our minds are built.[30]

To estimate the financial value of a case, we must in some way consider the stories that each side will tell . There are two basic plots, one for the plaintiff and one for the defendant.

The **plaintiff's basic story line** goes like this: D did something wrong without justification (exemption, privilege, etc.) that caused damage to P. By requiring D to pay money to P, the jury can fix, help, and make up for the damage caused.[31] In appropriate cases, the plot includes a punitive element: By requiring D to pay punitive damages, the jury can deter D and others like D from doing this kind of wrong thing again.

---

[30] *See, e.g.,* Mark Turner, *The Literary Mind* (New York: Oxford University Press, 1996).
[31] The "fix, help, and make up for" motif comes from David Ball, *David Ball on Damages: A Plaintiff's Guide for Personal Injury and Wrongful Death Cases* (Notre Dame: National Institute of Trial Advocacy, 2001).

The plaintiff's attorney argues to the jury that up to now P's story has an unhappy ending. The jury can help finish the story by supplying a happy (or, at least, a satisfactory) ending.

The **defendant's basic story lines** are

We didn't do it.

OR

We were justified in doing it.

OR

P is to blame.

OR

P was not harmed or not harmed as much as she claims.

The defendant's lawyer argues to the jury that P's story is faulty in some respect. Either it didn't happen or D is not morally or legally responsible for P's misfortune or the amount of money P is seeking is inappropriate for some reason or another.

These basic story lines recur in every case because they lay out the essential components for establishing liability and proving damages or asserting a defense. In fact, they are so basic that advocates fall into them automatically, running the risk of depersonalizing their client's actual story.

For case valuation purposes, we must be candid with ourselves. Are we, like Driselda in *Cinderella,* trying to squeeze a size 12 foot into a size 8 glass slipper? Is the client's true story really all that compelling? Does it hang together ? Does it account for all the evidence consistently?

Examining the story is one of the best ways to surface problems in our case or in that of the other side. If we have a powerful story, then we should have a strong case. If not, we need to be frank with ourselves in translating that fact to the estimate of financial value.

CHAPTER 16:

DOES YOUR CASE PRESENT A COMPELLING STORY THAT HOLDS TOGETHER WELL AND IS GROUNDED IN ALL OF THE EVIDENCE?

The Correspondence Theory of Truth[32]

The scientific enterprise is grounded in a fundamental notion of truth: Statements that correspond with what is objectively the case—what is really out there—are true. Assertions having no known basis in reality are false. (They are not scientifically verifiable, i.e., not—yet—true.)

Sound familiar? It's the judicial theory of truth as well. It is why we gather evidence. It is why we have developed rules to protect against the use of faulty or unreliable evidence as a basis for judicial decisions. We go to great lengths to protect against the corruption of the judicial process with misleading, false, and unreliable evidence. Our judicial system does not permit evidence that does not correspond to what witnesses or documents confirm as having happened or is actually out there. Elaborate belief systems or superstitions have no place in the courtroom.

The Coherence Theory of Truth

Evidence with no overarching explanation is not truth. It is mere data. For this reason, science also subscribes to the coherence view of truth. Observable data must

[32] For a more in-depth discussion, *see* Kenneth R. Hammond, "Coherence and Correspondence Theories in Judgment and Decision Making," chapter 3 in Terry Connolly et al. (eds.), *Judgment and Decision Making: An Interdisciplinary Reader* 53-65 (2nd ed., Cambridge: Cambridge University Press, 2000).

somehow be shown to make sense, to hang together in a meaningful way, to cohere. This is what scientific theory is all about.

In the courtroom we also look for the theme, the story, the explanatory structure. It is not enough to have disjointed facts paraded in front of the jury.[33] They must be logically consistent. Internal contradictions cannot be left to stand. Expert witnesses may testify about special theories. But the theories may not be beliefs divorced from scientifically controlled evidence.

Coherence in the courtroom typically comes in the form of arguments. The arguments are sometimes based on rules (the statement is hearsay and must, therefore, be excluded). At other times, arguments summarize or explain evidence ("if it doesn't fit, you must acquit"). Logical consistency is a central feature of both kinds of arguments.

The Three Musketeers: Ethos, Pathos, and Logos

The primacy of story presented in the previous chapter and the correspondence and coherence theories of truth summarized above are not radically new insights into the way humans know reality and make decisions. In his book on *Rhetoric*, Aristotle addressed much the same thing 2,500 years ago.

To communicate well, we must combine three elements of human cognition: shared values, emotion, and reason. In Greek, these are ethos (ἐθος), pathos (πάθος),

[33] Every courtroom attorney should learn how to tell stories through testimony. There is no better guide for learning why this is important and how to do it than Herbert J. Stern, *Trying Cases to Win Vols.I-III:* (Wiley 1991).

and logos (λὀγος). "Ethos" is the Greek word for custom or habit. It can also take on the meaning of moral character or characteristic of. (Our word "character" is a transliteration of the same Greek word, χαρακτερ.) In a broader sense, it designates our common ways of doing things, the assumptions we hold in common, and our shared understandings of what is right and proper. It is what ties us together socially. It is the root of "ethic" and "ethics" and similar cognates.

Thus, when we fashion arguments or tell stories in court that include the ethos component, we are deliberately appealing to understandings, values, customs, and habits that all of us in a given culture share—judge and juror included. Grounding our arguments in such shared identity lays the foundation for persuasion. Failure to address this component of rhetoric adequately leaves results in thin, abstract, and disjointed presentations that listeners have difficulty relating to.

"Pathos" has several meanings in Greek, depending on context. It can mean an incident or accident or whatever happens to someone. A related meaning is what one has suffered, one's experience. The Greeks also used "pathos" to signify a passion or emotion, such as love, hate, anger, and the like.

For purposes of courtroom communications, we use "pathos" to refer to engagement of the listener at an emotional or visceral level. Prosecutors and civil plaintiffs seek to use photographs and videos of the injured victim because they evoke the passions of the jurors. They speak at a subconscious, primal level, the effects of

which we have difficulty controlling. The law may well be dispassionate, but judicial decisions are not.

The third Musketeer, "logos," has a broad sweep of meanings. At its most basic, it referred to thoughts as well as the means for expressing thoughts, i.e., words. But like people in other cultures, the Greeks invested the word "word" with special qualities. Speaking words could, magically, make things happen.[34] The Hebrew Bible captures this creative power of words in its first sentence: "And the divine power said, 'Light be,' and there was light."[35] Of course, every practicing lawyer knows this function of words, which is implicit in every "hereby order," "do hereby resolve," "in witness whereof," and "hereby give, grant, sell, convey, and confirm" that we use to do things.

The third collection of meanings that "logos" connotes relates to reason and logic. This is the sense that Aristotle appears to have in mind when referring to the role of logos in rhetoric. An argument must be logically consistent if it is to persuade. Arguments that are absurd, arbitrary, capricious, incoherent, irrational, meaningless, or illogical do not convince the listener. They contradict our thinking or create gaps. They do not carry us along, because we cannot follow.

---

[34] It was not until the mid-20th century that English-speaking philosophers rediscovered this quality of words, something lawyers have known implicitly for hundreds of years. *See* J.L. Austin, *How to Do Things with Words,* (J.O. Urmson, ed., Oxford: Clarendon, 1962).

[35] Genesis 1:3. This translation is a modified version of the German translation by Martin Buber and Franz Rosenzweig ("Gott sprach: Licht werde! Licht ward.") in which I attempt to remain faithful to the Hebrew word "elohim," which is not a proper name but a plural form meaning literally "gods" but which is more accurately translated with "godhead," "divinity," or "deity." Translations that use the word "God" tend to suggest a person or entity. "Elohim" can be thought to designate a role in reality such as king or steward; in this instance, it is the role of creating force.

All three aspects of powerful communication—ethos, pathos, and logos—are important parts of the coherence side of persuasion. If an argument is not grounded in common beliefs, it will appear not to hold together, however logically pristine it may be. If it does not engage the emotions of the listener, it will not have a primal integrative force that the audience needs. And if an argument is illogical in any respect, it will not cohere—hang together—at the most basic level.

The judicial system, like the scientific enterprise, relies on both correspondence and coherence to reach conclusions about what happened and what it means. When evaluating the four types of factors that affect decisions and estimating their impact on potential decisions, therefore, we should keep in mind *both* correspondence *and* coherence.

CHAPTER 17:

FACTORS THAT AFFECT COURT DECISIONS

Four types of factors affect the decisions of judges and jurors:

1. Evidence
2. Arguments
3. Non-dispositive contingencies
4. Extraneous Factors

The judge must rule on motions and objections. The jury must decide liability and damages. In each instance, there will be evidence, legal and logical arguments, and extraneous factors that affect the decision. The phrase "non-dispositive contingencies" refers to decisions by the judge that would exclude evidence potentially important to the jury's decision. By looking at how these factors are likely to affect decisions, we can get a more complete feel for the likely outcome. The picture has greater granularity. We can see the parts that make up the whole. And we are less likely to overlook significant matters that might have an impact on the decision in question.

Keep in mind that no decision maker—judge or juror—goes through an analytical process such as this to arrive at a decision—at least not initially. (*See* Chapter 13: Feel, Think, Act.) But judges or jurors routinely examine evidence and arguments to support (or change) an intuitive judgment. In any event, this kind of painstaking analysis—and it is a pain!—can be highly useful in understanding what the decision outcomes are likely to be. An expert pastry chef will have a fair notion of what a cake

will taste like if she knows the ingredients and their amounts, the order in which they will be mixed, the temperature at which they will be baked, and the length of time they will be in the oven. When it comes to litigation, you are the expert pastry chef.

Organization of the Factors

To evaluate the information constituting each of the factors discussed below and to estimate its likely impact on court decisions, it needs to be organized properly. The best way to do this is to group information in each factor type for each sub-part of each component of case valuation. The best time to start is at the outset of the case. Further guidance on what to do, how to do it, and what tools to use in the process is available at www.WinBeforeTrial.com.

Evidence

Before we can estimate the likely decision on an element of a cause of action or a type of damages, we need to know the evidence relevant[36] to it. This is elementary. Every law-school graduate knows this. But not every litigator takes the time in appropriate cases to assess the evidence systematically.

From the decision maker's perspective, evidence plays a supporting role in litigation decisions. Say what? Yes, evidence is not primary; it is secondary. Primary is the story that the lawyer uses the evidence to tell. The evidence proves—makes plausible or compelling—that story. (Or it disproves the other guy's bogus story.)

[36] "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

The management task is to compile all evidence relevant to each component of the case valuation process and to assess its likely impact on the decisions respecting that component. This means all of the evidence—that which helps, along with that which you would like to deep six. While compiling and evaluating the evidence can be a daunting undertaking, it should be part of trial preparation in any event. It is embarrassing to discover mid-way through the trial that you have no evidence with which to establish one of the elements of your cause of action or affirmative defense.

Arguments

Compiling the arguments likely to have an impact on court decisions is a process of putting together the stories—the sub-plots—that make up the play as a whole. Because we want to know how these arguments will affect the judge's or jury's decisions, we must take care to look at the ethos, pathos, and logos of each. Logos alone does not persuade. The ethos and pathos elements are particularly important in connection with the extraneous factors (e.g., biases and prejudices) discussed below.

Like stories generally,[37] there is a basic set of plots in the judicial context as well. Some pertain to evidentiary arguments. "Your Honor, that testimony is hearsay because it relates an out-of-court statement offered to prove the truth of what it says." Some pertain to proof of facts. "Ladies and gentlemen, we know that it was Colonel Mustard because Miss Scarlet saw him in the billiard room holding the rope shortly after the

[37] Literary theorists have endeavored for hundreds of years to identify the basic plots of storytelling. For example, Georges Polti believed there were 36. *See* George W. Brandt (ed.), *Modern Theories of Drama : A Selection of Writings on Drama and Theatre, 1850-1990* 12-18 (New York : Oxford University Press, 1998).

butler died by strangulation." Others pertain to mitigation. "Your Honor, we implore you to consider the harsh environment in which my client was raised. Anyone with that upbringing would likely end up selling drugs." And so on.

In short, we need to know what arguments are likely to be made in support of or in opposition to a particular decision and how persuasive these arguments are likely to be given their substance and the mindsets of the decision makers. Only then can we assess their likely impact on the judge or jury.

Non-Dispositive Contingencies

Non-dispositive contingencies are decision events the outcome of which could limit the evidence that the jury ultimately considers. There are not likely to be many such contingencies; but their impact may be substantial, even outcome determinative.

For example, the plaintiff is suing her former employer for sexual battery. Within an hour after the alleged assault, she described what happened in highly emotional terms to her best friend, Cassandra. The plaintiff wants to introduce Cassandra's testimony about the conversation under the excited utterance exception to the hearsay rule. The defendant has filed a *motion in limine* to keep it out. The judge's decision on the motion is a non-dispositive contingency. Even if the judge grants the motion, the case will still go forward. But the impact on the jury's liability and damages decisions could be considerable. In estimating the financial value of the case, you need to evaluate what that impact is likely to be.

Extraneous Factors

The biases and prejudices of the judge and jurors, the advocacy skills of the lawyers, the demeanors of witnesses, the attractiveness of the plaintiff, and similar factors are all irrelevant. They do not have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[38] I call them **extraneous factors** because, for the most part, they operate outside the legal framework and are not subject to the control of the judge or appellate court.[39] But such extraneous factors can have a decisive effect on the outcome of the case.

We are on mushy terrain here. We may be able to get some hard data to work with such as the won/loss record of opposing counsel, demographics of potential jurors, and the appellate record of the trial judge. But assessing the impact of extraneous factors on the jury's decision involves judgment calls that are largely impressionistic in nature. By focusing on these points consciously, you enter the information into your memory bank, making it available for your intuitive judgment later. To function well, your intuition needs all the experience and information you can give it.

The following four types of extraneous factors merit the most attention:

1. Demographic makeup, dominant biases and prejudices, and relevant beliefs of likely jurors.
2. Emotionally charged factors relating to parties and witnesses

[38] F.R. Evid. 401.

[39] The exception to this general statement is the duty of the judge to excuse potential jurors for cause if they reveal a prejudice or bias that would interfere with their ability to render a fair and impartial verdict.

3. The judge's biases and prejudices.
4. Advocacy skills: Yours and those of opposing counsel.

Demographic Makeup of the Jury

When you calculate the Net Present Financial Value before trial, you cannot know who will be on the jury. But you can know the kind of people who live in this jurisdiction. What are their values and shared beliefs as they might pertain to this dispute? What general cultural biases do they have? What is their general income range? What level of education is typical? How conservative or liberal are the politicians that they elect? Do bond issues pass readily or not at all? Are high school, college, or professional sports a big deal in the area? How many churches, synagogues, and mosques does the area support? What is the overall level of economic prosperity?

A rural jury likely will have different biases, prejudices, and relevant beliefs than a jury drawn from a major city. A northern jury will react differently to the same facts than a southern one or a western one or a mid-western one. If you're from out of town, be prepared for some home cookin', as they like to say in the South.

Are the potential jurors in your jurisdiction predominantly conservative or liberal, open- or closed-minded, college educated or mostly limited to high school, financially well off or struggling to get by, frugal or big spenders? Of particular interest in the demographic review are the belief systems (about religious issues, right and wrong, good and bad, blame and blameworthiness, personal injury lawsuits, insurance

companies, lawyers, etc.) that are likely to prevail among the jurors in your case? These are part of the ethos discussed above.

The belief systems, mental maps, and scripts that populate the jurors' brains are highly important when developing your strategy for your opening argument, presentation of evidence, and closing argument. Jurors use their existing mental software to arrange details and complete stories in ways that reflect their beliefs.[40] In estimating a range of likely verdicts, it helps, therefore, to get at least a general understanding of the mental makeup of your potential jurors.

Every jurisdiction will have outliers. What we are looking for is the average insofar as it could affect the jury's ability and inclination to understand and reasonably decide your case the way you would prefer.

Emotionally Charged Factors Relating to Parties and Witnesses

Emotional responses to non-evidentiary aspects of a case are real. Will the jury find your client, the opponent, or one or more witnesses likeable, sympathetic, unsympathetic, repulsive? Is she obese (= generally unsympathetic) or confined to a wheel chair because of the accident (= generally sympathetic)? Is your client a faceless

[40] Cognitive psychologists such as Jean Piaget have been elucidating the underlying mental processes at work here for well over 75 years. The application of cognitive psychology to understanding judges and jurors has a pedigree equally as long. *See, e.g.*, SunWolf, *Practical Jury Dynamics2: From One Juror's Trial Perceptions to the Group's Decision-Making Processes* (Charlottesville: LexisNexis, 2007); *Anonymous*, "How Jurors Really Think: A Primer of Jury Psychology;" Melissa Gomez, "The Best Educator Wins: The Psychology of Learning in the Courtroom," The Legal Intelligencer (Philadelphia, 2006); Walter Abbott and John Batt (eds.), *A Handbook of Jury Research* (Philadelphia: American Law Institute-American Bar Association, 1999); James J. Gobert and Walter E. Jordan, *Jury Selection: The Law, Art, and Science of Selecting a Jury* (2nd ed., New York: Clark, Boardman, Callaghan, 1990); Norbert L. Kerr and Robert M. Bray, *The Psychology of the Courtroom* (New York: Academic Press, 1982); Kalvin and Zeisel, *The American Jury* (Boston: Little, Brown, 1966); Karl Llewellyn, *The Bramble Bush: On Our Law and Its Study* (1930).

corporation generally known to be callous and greedy? If so, can you find ways to mitigate this prejudice by humanizing the company? Is a key witness particularly attractive? Or will he come across as a jerk? Are any facts likely to evoke strong emotions such as outrage, compassion, disgust, annoyance, hostility, affection, suspicion, and the like?

None of this should affect the jury's (or judge's) verdict. But it does. Because it does, you need to consciously consider the potential impact of emotional factors when trying to estimate the probability of a liability finding and the range of damages.

The Judge

Judges are human. Like other humans, they differ in their biases, their legal acumen, their knowledge of the rules of evidence, their courtroom demeanor, the way they preside over trials, and more. Seasoned courtroom lawyers know this all too well.

Know your judge. Know her as well as possible. Know whether she is choleric, arrogant, respectful, egotistical, bossy, impatient, or temperamental. Know whether she keeps a short leash on trial counsel during the examination of witnesses. Know her judicial record cold. What rulings has she made in similar cases? How often has she been reversed and on what grounds? Also find out what she did in life before elevation to the bench. What kinds of clients did she represent? Were they typically plaintiffs, defendants, or a mix of both? Did she work in a large firm or as a sole practitioner? Was she a prosecutor or some other government lawyer? If she was appointed, what was the

party of the Governor or President who appointed her? Has she been active in party politics? What do other lawyers think and say about her?

Lawyers in rural jurisdictions likely know the foibles and idiosyncrasies of every judge to whom their case could possibly be assigned. Big-city and out-of-town lawyers are not so lucky. But regardless of the extent of personal knowledge about the judge, it is useful to take at least a few moments to think about who the judge is and what that might mean for the eventual outcome of your case.

The point here is to anticipate the impact of the particular style and known biases of the judge likely to preside over your case. Is it likely to affect the jury's verdict in a material way? If so, you should determine how and to what extent and include your conclusion as one of the factors in arriving at the range of likely verdicts.

Advocacy skills: Yours and Those of Opposing Counsel

After the law and the evidence, the advocacy skills of the lawyers in the courtroom are the most important factor affecting the final judgment.

The law and evidence are like bricks, mortar, windows, doors, carpet, wood, and nails. You can't make the Taj Mahal out of the materials for a three-bedroom ranch. But the same materials can be used to make a $300,000 ranch or something of much less value. It depends on the designer and builder. The plaintiff's lawyer is the designer and builder. Her skills matter—greatly. Defense counsel are busily trying to remove every brick that her opponent is laying.

Beware of assumed reputation. Some lawyers from big firms have tried only a handful of cases and are not good at it when they do. They may have great rainmaking ability but deficient courtroom skills. Other lawyers who have tried many cases have merely done the same wrong things over and over and over. I once sat in a courtroom watching supposedly top lawyers on both sides of a case, neither of whom could properly lay a business records foundation. One had obviously had only minimal contact with the expert witness who was key to his case. The other launched forth on a wild goose chase with a last-minute theory that was patently absurd (and the judge said so). This may have just been a bad day for each, but it was valuable information for me to tuck away for future cases.

PART II:

WHAT ARE THE CHANCES:

ESTIMATING DAMAGES, COSTS, AND PROBABLE OUTCOMES

CHAPTER 18:

COMPLEXITY AND UNCERTAINTY—WHY IT'S HARD TO SAY WHAT YOUR CASE IS WORTH

You represent a major pharmaceutical company in a multi-count case in which a former senior manager has alleged sexual harassment, sexual assault, failure to train employees properly, retaliatory termination, and sex discrimination in hiring and promotion. The plaintiff was making $165,000 per year plus annual bonuses averaging $40,000 at the time she was laid off along with 723 other employees as part of a cost-cutting strategy. The co-defendant, a senior vice president who is married with two children and active in his church, emphatically denies that he did anything that the plaintiff alleges and, instead, claims (a) that he rebuffed her sexual overtures to him and (b) that she performed her job at best at a mediocre level.

You filed a motion for summary judgment on count II (intentional infliction of emotional distress) six weeks ago, arguing that under the law of Pennsyltucky this cause of action requires deliberate threat of immediate bodily harm, which cannot be shown under the facts of this case. You plan to file a motion in limine to exclude the testimony of the plaintiff's friend insofar as it relates what the plaintiff told her one hour after the alleged assault incident. You will argue that it is hearsay not covered by the excited utterance exception.

Plaintiff's complaint seeks compensatory damages of $750,000 and punitive damages against both the senior vice president and your client in an unspecified

amount. A partner and rainmaker in a firm with 232 lawyers and offices in four cities, you have been a litigator for 12 years but have tried only five cases to verdict. You are assisted by a senior associate and a paralegal. Trial is expected to take place in 18 months. You have given your client's in-house counsel an estimate of between $175,000 and $225,000 in fees and expenses between now and a jury verdict. "But it could be more," you added.

The present judge in the case is known to be somewhat moody and erratic in her rulings. A different judge might preside over the trial. The case is pending in state court. Conservative values predominate in this jurisdiction. The largest verdict returned in the county to date was $375,000 in major automobile accident in which the medical and other special damages came to around $125,000. To the shock of the plaintiffs bar, one jury recently returned a defendant's verdict in a rear-end collision case in which the defense did not actively contest liability.

The plaintiff is an attractive, intelligent young woman in her mid-30's who started her own marketing firm after she was fired. Her net income from that business is about one third of her salary and bonus in the last year that she was employed by your client. From your research you have discovered that the plaintiff's lawyer is a competent general practitioner who has tried a few routine personal injury cases but has little experience in employment or sexual harassment cases. Apparently, the case came to her through the referral from a mutual friend of the plaintiff and the lawyer. Mediation is scheduled to take place five weeks from today.

What is the net present financial value of this case from your client's perspective?

Do you have a ready answer? If so, how confident are you that your answer is correct? If you do not have an answer or are not highly confident that it is correct, what do you need to produce an answer you could confidently give to your client?

Many lawyers will give the standard lawyer answer to the client's question about the net settlement value of the case today: **It depends**. It certainly does. In fact, effectively managing the various contingencies on which the answer "depends" is a major part of what this section is all about.

The problem here is twofold: First, there are numerous **uncertainties** that you must consider in estimating what the eventual outcome might be and in determining what that means for settlement value today. Second, the **complexity** and interdependence of known factors and still-to-be-determined factors (unknowns) is bewildering.

Uncertainty and **Complexity** are the twin enemies of reasonably accurate estimates of net present financial value. The challenge is to wrestle them into submission.

CHAPTER 19:

KNOWNS, UNKNOWNS, AND UNKNOWN UNKNOWNS

To determine the Net Present Financial Value of a case, we need to assess:

(1) which evidence, if any, the jury is likely to see and hear,

(2) the likely effect of that evidence on the jury's decision, and

(3) what it is likely to cost to get a final judgment.

The answers to these questions are **contingent** upon the outcomes of future events and decisions. To determine the Net Present Financial Value of the case, therefore, we need to consider and manage contingencies that affect what evidence the jury will get.

We must take three categories of knowledge into account:

1. Knowns
2. Known Unknowns
3. Unknown Unknowns

Some Useful Terms

Knowns. The material evidence, law, and decisions collected to date that could affect the outcome of the case.

Known Unknowns. Decisions, events, and outstanding discovery that we know we do not yet know and that could affect what evidence the jury gets or how that evidence affects the jury's decision.

Unknown Knowns. Data in computer files, boxes, and your brain the significance or existence of which you are unaware.

Unknown Unknowns. Events and evidence we do not even know about that may emerge as surprise factors that affect the outcome of the case.

Contingency. An event or piece of information whose occurrence depends on some decision or other event. For example, a judge's decision on a motion for summary judgment might depend on whether the plaintiff disputes a key fact at his deposition. Whether a key witness testifies is contingent upon whether a motion to exclude her testimony is granted or upon whether she in fact appears.

Certainties and Uncertainties. That it snowed yesterday is a certainty (a/k/a fact). What the actual temperature will be tomorrow and whether it will rain or snow are uncertainties. The occurrence of rain tomorrow depends on a variety of known, unknown, and unknowable factors. Similarly, an uncertainty in litigation is an event whose outcome cannot be known in advance although we can isolate some of the factors (both the knowns and known unknowns but not the unknown unknowns) that will affect what actually takes place.

Knowns

The **Knowns** are what you already know about the law and the evidence that you and your opponent have

gathered in discovery, interviews, and investigation. The category of knowns also includes what you know about your own advocacy skills and those of your opponent, general jury demographics, decisions in similar cases, the track record of the judge, and anything else you know that could have a bearing on the outcome of the case.

Known Unknowns

Assume that you are sufficiently interested in a house for sale that you want to know more. You know some specific things that you do not know about the house, things that home inspectors and appraisers make lists about. How does it sit on the lot? What does the neighborhood look like? Does it have a radon gas? Have pests ever been a problem? You know that you do not know these things but would like to. You also know that you do not know how you will feel about the house once you see it and go inside. All of this information—the ascertainable facts about the house and your potential feelings toward it—are **known unknowns**. We know that we need to know them to make wise choices and we know that we do not yet know them.

Some known unknowns are knowable. We can find them out now by asking the right questions or investigating properly. What kind of heating system does the house have?

Other known unknowns are not (yet) knowable because they are future events. How long will the heating system last before it will need to be replaced?

At each moment in its life until final judgment, every lawsuit has a set of known unknowns. Some are knowable: What time did the arresting officer arrive at the scene?

Others are not yet knowable: Will the arresting officer appear at a disputed speeding ticket trial? Will an appellate court change the law? Will the opposing side file a motion to dismiss or for summary judgment? How will the court rule if they do? Will our peremptory challenges be sufficient to strike biased jurors whom the judge will not dismiss for cause? Will we be able to defeat the plaintiff's case on a motion for directed verdict? The jury's verdict is the biggest known unknown of all.

It pays to think hard about known unknowns such as a potential change in the law. In a bitterly fought RICO case, the plaintiff had prevailed in the motion to dismiss and the motion for summary judgment. Three weeks before trial, however, a new Supreme Court decision formed the basis for a renewed motion for summary judgment, which was quickly granted. The case was over. The Net Present Financial Value of the case dropped to zero over night. The cocky plaintiff had rejected a decent offer secure in the knowledge that the case would go to trial, and a jury would likely hammer the defendant. Oops.

Unknown Unknowns

Finally, there is that category of things we do not know that we do not know—the **unknown unknowns**. We cannot anticipate them specifically because we barely know that we should be thinking about them. We do not even know what it is we do not know. All we know is stuff sometimes happens that we have no way of anticipating.

If it's unknowable, then unlike known unknowns, we cannot even make a reasonable guess as to the likely outcome of the event. So, what's the point of even talking about it?

When Earnest Shackleton set out to lead a team of explorers across Antarctica, his preparation had been exhaustive. He knew something of what to expect because he had been a member of Scott's failed expedition to the South Pole. He stocked the ship with every conceivable necessary resource and available tools for a successful effort.

Yet, Shackleton knew that he and his crew might encounter unforeseen and even unforeseeable problems and opportunities. What would the weather be like? No one could know with precision. Would they have medical problems that could slow them down or even undermine the viability of the enterprise? Would men who had never been to Antarctica be able to withstand the mental strain of weeks of 24-hour darkness?

Try as he might, Shackleton could not prepare for every contingency because he could not possibly know each one. There were known unknowns (what would the weather be like) and unknown unknowns. As with any great endeavor, events might occur that it was impossible to anticipate. He could not have known that his ship might get eaten by the ice. Nothing like this had ever happened before. It was an unknown

unknown. The men would have to deal with such challenges as best they could when they popped up.

In planning, therefore, Shackleton needed to give due consideration to the potentially devastating impact of unknown unknowns—events that he could not possibly anticipate. After weighing the likely effects of known problems and known contingencies, he would need to add something like an X factor. Although no one has ever found the actual advertisement legend says he used to recruit seamen for the expedition,[41] the words "safe return doubtful" were fully consistent with the unknown unknowns.

The nature of exploration into the unknown entails a sizeable X factor. Big cases that break new ground (pioneering lawsuits against airplane and cigarette manufacturers etc.) have large X factors. But seemingly routine cases can have significant X factors as well. In the *Lakey v. Sta-Rite* case, the plaintiffs did not know that they did not know about 12 other instances of similar damage that had been caused by the removal of defendant's protective drain cover. As this case shows, an X factor is not always negative. (The 12 other occurrences were an unknown unknown to plaintiffs only. For the defendant, they were a known.) Unknown unknowns can help or hurt. We just don't know.

---

[41] The apocryphal advertisement was printed in Julian Watkins, *The 100 Greatest Advertisements* (2nd ed., Dover 1959, original 1948). The Antarctic Circle, a website created by Robert B. Stephenson, contains an exhaustive discussion of the fake provenance of the ad at http://www.antarctic-circle.org/advert.htm. The "picture" of the advertisement displayed above is the artistic creation of John Hyatt and not a reproduction of an original. *See* http://johnhyattillustration.com/shackleton%20poster.html.

In determining what a case is worth, therefore, it is always wise to make some allowance for the impact of information we do not even know might be knowable. Every lawsuit has an X factor of some kind. It makes sense, therefore to make some allowance for the occurrence of things that we have no way of knowing anything about until they happen.

CHAPTER 20:

REDUCE UNCERTAINTY WITH EXPERT INTUITION AND EVIDENCE-BASED ANALYSIS

An experienced antiques expert takes a quick look at mahogany chest of drawers and tells instantly what it should sell for without conducting any tests, referring to any catalogues, or even subjecting it to a close examination. A layperson might not have a clue as to its value.

The expert can make accurate assessments like this because she has acquired a large amount of data over years of working in the field which her subconscious mind makes available intuitively in the blink of an eye.[42] She does not need to spell out for herself all the components of that judgment. But she can.

She might want to double-check her first judgment by carefully examining the chest for indicia of its age and provenance or signs of repairs that are not immediately evident. She might want to ask the current owner where he got it and what he knows about its history. If the value is of critical importance, she might want to have chemical tests performed on the wood, varnish, or fittings of the chest. After engaging in this painstaking investigation, she may either confirm or revise her initial assessment.

Our brains enable us to make both intuitive and analytical judgments.

[42] Social scientists sometimes refer to the 10,000 hour rule for acquiring mastery of a skill or subject. They have found that 10,000 hours of practice helps the brain routinize skills that function automatically and can be called upon in a variety of settings, including circumstances never before encountered. In common parlance, such skills become a "sixth sense," a seemingly uncanny ability to size up a situation in the blink of an eye and know what to do. Thus, the experienced courtroom lawyer develops a sixth sense about when to object and when to keep silent, when to cross-examine and when to stay seated, which cases are likely dogs, and which may well be winners.

On the one hand, our brains are better than supercomputers. Provided with the experience and information, they can make intuitive judgments in the blink of an eye that are remarkably trustworthy. Such judgments are the result of data processing that occurs unconsciously. We do not know—perhaps cannot know—everything that goes into it or how it is done. What weight is given to various factors or pieces of evidence is beyond our conscious control or even awareness. Intuitive judgments have the feel of something that just magically and effortlessly appears.

Analytical judgments, on the other hand, come at the end of a careful, step-by-step, linear process. We can develop methods for reaching them. First, collect all relevant data. Then determine which data are missing and unavailable. Then weigh the relative importance of the data we have. And so on.

Both analytical and intuitive judgments can be wrong. In his bestselling book *Blink*, Malcolm Gladwell tells the story of a museum that wanted to determine the authenticity of an apparently ancient vase for which it was considering paying $X million.[43] It hired forensic-type experts who conducted numerous tests of all kinds and pronounced it genuine. After the museum laid out the cash to acquire the vase, an art historian took one look at it, turned it over in his hands, and pronounced it a fake. He had conducted no tests and spent no more than 10 minutes looking at it. He had highly specialized knowledge that was accessible intuitively. In fact, at first, he had difficulty

[43] Malcolm Gladwell, *Blink: The Power of Thinking Without Thinking* (New York: Little Brown & Co., 2005). Gladwell's highly popular book was based on decades of research, including that of Gerd Gigerenzer, head of the Max Planck Institute for Human Development in Berlin.

spelling out the reasons that led to his conclusion. But subsequent investigations confirmed his judgment.

The point of the story is that we need both intuitive and analytical judgment. In fact, judgment is the result of both intuition and analysis working together. The analytical and the gestalt should complement and enhance each other. They act as checks and balances against each other, and they each can fill in gaps in the knowledge of the other. Our intuition can lead us to double-check a restaurant bill that, upon examination, we discover includes a double charge for the main course. Likewise, spelling out the known facts and consciously sifting, weighing, and assessing them with a valid method can help overcome built-in biases, unearth aspects we may have missed, and check and balance our gut feelings.

When hitting a golf ball, champion golfers do not try to think of everything they need to do. They have at most one swing thought. All else is feel.

But before they set up to swing the club, the best golfers go through a careful analytical process. The assess the fairway and any hazards within play. They consider the potential trouble an errant shot could land in. They determine how far they need to hit the ball, how long it must stay in the air, how high the trajectory should be, and whether it should have any backspin when it lands. They check which way and how hard the wind is blowing. They evaluate the landing area and project what the ball is likely to do after it hits. They may try to visualize the flight of the ball. When putting,

they will try to determine the break and will look at the grain and other aspects of the green to determine how hard they need to strike the ball.

Skillful golfers focus on a large amount of data before they ever address the ball. (They take in even more information subconsciously.) *After* doing the analytical work, they stop thinking and trust their feelings and the technical skills they have honed in thousands of hours of practice.

There is a similar relationship between analytics and intuition in the process of determining the Net Present Financial Value of a lawsuit. At many points, a lawyer must exercise professional judgment about likely outcomes. But that judgment will *always* be better if it is preceded by careful analysis of the available data. To be the Tiger Woods of the litigation process, you cannot ignore the analytics.

Analytical investigation is not always easy or fun; and we frequently do not know an appropriate method. As a result, we sometimes rely too much on our gut instincts. This is particularly problematic when the stakes are high, the factors are numerous, and the interaction among the various factors is complex. In such cases, we cannot keep all material factors consciously in mind. And we may not have the necessary experience and expertise with which to make sound intuitive judgments.

Give It a Rest—The Power of Your Subconscious

Many people report the experience of working intensely on a problem late into the night, going to bed with no solution, and then waking up with new insights, perhaps even the answer to their question. Stories abound of great discoveries and

creative breakthroughs coming to their authors when they were not even thinking about the problem.[44] The Greeks even invented mythological figures—the Muses—which they saw as the sources of such inspiration.

Flashes of insight are different from intuitive judgments, but both have in common that they are the result of unconscious processes. Over the past 100 years, since Sigmund Freud and William James, laborers in the vineyards of psychology have made significant progress in helping us better understand whether and when intuition is reliable and how and why it works.[45] Flashes of insight generally have the characteristic

[44] One such is the story of Henri Poincaré's discovery of the Fuchsian functions, which came to him in a flash as he was stepping on to an omnibus (as such vehicles were called at the time). Henri Poincaré, ""L'invention Mathématique," «Bulletin de l'Institut général Psychologique» n. 8 (1908) (published in English as "Mathematical Creation" in *Scientific American* 1948, also available in *Resonance* February 2000). Another is Karl Barth's account of how the structure of a major section of his monumental *Kirchliche Dogmatik* came to him in his sleep, whereupon he arose and scribbled furiously to capture the insight before losing it. (Related by Barth's most prominent student, Helmut Gollwitzer, in a seminar on Barth in in Berlin during the 70's.)

[45] The published results of research in this field are now wide ranging and voluminous. For a selection of scientific work relevant to the topic at hand, *see, e.g.,* Robert Stickgold and Jeffrey M. Ellenbogen, "Sleep on It: How Snoozing Makes You Smarter," *Scientific American* (August 2008)(during slumber, our brain engages in data analysis, from strengthening memories to solving problems).; Ap Dijksterhuis, "Think Different: The Merits of Unconscious Thought in Preference Development and Decision Making," 87 *Journal of Personality and Social Psychology* 586–598 (2004); Diederik A. Stapel and Willem Koomen, "The Flexible Unconscious: Investigating the Judgmental Impact of Varieties of Unaware Perception" 42.1 *Journal of Experimental Social Psychology* 112 (Jan 2006); Scott Huettel, A. Song, & G. McCarthy, "Decisions under Uncertainty: Probabilistic Context Influences Activation of Prefrontal and Parietal Cortices," 25 *Journal of Neuroscience* 3304-3311 (March 30, 2005); Scott A. Huettel, Peter B. Mack, and Gregory McCarthy, "Perceiving Patterns in Random Series: Dynamic Processing of Sequence in Prefrontal Cortex," 5 *Nature Neuroscience* 485-490 (2002); Richard Ivry and Robert T. Knight, "Making Order From Chaos: The Misguided Frontal Lobe," 5 *Nature Neuroscience* 394-396 (2002); Benjamin Kleinmuntz, "Why We Still Use Our Heads Instead of Formulas: Toward an Integrative Approach," 107 *Psychological Bulletin* 296-310 (1990), reprinted in Terry Connolly, Hal R. Arkes, and Kenneth R. Hammond, *Judgment and Decision Making: An Interdisciplinary Reader* (2nd ed., Cambridge, UK: Cambridge University Press, 2000); Jonathan W. Schooler, Stellan Ohlsson, and Kevin Brooks, "Thoughts Beyond Words: When Language Overshadows Insight." 122 *Journal of Experimental Psychology: General*, 166-183 (1993); Nalini Ambady and Robert Rosenthal, "Half a Minute: Predicting Teacher Evaluations From Thin Slices of Nonverbal Behavior and Physical Attractiveness," 64 *Journal of Personality and Social Psychology* 431-441 (1993). For readily accessible presentations of the results of the growing body of research, *see generally* Dan Ariely, *Predictably Irrational: The Hidden Forces That Shape Our Decisions* (New York: HarperCollins, 2008); Drew

that they can be readily demonstrated with logical explanations even though they are not arrived at through step-by-step conscious logical thinking. Intuitive judgments, on the other hand, are largely feelings that we often have difficulty explaining in an orderly fashion. "I don't know," we say. "It just feels right (or wrong). I can't say why."

People with a depth of experience and expertise in a given field often have an intuitive sense that enables them to make good judgments without analytically spelling out detailed arguments in support of their decisions. But the same people are not always adept at translating intuition into numbers.

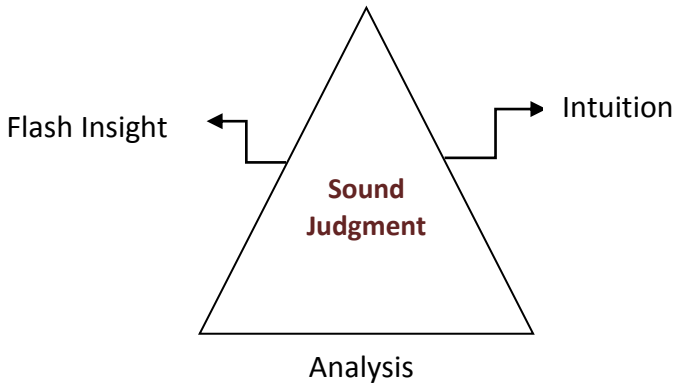
Of course, our intuitive feelings *can* be wrong. The less expertise we have about the subject of our intuitions, the more likely we will have misguided ones. And even experts can get it wrong, as appellate judges sometimes learn when they report to colleagues that their conference decision on a case "won't write."[46]

Westen, *The Political Brain: The Role of Emotion in Deciding The Fate of the Nation* (New York: Public Affairs, 2007); Jason Zweig, *Your Money & Your Brain: How the New Science of Neureconomics Can Help Make You Rich* (New York: Simon & Schuster, 2007); Jonathan Haidt, *The Happiness Hypothesis: Finding Modern Truth in Ancient Wisdom* (New York: Basic Books, 2006); Malcolm Gladwell, *Blink: The Power of Thinking Without Thinking* (New York: Little, Brown & Co., 2005).

[46] *See, e.g.*, Chad M. Oldfather, "Writing, Cognition, and the Nature of the Judicial Function," 96 Geo. L.J. 1283, 1284-85 (2008); Peter B. Rutledge, "Review: Clerks: Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court, Artemus Ward and David L. Weiden," 74 U. Chi. L. Rev. 369, 396 (2007); Rutledge cites to John M. Ferren, *Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge* 341 (North Carolina 2004) ("He was seen as a 'scholar' exploring every angle, remaining undecided until he worked the problem through in writing and could convince himself finally, by reading the analysis, what the best result was. . . . If a 'hunch' controlled the tough decision, the written elaboration had to convince.") (emphasis added). Justice Stevens was not the only clerk-turned-justice who emulated his former boss's management style. Justice White (a Vinson clerk) adopted Justice Vinson's approach to opinion drafting (Peppers, p 164) ("From the start, White's law clerks assisted in the opinion-writing process -- as did White himself when clerking for Chief Justice Vinson."). Chief Justice Rehnquist (a Jackson clerk) adopted his justice's approach to clerk recruitment (casting a broad net) and preparation for cases (generally no bench memos) (Peppers, pp 27, 125-29, 192-95). Neither book successfully obtained much information about Justice Breyer and, consequently, could not judge whether he followed the approach of his former boss, Justice Goldberg. *Id.* at n. 64.

While much can be said in favor of rapid-fire intuitive judgments about the probability of a judge's ruling or a jury's decision, there are also times when it is best to put a problem aside after having gathered information about it. Let it marinate. Your brain will continue to work on it while you sleep.

There is something like a triadic relationship among instant intuition, painstaking analysis, and flashes of insight. Intuition is literally a feel for an answer that arrives without apparent effort to spell out the reasoning or to assemble the evidence that supports it. Analysis is the detailed work of examining data and considering various alternatives courses of action or theories of explanation. Flashes of insight—the Aha! Experience—come after much work has been done. They resemble intuition in their instantaneous nature, but they differ in that they have a quality of being the synthesis of what has gone before.



In making probability assessments about the future decisions of judges and juries and about other events in a lawsuit, we need all three sides of the triangle. Intuition is

the result of experience and expertise. Analysis substantiates (or refutes) our gut feelings.[47] And flashes of insight help us connect parts of a lawsuit we might otherwise have missed. Intuition will come on its own. Analysis is the result of deliberate work. Insight occurs—if it does—by giving it a rest.

[47] The problem with intuition alone is that it may be wrong—seriously wrong. The unconscious processes that lead us to a snap judgment may be triggered by irrelevant associations or misperceptions. Analysis supplements intuition but it also corrects it on occasion. We need both.

CHAPTER 21:

THE PERILS OF CONDITIONAL AND COMPOUND PROBABILITY

During the mediation of a property dispute, each lawyer told me separately that he believed his client had an 85% chance of winning at trial. Both could not be right, of course. But, more importantly, these guestimates showed that neither lawyer had performed an informed probability analysis. To have an 85% chance of winning a lawsuit your chance of winning each dispositive and non-dispositive contingency likely to arise would have to be close to 100%. That happens only in slam dunk cases, which almost always settle well before trial. (The case in question did not settle; one side lost at trial.)

Consider that you are charged with deciding whether to file a patent infringement case. According to legal counsel, you have an 80% chance of proving that your patent is valid. Your lawyer also tells you that you have an 80% chance of prevailing on the infringement claim. So, if all other contingencies are decided in your favor, what are your chances of winning the case?

You answered 64%, right? Please, tell me that you answered 64%. But many lawyers (and other professionals) answer 80%. In my experience, many people miss the correct arithmetical result. We tend to think we have something like an 80% shot at winning because we do not realize the effect of **compound probability**. Most likely, no

one ever alerted us to this way of thinking in law school. Math is not our strong suit—at least not for most of us.[48]

It's all right to rely on experts—economists, statisticians, CPA's, and others—to handle the math stuff. But we need to grasp the basic concepts in order to assemble the information and to make the critical judgments that these other experts will need. And we need at least an elementary understanding of how this works to be able to have an intelligent conversation with our clients about their chances.

How Compound Probability Works

If each of three events must take place before a particular outcome can occur, the likelihood of getting that outcome is a function of the likelihood of each event multiplied by each other. For example, assume that if the jury decides for the plaintiff, they will award her $100,000. Assume further that the plaintiff will not prevail unless she wins the motion to dismiss, wins the motion for summary judgment, and persuades the jury to find in her favor, each of which has a 50% probability. For many, intuition suggests that she has a 50% chance of getting $100,000. Therefore, the case should be worth $50,000.

But that intuition is wrong. Plaintiff does not have a 50% chance of winning $100,000 because she must jump over both pre-trial hurdles. The loss of either knocks

[48] We are not the only smart people plagued with this mathematical blind spot. *See, e.g.,* Nassim Taleb, *Fooled by Randomness: The Hidden Role of Chance in Life and n the Markets* 204-205 (New York: Random House, 2004). The problem of misunderstanding statements made in the form of probabilities is itself quite widespread and has been the subject of various studies by scientists at the Max Planck Institute for Human Development in Berlin. *See, e.g.,* Gerd Gigerenzer, *Calculated Risk: How to Know When Numbers Deceive You* (New York: Simon & Schuster, 2002).

her case out, and she gets $0. She has a 50% chance of clearing the first hurdle (motion to dismiss), which would then get her a 50% change of surviving the motion for summary judgment which would finally get her a 50% chance of persuading the jury. At the starting line, therefore, there is only a 25% chance that she will ever get to present any evidence to the jury. Why? Because .5 X .5 = .25. And once in court, she has only a 50% chance of winning, which means her chance at the outset of recovering $100,000 is only 12.5% (.5 X.5 X .5 = 12.5).

Elements and Compound Probability: The Basics

Every cause of action consists of two or more elements. In a simple negligence case, for example, the plaintiff must prove that (1) defendant had a duty of care to plaintiff that (2) defendant breached, (3) proximately causing (4) harm to the plaintiff. If the plaintiff fails to meet the standard of proof on any element, her entire cause of action fails. Are the elements stochastically independent or stochastically dependent?

Before she can win on the harm element, the plaintiff must first persuade the jury that the defendant breached its duty of care. Let's say she has an 80% chance of crossing that threshold. But all she has won is the right to get the jury to consider the harm element. If she has an 80% chance of proving harm, what chance does she have of moving through both the breach and harm elements to the proximate causation round? 64%, right? (80% X 80% = 64%.)

"No, no, no," some readers are saying. Or "This makes my head hurt." For many of us it just does not seem right that we have an 80% chance of proving A and an 80%

chance of proving B but only a 64% chance of proving A and B. We think that we have an 80% chance of proving both A and B, possibly because the underlying events themselves are not subject to conditional probability. (They are stochastically independent.)

Whether plaintiff was harmed does not depend on whether defendant proximately caused the harm. But in assessing the likelihood that the jury will rule for plaintiff on all three elements, we are *not* looking at the probability of the events themselves. Rather, we are considering the probability of the jury's ruling. And from that perspective, the jury's liability determination is subject to the conditional probability of finding for plaintiff on each element. The plaintiff buys a breach of duty ticket, which, if she wins, gets her only the right to buy a harm ticket, which, if she wins, gets her only the right to buy a proximate causation ticket. Her overall chance at winning the trifecta, therefore, is the probability of winning the breach element times that of winning the harm element times that of winning the causation element: .80 X .80 X .80 = 51%.

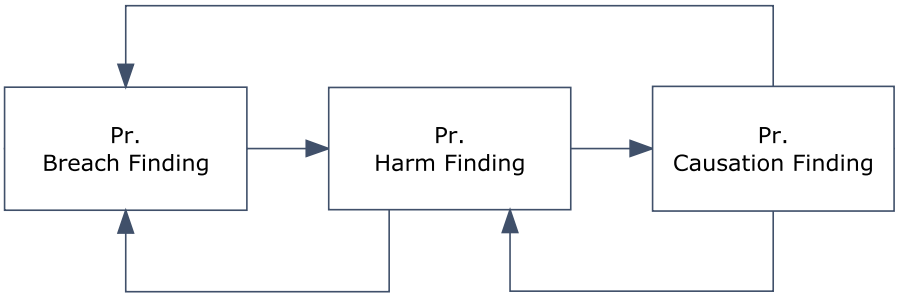
Elements and Compound Probability: The Complication

Logically, breach, harm, and causation are three distinct elements that in reality have no necessary relationship. A defendant can run through a red light thereby breaching a duty without plaintiff's having suffered any legally cognizable harm. And the defendant can breach its duty and the plaintiff can suffer harm without defendant's breach having caused the harm. As noted, it is because the three events are not

necessarily interdependent that we might fail to realize that the jury's liability finding depends on its having found for plaintiff on each element.

Unfortunately, not all jurors or juries think logically. Their conclusion that the defendant breached her duty could influence their thinking on causation and vice versa. This means that the findings on the three (or more) elements may not be psychologically independent. A finding that the defendant breached her duty and a finding that plaintiff suffered harm may increase the likelihood that the jury will find causation even if there is strong evidence of an intervening cause. Human nature is involved.

This does not mean that compound probability is no longer in effect. Rather, it means only that, in estimating the likelihood that the jury will rule in plaintiff's favor on any given element (say, causation) we must consider not only the evidence, arguments, and other factors that could affect their decision on that element in isolation but also the potential effect of the jury's findings on other elements (breach and harm) on its thinking and feelings about the element under consideration.



Thus, we may start out thinking that the evidence, arguments, and other factors on each element consider *in isolation* make a breach finding 85% likely, a harm finding 95%

likely, and a causation finding 70% likely (for a total probability of 56.5%). But then we may conclude that the jury is more likely to find causation if it finds breach and harm than the evidence and arguments on causation alone justify. The needle on the probability meter may move from 70% to 83% with the result that the plaintiff's chances of proving liability increase from 56.5% to 67%.

Let's Make a Deal

Consider the famous choice given to contestants on *Let's Make a Deal?* You may recall that there were three doors. Behind one door was a valuable prize, like a BMW. The other two doors concealed worthless items. The contestant could choose any of the three doors. At the outset, therefore, she had a 33.3% chance of choosing the door with the BMW and a 66.6% chance of picking the wrong one.

After the contestant picked a door, Monty Hall, who knew where the BMW was, would open one of the two remaining doors, revealing one of the worthless prizes, perhaps a goat. He would then offer the contestant the choice of staying with the door she had chosen or switching. Will her chances of success be better if she stays or switches? Or does it matter?

She greatly improves her chances of winning by switching to the other door. This answer flies in the face of our intuition. Most of us (me included) tend initially to think that with two doors left, the contestant has a 50/50 chance of choosing the right one. By this logic, there is no point in switching. She might as well stay with her original choice.

Why this intuition is wrong may help us get a better understanding of the way probabilities work with lawsuits. Consider that the contestant played this game 300 times. In how many of those rounds will she choose the wrong door initially? 200 times, right? Only 100 times will she get the right door from the start. So, she knows that she will have chosen the wrong door 2 out of three times. In other words, there is a 2/3 likelihood that she will be holding on to a losing door. Now, Monty Hall comes in and shows her that one of the remaining doors is also a losing door. Now, 200 out of the 300 times, the door she chose and the one Monty Hall just showed her will be the wrong doors. Knowing that 2/3 of the time she has chosen the wrong door, the only remaining door in 200 out of 300 games conceals the BMW. Thus, in 200 out of 300 rounds, she will win the BMW by switching to the remaining door.

Want to see it again? This problem has baffled even professional mathematicians, because most of us fail to think about the probability of choosing the *wrong* door from the beginning and the effect of the new piece of information that Monty Hall provides.

This example underscores the value of thinking in terms of 100 tries as opposed to X% when thinking about probabilities. When considering a likely jury verdict, it is helpful to ask what 100 different juries would do with this case. They would not all reach precisely the same conclusion. A few would return very high verdicts, a few zero verdicts, and most would fall somewhere in between. The percentage number is simply an expression of how many times out of 100 a particular result will occur. (The Latin phrase “per centum” means “by 100.”)

The *Let's Make a Deal* example also demonstrates the importance of new information. Every experienced litigator knows that the settlement value of a case is different before a judge has ruled on the motion for summary judgment than after the motion has been granted or denied. In other words, the probability of some events (getting a trial) depends on the occurrence of other events (the ruling on the motion for summary judgment). If the plaintiff must win two or more motions to get her day in court, then the probability of going to trial is the product of the probabilities of each of those motions.

CHAPTER 22:

ESTIMATING WITH CONFIDENCE: AT LEAST *X* BUT NO MORE THAN *Y*

Benny Gibbs: "So, what are my chances?"

Richard Rietti: "They're good. Excellent."

Trial and Error[49]

A client or judge or banker or partner asks you something like, "What are our chances of winning the motion for summary judgment?" or "How many days or weeks will it take to try this case?" or "What is the likely jury verdict?"

Purposes of this Chapter:

- Explain the importance of estimating probable outcomes using numbers
- Introduce calibration exercises for improving estimating skill
- Briefly explain the blending of intuition, analysis, and flashes of insight in making judgments about probable outcomes

If you're like most lawyers—indeed, most people—you might say something like, "We've got a good shot." Or, if you were not so sanguine, "Not good." You may have said, "It's hard to say. There are so many different factors."

The question seems to ask for a single number. We don't know a single number. And we feel foolish or fraudulent stating a single number.

[49] 1999 movie, screenplay by Sara and Gregory Bernstein. This exchange takes place between the hopelessly guilty defendant, Benny Gibbs, on trial for fraud, and the out-of-work actor, Richard Rietti, standing in for his hung-over lawyer friend at the final pre-trial conference. The inside joke is that an actor with no knowledge of the law or this specific case gives about the same answer as many real lawyers might. In part, this chapter is about why this happens and what to do about it.

So, we respond by saying either, "I can't say. It's too complicated. Too much plays into the outcome," or something like "pretty good" or "this is a difficult judge" or "we've got a good shot."

We've Got a Good Shot

Vague statements like "we've got a good shot" are virtually useless in trying to estimate the value of a lawsuit. Unless translated into numbers, they cannot be used in a computation. Worse, lawyers and clients often mean and understand something quite different with such phrases. To a client "We've got a good shot" often means "we're going to win" or "there is an 80-90% chance of winning." But you may mean only that you have a better than 50/50 chance of prevailing. How much better? "Can't say."[50]

This chapter is about turning our feel for the probable outcome of events into numbers. The inspiration and guide for much of what follows comes from Douglas Hubbard's groundbreaking book, *How To Measure Anything: Finding the Value of Intangibles in Business*, which provides additional explanations of the material touched on in this and other chapters of this section.

Our goal is to estimate the numerical chances of success or failure and the range of likely damage awards with confidence. How confident? We want to be 90% confident that we have stated a range within which the future outcome will fall. What that means in practice and how it is done is the subject of this chapter.

---

[50] In using words instead of numbers, we may be attempting to protect ourselves against subsequent criticism. John Kennedy once upbraided Walter Heller, his chairman of the Council of Economic Advisors, for being too specific with reporters. "Forget those numbers," Kennedy said. "Numbers can come back to haunt you. Words can always be explained away."

Many lawyers view this enterprise with great skepticism. "I can't tell you precisely how likely it is that the judge will grant or deny our motion for summary judgment. It is illusory to put a number on that. Too many unknown factors influence the outcome. It's just not possible."

This skepticism is healthy. We almost never can estimate the future with pinpoint precision. And the few instances in which we can (e.g., there is a 100% certainty that the sun will come up tomorrow) have almost no information value. It is meaningless to spend time thinking about them. (If the sun *doesn't* come up tomorrow, it's all over anyway.)

But there is a difference between precision and accuracy. We *can* make reasonably accurate predictions about the range of probability of a future outcome. When weather forecasters say that there is 10% chance of rain, that number is actually the average of a range of probabilities (e.g., 0 to 20% or 5 to 15% or 3 to 17% or 8 to 12%, etc.). And meteorologists keep records about past predictions and actual outcomes with which they calibrate their abilities to refine and narrow the range of estimates that form the basis of their forecast.

Ask A Different Question

On how many days will it rain next month? Even if you are a meteorologist with great experience, you will likely decline to answer that question. No one can say with precision how often it will rain within the next 30 days. There are too many unknown factors that will influence actual rain patterns.

Let me change the question. What are the minimum and maximum numbers of days that it will rain next month?

That is a question you can go to work on. The absolute minimum is obviously zero; the absolute maximum must be 30 or 31. But if you're planning a vacation to the beach (or selling vacation insurance), you need better numbers. OK. What season is it? Let's say it's summer. So, what is the average number of days of rain in summer for your town? (Your local Chamber of Commerce probably has this number.) Are there any records indicating an average distribution during the summer? What can you find out with a Google search? What has precipitation been like up to now this year?

As you methodically ask and answer these and other relevant questions, you will be gathering information that increases your confidence (reduces your uncertainty) in estimating how many days it will likely rain next month. You are now in a position to reduce the upper bound and increase the lower bound in the range you initially set. Depending on where you live, what the weather has been like this year, what expert meteorologists say about current trends, and such, you might reduce the top number to say 14 and increase the bottom number to 6.

In the current jargon of cognitive science, by *reframing* the initial question as one about the range within which the correct answer can be found, we have made it answerable. [51] We have restated the problem in a way that the answer can be justified.

[51] Like lawyers, philosophers, scientists, and professional pollsters have known for decades that the form of the question has a strong effect on the answer one gets. *See, e.g.,* Graham Kalton and Howard Schuman, "The Effect of the Question on Survey Responses: A Review," 145 *Journal of the Royal Statistical Society. Series A* 42-73 (1982) (factual and non-factual questions); J.W. Getzels, "The Question-Answer Process: A

You're halfway home by phrasing the case valuation question as, "What is the range within which I am 90% confident that the value of this case can be found?"[52]

Now, how confident are you that the actual number of rain days for next month will fall somewhere between 14 and 6 (or whatever numbers you came up with)? Highly confident? Somewhat confident? Not at all confident? How important is it to you that your estimate be correct? If you're off by a lot, will it merely make for a less enjoyable vacation, mess up a golf outing, or spoil your crops. How costly will it be for you to be wrong.

The higher the cost of a bad estimate, the more important it is to get a good one. If it is important enough to go to the trouble of estimating at all, it should be sufficiently important that we want to be 90% confident that we have correctly set the interval—the upper and lower bounds—of the estimate.

What does "90% confident" mean? And why 90% and not some other number?

To be 90% confident means that we are confident that 9 times out of 10 (90 out of 100, 900 out of 1,000, etc.) the actual number will be within our estimated range. Or, put differently, if we made this kind of estimate 100 times, we would get the range right 90 times out of that 100. Or, put yet another way, we would be just as willing to bet money

---

Conceptualization and Some Derived Hypotheses for Empirical Examination," 18 *The Public Opinion Quarterly* 80-91 (1954); Louisa M. Slowiaczek, Joshua Klayman, S.J. Sherman, RB Skov, "Information Selection and Use in Hypothesis Testing: What is a Good Question, and What is a Good Answer?" 20 *Memory and Cognition* 392-405 (July 1992). *See also* David Michaels, "It's Not the Answers That Are Biased, It's the Questions," *Washington Post* Page HE03 (July 15, 2008).

[52] *See, e.g.,* Melissa J. Ferguson and John A. Bargh, "Liking is for Doing: The Effects of Goal Pursuit on Automatic Evaluation," 87 *Journal of Personality and Social Psychology* 557–572 (2004) and studies discussed therein (we automatically evaluate objects that are relevant to our goals).

that we are right as we would be to place money on a bet with a guaranteed 90% chance of winning (such as spinning a wheel with 90 winning slots out of 100).[53]

OK. But why 90%? Why not 95% or 80% or some other number? This particular percentage is a convention among probability theorists. We could set it higher or lower. But it is not arbitrary. The rest of this chapter shows why 90% is about right, but the short answer is that 90% is the minimum confidence level at which the estimated range will be useful. (I'll come back to this momentarily.)

For now, let's practice estimating a bit. The first of the following two tables asks you to provide an upper and lower bound estimate that you are 90% confident contains the correct answer. The second table asks you to answer true or false to 10 statements and to circle the percentage number indicating your level of confidence in the accuracy of your answer. (50% is the same as flipping a coin.) Please complete the exercise before continuing with this chapter. (The correct answers are at the end of the chapter.)

Question	**Lower Bound** (95% chance value is higher)	**Higher Bound** (95% chance value is lower)	Accurate ✓
1. When was Martin Luther born?			
2. What is the population of Turkey as of 2007?			
3. What percentage of the total amount of			

[53] Hubbard calls this the "equivalent bet test." You can check whether you are really 90% confident (or 20% or 45% or some other number) by comparing your confidence in the range to a bet of money with equivalent known probabilities. "Research indicates that even pretending to bet money significantly improves a person's ability to assess odds. In fact, actually betting money turns out to be only slightly better than pretending to bet . . . " Douglas Hubbard, *How To Measure Anything*, *supra*, at 59. In the case of estimating the ranges of percentages in connection with generating an estimated net present financial value, of course, you are putting real money at risk. It pays to get it right.

forestland that existed when Columbus discovered America 500 years ago still exists today?			
4. When was the first symbol for Zero invented?			
5. What is the maximum number of times that a piece of paper can be folded in half?			
6. What is the wingspan of the original Boeing 747?			
7. On what date (day, month, year) did Andrew Johnson formally declare an end to the Civil War?			
8. How large in square meters is the base of the Great Pyramid of Giza?			
9. What is the highest price ever paid for a Stradivarius violin?			
10. When was moveable type invented in China?			

True/False statements. Answer the question and circle your level of confidence.[54]

	Statement	Answer (T/F)	Confidence that you are correct (Circle one)
1	The melting point of tin is higher than the melting point of aluminum.		50% 60% 70% 80% 90% 100%
2	In English, the word “quality” is more frequently used that the word “speed”.		50% 60% 70% 80% 90% 100%
3	Any male pig is referred to as a hog.		50% 60% 70% 80% 90% 100%
4	California’s giant sequoia trees are named for an early 19th century leader of the Cherokee Indians.		50% 60% 70% 80% 90% 100%
5	The Model T was the first car produced by Henry Ford.		50% 60% 70% 80% 90% 100%
6	When rolling 2 dice, a roll of 7 is more likely than a 3.		50% 60% 70% 80% 90% 100%
7	No one has ever been reported to have been hit by any object that fell from space.		50% 60% 70% 80% 90% 100%
8	Sir Christopher Wren was a British anthropologist.		50% 60% 70% 80% 90% 100%

[54] This set of calibration questions was created by Douglas Hubbard and is available in longer format at www.HowToMeasureAnything.com.

9	Pakistan does not border Russia.		50% 60% 70% 80% 90% 100%
10	The Navy won the first Army-Navy football game.		50% 60% 70% 80% 90% 100%

Now, look up the correct answers at the end of the chapter and score your exercise by checking all the estimates you made that contain the correct answer. Add up the number of correct answers. Congratulations. You have just completed your first exercise in calibrating your ability to estimate.

Did you get at least 18 out of 20 right? If so, you already have a 90% calibration. If not, don't despair. Help is on the way.

You may have found this exercise frustrating. It may even have made you angry? "How can I estimate something I don't know anything about? I refuse even to try." Such a response is common among people who work through such calibration exercises for the first time. Often this response comes from a misunderstanding of what is called for. We are looking for the *range* within which *you* believe the correct answer can be found, not the precisely correct answer itself. Nor are we concerned with the estimate someone else might give. (Clearly, people with more relevant knowledge are likely to be 90% confident with tighter ranges.)

The questions require that you look into whatever knowledge you have that can be brought to bear on the process of estimating a range. For example, you may know only that Martin Luther was a Christian. That piece of information does not reduce your uncertainty by much, but you would likely conclude that he was born somewhere after Jesus died (the lower bound) and today (the upper bound). That range may or may not

be all that useful, depending on why you would want to know when Martin Luther was born. Or you may know that Martin Luther was somehow connected with the Protestant Reformation. That fact would lead you (perhaps subconsciously) to explore what you know about the Protestant Reformation and when it occurred. As you work through whatever you know, the possible ranges of dates for Martin Luther's birth start to emerge.

Or you may have nothing to go on other than the name "Martin Luther" itself. You may never have heard of the chap. The name tells you no more than any other European-sounding name such as John Smith or Francois Levesque. But even that tidbit should be enough to help you set a range limited to European history. If it is the best you can do to achieve a 90% confidence level, then it is the best you can do at this time.

In the context of estimating your BATNA, the net present financial value of litigating to a final judgment, the importance of accurately estimating ranges cannot be overstated. To derive an estimated net present financial value, you must make numerous estimates (e.g., likelihood that the jury will find liability, likely range of damages, likely outcome of key motions, likelihood that key witness will testify, etc.). On all such matters you will have incomplete information. The task may seem overwhelming. But the consequences of misestimating or, worse, failing to estimate at all, can be catastrophic.[55] Knowing how to marshal the knowledge you have and how to

[55] Lichtenstein *et al.* address this point when addressing the question, "Why be well calibrated?" "[W]hen the payoffs are very large, when the errors are very large, or when such errors compound, the expected loss looms large. For instance, in the Reactor Safety Study (U.S. Nuclear Regulatory Commission, 1975) 'at each level of the analysis a log-normal distribution of failure rate data was assumed with 5 and 95

look for missing information for purposes of estimating probabilities are skills. You can get better at them. That is the purpose of these calibration exercises.

I'm Better Than I Think I Am—The Overconfidence Problem

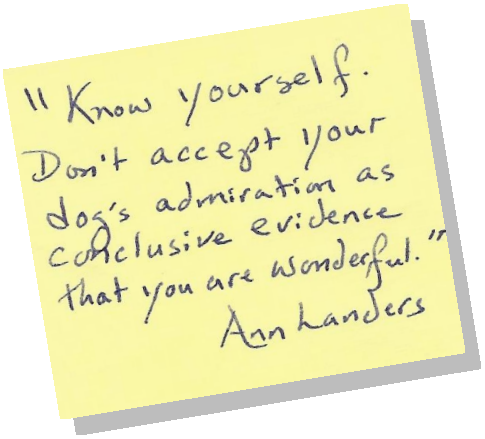
It is a good bet (i.e., more likely than not) that the correct answer to the questions in the calibration exercise above did not fall in your estimated ranges at least 90% of the time. Failure to reach a 90% level of accuracy reflects overconfidence in estimating. (The ranges are too narrow to contain the correct answer.) This failure is common with people whose estimating ability has not yet been calibrated. In fact, most people routinely overestimate in all kinds of settings. Most often, we have an unrealistically high assessment of our own abilities. For example, 94% of college professors say that they do above-average work.[56] Social scientists call it the "overconfidence effect" or "overconfidence bias."[57] The rest of us know it as the Lake Wobegon Effect. (Some of us underestimate. Very few start with a 90% accuracy.)

---

percentile limits defined' (weatherwax, 1975, 0. 31). The research reviewed here suggests that distributions built from assessments of the .05 and .95 fractals may be grossly biased. If such assessments are made at several levels of an analysis, with each assessed distribution being too narrow the errors will not cancel each other but will compound. And because the costs of nuclear-power-plant failure are large, the expected loss from such errors could be enormous." Sarah Lichtenstein, Baruch Fischhoff, and Lawrence D. Phillips, "Calibration of Probabilities: The State of the Art to 1980," in Daniel Kahneman, Paul Slovic, and Amos Tversky (eds.), *Judgment Under Uncertainty: Heuristics and Biases* 331 (Cambridge, UK: Cambridge University Press, 1982.

[56] David Dunning, *Self-Insight: Roadblocks and Detours on the Path to Knowing Thyself* 7 (Psychology Press, 2005). *See also* T.J. Carter & D. Dunning, "Faulty Self-Assessment: Why Evaluating One's Own Competence Is an Intrinsically Difficult Task," in 2 *Social and Personality Psychology Compass* 346-360 (2008). It is theoretically possible for 94% to be above average only if the remaining 6% are so abysmally bad that they bring the average down. Thus, 8 of 10 people earning $100 per week would each have above-average earnings if the other two made nothing. ($800/10 = $80 average.) But this kind of skewing is unlikely with college professors.

[57] *See, e.g.*, Jason Zweig, Your Money & Your Brain: How the New Science of Neureconomics Can Help Make You Rich 85-126 (New York: Simon & Schuster, 2007); Ulrich Hoffrage, "Overconfidence" in Rüdiger Pohl, *Cognitive Illusions: a handbook on fallacies and biases in thinking, judgement and memory*



More specifically, we tend to be overconfident in answering general-knowledge questions of moderate or extreme difficulty.[58] Our overconfidence is "most extreme with tasks of great difficulty."[59] Paradoxically, it seems, the harder the estimating task, the more likely we are to be overconfident. (We become *less* overconfident when the estimating tasks get easier.) And people with the most knowledge about a subject tend to be *under*confident when responding to questions about the easiest topics in their field.[60] Lichtenstein *et al.* posit that the "hard-easy effect" arises out of our "inability to appreciate how difficult or easy a task is."[61] This may explain why completing calibration exercises helps us improve our ability accurately to estimate ranges with a 90% confidence level.

Expertise matters but does not always translate into accurate probability estimates. For example, a 1981 study of physicians estimating the likelihood of pneumonia in patients examined because of a cough found that their "calibration was

---

(Psychology Press, 2004); Thomas Gilovich, Dale Griffin, and Daniel Kahneman (eds.), *Heuristics and Biases: The Psychology of Intuitive Judgment*. (Cambridge, UK: Cambridge University Press, 2002). A highly readable, non-technical account of the overconfidence problem and other brain crotchets is available in Cordelia Fine, *A Mind of Its Own* (New York: Norton, 2006).

[58] Sarah Lichtenstein, Baruch Fischhoff, and Lawrence D. Phillips, "Calibration of Probabilities: The State of the Art to 1980," in Daniel Kahneman, Paul Slovic, and Amos Tversky (eds.), *Judgment Under Uncertainty: Heuristics and Biases* 314 (Cambridge, UK: Cambridge University Press, 1982. I discuss the overconfidence bias more extensively in section II of this book, Making Good Decisions.

[59] *Id.* at 315. Lichtenstein *et al.* report studies showing that the initial ability to estimate ranges accurately does not appear to be a function of intelligence. The smart and not-so-smart alike miss the mark. *Id.* at 319

[60] *Id.* at 316.

[61] *Id. at 316-317.*

abysmal." Physicians who stated that they were 88% confident that they had correctly diagnosed the problem were correct only 20% of the time.[62]

In my experience, we (uncalibrated) lawyers are no better at estimating ranges even for routine matters. For years, I consistently underestimated the days needed to try a case. Having finally caught on to my own bias, I began simply doubling my best estimate. In mediations, attorneys for both sides often provide high-percentage estimates of their client's chances of success at trial.

The overconfidence bias can be particularly pernicious in attempts to settle lawsuits. When each lawyer is confident that she has an 85% chance of prevailing at trial, settlement becomes a challenge. But the ultimate settlement decision is only one of many decisions in the litigation process that are skewed by the overconfidence effect.

More importantly, by avoiding the overconfidence bias, aren't you more likely to have a strategic edge over opponents who succumb to it? Of course, even then, you will need to allow for dumb luck. Your adversary can get lucky despite foolhardy decisions. The goal is to reduce the impact of her dumb luck on you and your client. And one way to do that is to factor such dumb luck (a/k/a "the Murphy Factor")[63] into your estimates.

---

[62] *Id.* at 321.

[63] See also Nassim Nicholas Taleb, *The Black Swan: The Impact of the Highly Improbable* (New York: Random House, 2007).

Numbers are the Language of Measurement

According to conventional wisdom in the book-publishing game, every equation in a book cuts its sales in half.[64] And, notwithstanding acceptable LSAT scores in math and logic, many lawyers recoil at the thought of working through mathematical problems, saying, in effect, "If we'd been good at numbers and such, we would have become economists or, perhaps, physicians (though there's still the yuck factor to deal with)."

Let me reassure the mathematically challenged (which includes me) that this book neither contains nor demands anything more sophisticated in the numbers dodge than simple arithmetic—and not much of that. But there is no getting around some numbers if you want to be the best litigator you can be. Numbers are the language of measurement. Lawsuits come down to measurement. That means they come down to numbers.

Damage awards incorporate a numerical assessment. True, some personal injury lawyers tell juries in so many words, "I don't know what John's pain and suffering are worth. You tell me." But they frustrate jurors and cheat their clients when they do that.

For settlement work, we must have a reasonable understanding of the financial—i.e., numerical—value of a case. Litigators who are completely allergic to numbers should get a paralegal or partner who likes this stuff. It's part of our professional responsibility.

---

[64] *See, e.g.,* John L. Asti, *Five Golden Rules: Great Theories of 20th Century Mathematics – And Why They Matter* xiii (New York: Wiley, 1996).

The Confidence Interval

The term "confidence interval" is used by statisticians and probability theorists to refer to the range of values that likely contains the correct answer.

Historically, the confidence interval (CI) is about determining the likely accuracy of projecting data obtained from a sample on to the whole. If we selected and tested 350 Power Rangers for defects from a total production of 10,000, what would the defect rate in our sample tells us about the number of defective Power Rangers in the 10,000? The objective is to find a range of probability within which the real defect rate for the 10,000 could be found 90% of the time. Put differently, if we selected 100 different sample sets of 350 Power Rangers each and then actually tested every single Power Ranger from the 10,000, in 5 of the 100 sample sets the real defect rate would be higher than indicated by the sample and in another 5 of the 100 sample sets it would be lower. In the remaining 90 sample sets, the range given for the defect rate would contain the real percentage of defects actually found by testing all 10,000 Power Rangers. In such a case we would have a 90% Confidence Interval. The CI relates to how confident we are that our range is close to the actual number. How close to accurate are we?

As used in the present context for estimating the probable outcomes of future events, the meaning of "Confidence Interval" is slightly different from its historical use.[65] We are not taking any samples. We are not trying to detect the frequency of a

[65] For those familiar with probability theory, the distinction is between *frequency probability* and *Bayesian probability*. Some probability theorists deny that Bayesian probability has anything to do with real probability, but such traditionalists are declining in number and influence. The evidence tends to indicate that they are wrong.

given event or state among an *existing* large quantity of events or objects (voter attitudes, rate of defective Power Rangers on a given production line, customer satisfaction, etc.). Rather, we are trying to estimate what *would be* the case if a given event that has not yet occurred were to happen repeatedly a large number of times, say 1,000. If this motion for summary judgment were argued 1,000 times, how many times would it be granted and how often denied? What is the 90% Confidence Interval for the answer to that question? We are asking our brain to use everything it knows (about the law, the evidence, the judge's proclivities, potential change in judges, our advocacy skills and those of our opponent) to come up with a range of percentages.

This method is something like a reverse statistical inference process. Typically, statisticians measure a sample of a larger group (e.g., 900 voters out of 200,000,000 or 300 toys out of 40,000) and seek to obtain a confidence interval from that selection. With the method employed here, we are trying to generate an informed guess about the likely outcome of some future event.

Collaborative Estimating

Although we don't usually think of them this way, most settlement negotiations constitute a kind of joint estimating exercise. The plaintiff demands a high figure; the defendant offers a low number, perhaps even zero. In a sense, the parties are saying that the real settlement number is somewhere within those two starting numbers. If one states a number that is completely unrealistic, settlement discussions will often break off, with the other party saying something like, "Let me know when you decide to get

real and we'll talk." But if both parties are within a zone of reasonableness, then the concession dance goes forward and continues until there is a deal or talks break down.

If you had to estimate where the settlement number will end up, you could state the upper and lower bounds of the range. Put differently, you could say with 90% confidence that the number at which the case will settle will not be greater than X (plaintiff's demand) or less than Y (defendant's offer). It will be somewhere within that range.

Thus, you are already familiar with the process of estimating by stating ranges. It's just that you usually have a counterpart when you do it.

By practicing with Hubbard's calibration exercises,[66] you are training your brain to ask the right questions. Instead of telling it to come up with a specific number, you are asking it to compute probabilities by setting upper and lower limits of the range within which the number is likely to appear.

ANSWERS TO CALIBRATION QUESTIONS

Question	Lower Bound (95% chance value is higher)	Higher Bound (95% chance value is lower)	Correct Answer	Accurate ✓
1. When was Martin Luther born?			Nov. 10, 1483	
2. What is the population of Turkey as of 2007?			71,158,647	
3. What percentage of the total amount of forestland that existed when Columbus discovered America 500 years ago still exists today?			66%	

[66] More exercises are available at Douglas Hubbard's website: www.HowToMeasureAnything.com.

4. When was the first symbol for Zero invented?			500 C.E.	
5. What is the maximum number of times that a piece of paper can be folded in half?			12	
6. What is the wingspan of the original Boeing 747?			195.67 ft	
7. On what date (day, month, year) did Andrew Johnson formally declare an end to the Civil War?			August 20, 1866	
8. How large in square meters is the base of the Great Pyramid of Giza?			52,600	
9. What is the highest price ever paid for a Stradivarius violin?			1644 $3,544,000	
10. When was moveable type invented in China?			Between 1041 and 1048 C.E.	

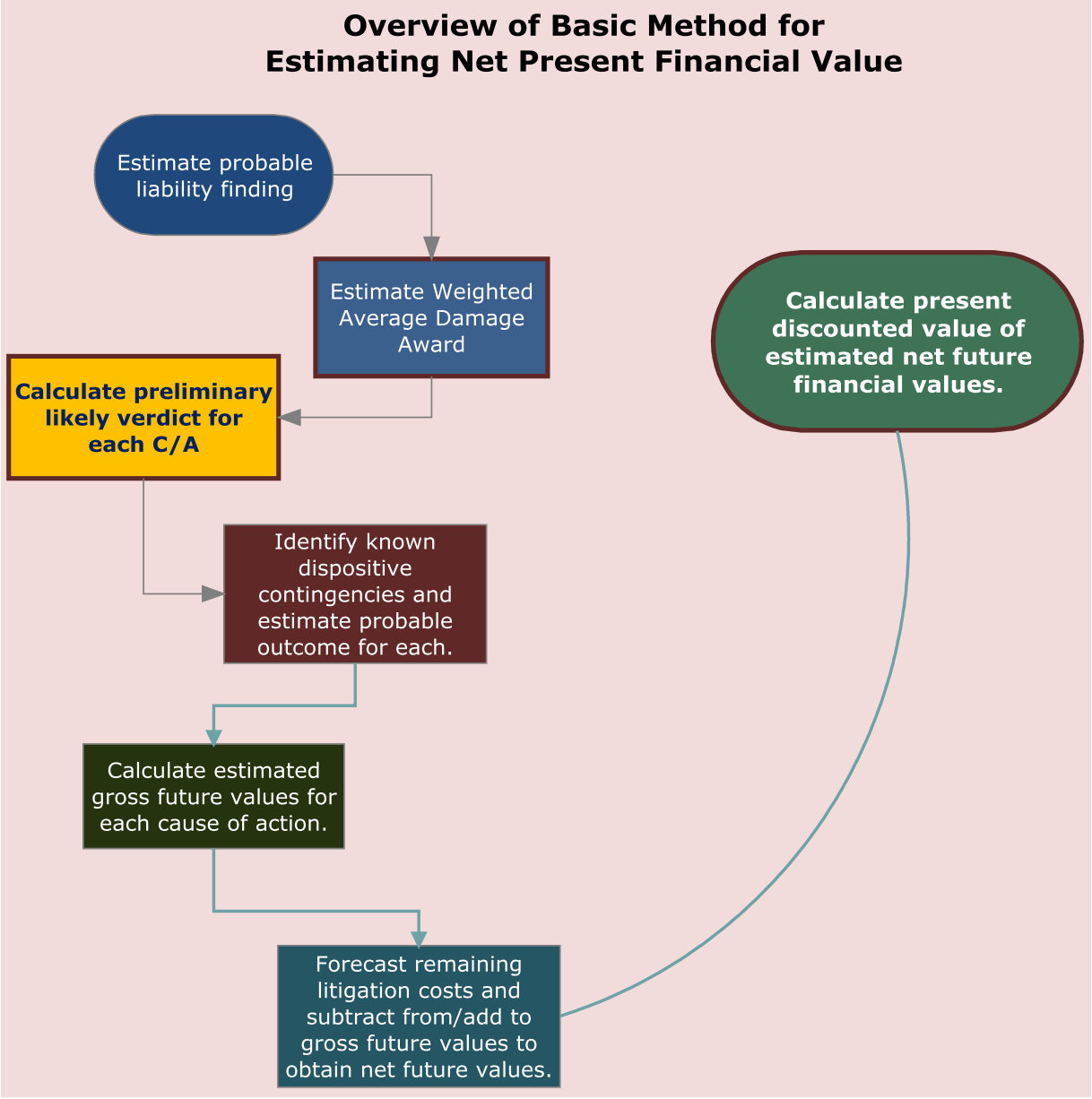
	Statement	Answer (T/F)	Confidence that you are correct (Circle one)	Answer
1	The melting point of tin is higher than the melting point of aluminum.		50% 60% 70% 80% 90% 100%	FALSE
2	In English, the word “quality” is more frequently used that the word “speed”.		50% 60% 70% 80% 90% 100%	TRUE
3	Any male pig is referred to as a hog.		50% 60% 70% 80% 90% 100%	FALSE
4	California’s giant sequoia trees are named for an early 19th century leader of the Cherokee Indians.		50% 60% 70% 80% 90% 100%	TRUE
5	The Model T was the first car produced by Henry Ford.		50% 60% 70% 80% 90% 100%	FALSE
6	When rolling 2 dice, a roll of 7 is more likely than a 3.		50% 60% 70% 80% 90% 100%	TRUE
7	No one has ever been reported to have been hit by any object that fell from space.		50% 60% 70% 80% 90% 100%	FALSE
8	Sir Christopher Wren was a British anthropologist.		50% 60% 70% 80% 90% 100%	FALSE
9	Pakistan does not border Russia.		50% 60% 70% 80% 90% 100%	TRUE
10	The Navy won the first Army-Navy football game.		50% 60% 70% 80% 90% 100%	TRUE

PART III

BUILD YOUR CRYSTAL BALL TO FORECAST COURT DECISIONS AND CALCULATE NET PRESENT FINANCIAL VALUE

CHAPTER 23:

AN OVERVIEW OF THE WIN BEFORE TRIAL METHOD



There is no legal way to know the outcome of a lawsuit in advance with certainty. But by using a rational method, we can reduce the level of uncertainty

sufficiently to make informed and wise decisions about whether to settle or continue with litigation.

The following chapters present tools and techniques with which to isolate specific aspects of the case and to subject those involving a decision by the judge or jury to quadri-partite analysis. The four major components of case valuation (damages, liability, contingencies, and costs) each have sub-parts. For example, the elements of a cause of action provide the structure for the liability analysis. When looking at each sub-part of each component, we will want to know what effect the evidence, arguments, non-dispositive contingencies, and extraneous factors are likely to have on the jury's or judge's decision on that aspect of the case.

Information that becomes salient in one step frequently will affect judgments about other aspects of the process. The order of the steps is not rigid; and the practitioner can arrive at a more accurate assessment by reviewing information in earlier steps in light of subsequent analyses. As you focus on the evidence that may be

Your Crystal Ball in a Nutshell

Step 1: **LIABILITY**. Assuming that the jury hears all possible evidence, estimate the probable liability finding for each cause of action.

Step 2: **DAMAGES**. On the same assumption, estimate the range of likely damage awards together with the probability of the low, medium, and high numbers, and compute the weighted average damage award (WADA).

Step 3: Calculate the preliminary likely verdict.

Step 4: **CONTINGENCIES**. Identify and determine the numerical probability of the key dispositive contingencies that could affect what evidence the jury hears.

Step 5: **COSTS**. Estimate the costs of obtaining a final judgment and subtract that from the estimated verdict.

Step 6: Calculate the net future financial value of the final judgment.

Step 7: Using the current interest rate for a CD with a term equal to the remaining time until trial, calculate the net present financial value.

excluded or the credibility of a key witness, you may realize that the estimated range of verdicts is too high or too low. Similarly, as you consider what can affect the verdict, you may discover contingent events that you missed in another part of the process.

By starting with the process of estimating liability and damages, you get an overview of the whole case. You work backwards to think about what the jury must know and do to reach each of the possible verdicts.

It is important to remember the goal of all this digging: to achieve 90% confidence that we have accurately estimated the net present financial value of the lawsuit. We should dig down only so far as necessary to reach that level of confidence. This means that we will need to pay more attention to the details of some parts of the case than to others. In all of what follows, I have tried to follow Einstein's dictum: "Everything should be made as simple as possible—but no simpler."[67]

[67] *Cf.* William of Occam: "Numquam ponenda est pluralitas sine necessitate." (Loosely translated: "It is vain to do with more that which can be done with less." Or more literally: "Never posit more [entities] than necessary.")

CHAPTER 24:

USE THE FOUR BASIC QUESTIONS TO WRING INFORMATION OUT OF AVAILABLE DATA

To Take the Case or Not?

A prospective client, Karl Norovich, has just told Jane Smathers about having been stiffed by an insurance company on a flood damage claim. The company says there is no coverage. The policy is somewhat ambiguous, but Jane thinks Karl has at least a 50/50 shot at proving liability. The bills from the flood repair total $67,789. If Jane has to sue, Karl said that he would pay Jane 40% of any final judgment net of expenses and 25% if she can negotiate a satisfactory settlement without trial. Jane's hourly rate is $225/hour. What is the net present financial value of this case? Does it make financial sense for Jane to take the case?

What Does Jane Need to Know to Answer the Client's Question?

I suspect that most lawyers would respond to the three scenarios above with some expression of dismay coupled with: "It depends." "There is no way I can answer that question." or "If you must know this instant, the number is X. That's my best guess, but it's only a guess, and I could be off by a factor of 200 or 300% or more. We just can't say without more information."

So, what more information does Jane need? What would reduce her uncertainty about the value of Karl's case against the insurance company?

Break Big Questions Down into Smaller Ones

A key part of estimating the net present financial value of cases is learning how to break the big questions down into the right smaller questions. In most cases in which we seek to assess case value (including Karl's insurance claim), we will already have a sizeable amount of information. We know more than we know we know. That is, we can wring additional information out of what we already know by asking good questions. As a lawyer, you have been trained to ask questions to discover evidence and legal rules with which to determine the proper outcome of a legal dispute. To measure your BATNA, you need to refocus your powerful interrogation skills on the question of value.

As with legal analysis, value analysis begins by asking, "What do I want to know?" The answer to that question guides your subsequent investigation. In Karl's case, for example, your initial question might be, "Should I take this case?" Or you might be asking, "What's this case worth?" or "Will I lose money if I take this case?"

Once you have stated in clear terms what you want to know, you then ask, "What do I need to know in order to answer that question?" Suppose in Karl's case your question is, "What is this case worth?" That question leads to several other questions: Can we prove liability? What is the range of damages that a jury might return? What kinds of costs will we incur? Is the defendant likely to want to settle? How long will it take before we could get a final judgment?

Once you start asking the right questions, you will discover that the BIG question becomes less daunting. You also see that you know more than you knew you knew. It is similar to legal research and evidentiary discovery. Much of the method for measuring your BATNA is little more than the astute surfacing and organization of data that you already have on hand somewhere in some form—organizing it so that it reduces uncertainty.

Put Effort Into Asking the Right Questions

As you know, the way you phrase a question in a deposition can affect what answer you get, if any. The same is true when looking for the value of a lawsuit. How you ask the questions will strongly influence the quality and content of the information you get.

Because we know we must make our case, we tend to ask questions designed to elicit information about its strengths and weaknesses: What evidence do we have? What is missing? How good are the witnesses likely to be? Does the law provide an insurmountable defense? And so on.

There is nothing wrong with these questions. We must answer them eventually. But they may not be the best place to *start* when trying to determine value.

I suggest that you will be better off starting with the ultimate *buyer*—namely, the jury.[68] What is the jury going to do with this case? That question leads almost immediately to a prior question: What case will the jury get, if any

If you begin by asking questions from the jury's perspective, at some point you will find yourself asking questions like the following:

(1) **What evidence and arguments, if any, is the jury likely to get?** How likely is it that the jury will hear all the available evidence in the case? Will any cause of action or line of argument be excluded? Will all the necessary witnesses show up? In other words, what could prevent the jury from hearing the case at all or a particular part of it and, how likely is each such contingent event to go against the plaintiff?

(2) **What will the jury do with the evidence and arguments it gets?** What is it likely to decide? Why would the jury rule for the plaintiff on each element of each cause of action rather than for the opposing party? The issue is *not* why *should* the jury rule in one way. Rather, we want to know what will likely influence its decision, even extraneous factors such as biases and prejudices. How will it come out, whether or not it should?

Because the jury must make separate decisions on liability and damages, these two groups of questions break down into three:

1. Given all the evidence known at this time, what is our best judgment about the range of probability that the jury will find the defendant liable to the plaintiff?

2. Given the same evidence, if the jury finds the defendant liable to the plaintiff, what is our best judgment about the range of likely damage awards we can expect it to make and what is the probability for each of a high, medium, and low verdict in that range?

3. What contingent events/decisions could affect which evidence, if any, is actually presented to the jury and, for each event, what is our best judgment about the range of probable outcomes?

[68] Throughout this chapter I use the word "jury" to indicate the trier of fact, whether that is a judge or jury.

Finally, before we can compute the financial value of a lawsuit, we must estimate its remaining costs, which leads to the fourth question:

4. What is our best judgment about the range of likely costs (in money) we will incur in getting a final judgment? How much money must each side spend to continue the litigation battle? What other price will each party pay while moving from skirmish to skirmish in the relentless progression toward a showdown in court?

These are the four questions that constitute the basic framework for measuring your BATNA (and theirs too).

To compute the financial value of the case, you must then multiply the probable outcomes discovered as answers to questions 1-3 and subtract (plaintiff) or add (defendant) the remaining costs (question 4). The result of this calculation (the net future financial value) is then discounted to its present value.

The following chapter lays out the structure of the basic *Win Before Trial* case valuation method. The chapter after that illustrates the basic framework by showing how you might determine whether it makes financial sense to take Karl Norovich's case on a contingent fee basis.

CHAPTER 25:

MANAGE COMPLEXITY WITH THE FOUR COMPONENTS OF CASE VALUATION

The net present financial value of the case is determined by methodically answering the following four questions, by using the answers to compute the net future financial value, and finally by discounting the net future financial value to its present value:

A. What is the Likely Finding on Liability?

1. Considering all the evidence and any affirmative defenses, for each cause of action, how likely is it that the jury will find the defendant liable to the plaintiff?
2. In complex cases, drill down to each element of each cause of action to examine the likelihood that plaintiff will prevail on that element.

B. What is the Weighted Average Damage Award for Each Cause of Action?

1. Assuming all available evidence is admitted, for each cause of action, what is the likely range of high, medium, and low verdicts?
2. For each number in that range estimate the probability of that number.
3. Multiply the probability factor times the dollar amount for the high, medium, and low numbers.
4. Add the results to obtained the Weighted Average Damage Award (WADA).

C. What are the Costs and Benefits of Getting a Final Executed Judgment?

1. What are the direct dollar costs that the client pays to obtain a final executed judgment?

a. Professional fees (lawyers, paralegals)

b. Other out-of-pocket expenses (including expert witnesses)

2. What are the direct dollar benefits of continuing with litigation through a final executed judgment?

   a. Interest earned on money not paid in settlement.

   b. Business opportunities pursued while outcome of litigation uncertain.

3. What are the indirect costs to the client translated into dollars of continuing with litigation through a final executed judgment?

   a. Lost opportunity costs (other productive uses of money and other resources)

   b. Diversion of employee and executive time from productive work

   c. Emotional and well-being costs to individual litigants such as emotional stress, embarrassment, shame, anxiety, etc.

   d. Other intangible costs (e.g., having a negative precedent established that will reduce the ability to pursue a line of business, damage to reputation, interference with merger and acquisition opportunities, etc.).

4. What are the indirect benefits to the client of continuing with litigation through a final executed judgment?

   a. Business opportunities pursued while outcome of litigation uncertain.

   b. Distraction of competitor from its business.

   c. Emotional and well-being benefits of pursuing vindication, having one's day in court, seeing the other side suffer, achieving a court-imposed sanction, being able to proclaim victory to the rest of the world, etc.

   d. Other intangible benefits (e.g., setting a precedent that opens a line of business, resolving ambiguous law making it easier to attract investment, establishing or maintaining a reputation, revenge, vindication, etc.).

D. What Contingent Decisions or Events Will Affect the Evidence, if any, the Jury Receives

These are typically motions, objections to evidence, and uncertainties concerning whether one or more witnesses will be available. All but the

simplest case has a few such contingencies. For case valuation purposes, there are two fundamental kinds of contingent events:

a. Dispositive contingencies and
b. Non-dispositive contingencies.

As the names suggest, dispositive contingencies are decisions and events that potentially dispose of an entire case or cause of action. A motion to dismiss or for summary judgment is such a contingency.

Non-dispositive contingencies affect only part of a case and have the potential to make a finding of liability or a specific damage award less likely. A motion *in limine* to exclude a document or part of the testimony of a witness is such a non-dispositive contingency. Whether a witness will show up for trial is another.

The distinction has critical importance for using decision trees to manage complex contingencies.

E. The Time Value of Money for Your Client for the Period Between Now and Final Judgment

The answers to the questions in these four areas (liability, damages, contingencies, and costs/benefits) tell us our best estimate of the state of the case at any given moment. The four question sets are parameters, aspects of a case that vary over time. Obtaining the answers to the questions is like measuring the red blood cell count, blood pressure, pulse, temperature, weight, and other parameters in an organism to

measure its physical state. We estimate the values of the parameters in the four NPFV components to derive the basis for computing the Net Present Financial Value.

After measuring the four parameters that make up the financial value of the case, we compute the net future value for each cause of action by multiplying the probable liability decision times the weighted average damage award times the probability of any contingency that affects liability or damages and subtract (for plaintiffs) or add (for defendants) the net costs/benefits of continuing with litigation.

The Net Present Financial Value, then, is simply the Net Future Financial Value discounted to its present value using an appropriate discount rate for the number of months until the final executed judgment. For plaintiffs, the discount rate is what it costs plaintiff to borrow money. For defendants, it is the rate of interest that the client can earn on the money not paid for a settlement now. Once you have calculated the Net Future Financial Value, you can easily compute the discounted value with any standard business calculator.

CHAPTER 26:

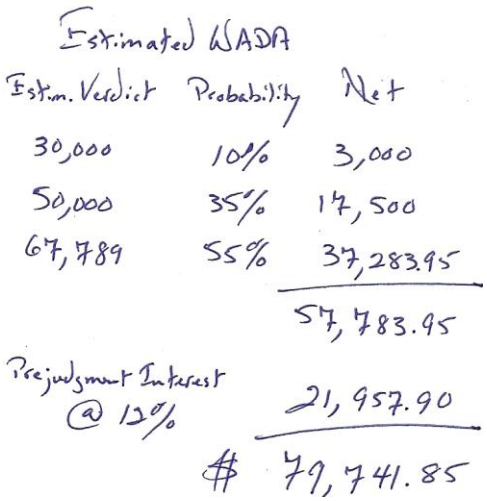
PUTTING IT TO WORK: THE BASIC FRAMEWORK IN ACTION

To illustrate how the 60-Minute *Win Before Trial* Method works in simple cases, let's consider the contingent-fee case against the insurance company. Will it be financially profitable to take the case? (There may be other reasons to take it even if Jane will lose money doing so. For now, we are focusing solely on the immediate financial question.)

First, is the jury likely to find the defendant liable? Jane looks at the policy. The coverage clause in question is buried in the small print on page seven. It's ambiguous. The advertising literature for the policy said, without equivocation, that it covers water damage. Karl says the salesman for the company did not point out any restrictions on the water damage coverage. Based on what Jane knows now, she estimates that she has between a 40 and 56 per cent chance of convincing the jury that the defendant is liable. In other words, she is 90% confident that, if this case were tried 100 times before 100 different juries, between 40 and 56 of those juries would find the defendant liable. A range of 40 to 56 translates to an average of 48. Plaintiff would win an average of 48 times out of 100 trials and lose the other 62 times. With better information (obtainable through discovery and legal research), she will likely be able to narrow the range of estimates.

Second, what will the jury find for damages? Karl Narovich has invoices for $67,789. A rational jury should return a verdict of that amount. But juries sometimes

reach compromise verdicts. You estimate that the range of jury verdicts will be between $30,000 on the low side to $67,789, plus prejudgment interest at the statutory rate of 12% for the 38 months you anticipate it will take to get a verdict. Jane's guess is that there is a 10% chance of $30,000, a 35% chance of a middle number of $50,000 and a 55% chance of $67,789. These are just guesses, but they are *informed* guesses based on everything that Karl has told Jane plus her 18 years experience as a trial lawyer.



You scribble these numbers on some scratch paper:

Jane have noticed that there is a potential consumer fraud claim lurking in these facts, but without more information than she has at present, she thinks she would be unwise to base any decision about taking the case on it. So she leaves it out. If it develops later, that will be gravy. For now, she figures she will use only the breach of contract claim as the basis for determining whether to take the case.

Third, she determines that the only contingent event that could affect what evidence the jury hears is the judge's decision on the defendant's likely motion to dismiss. The defendant will likely claim that the clause is not ambiguous as a matter of law. She estimates that the defendant has a 15 to 25 per cent chance of winning that motion. She splits the difference at 20%.

Fourth, she estimates that she will spend about $1,600 on court reporter fees, deposition transcripts, exhibits, and photocopying expenses. (Because her legal fees will be a percentage of the recovery, they are not part of the net present value calculation from the plaintiff's perspective.)

Having answered the four basic questions on liability, damages, contingencies, and costs, Jane can now calculate the Net Future Financial Value and the Net Present Financial Value of the case. Each of these is a simple arithmetical computation using the results of the four-question analysis.

The plaintiff calculates the Net **Future** Financial Value by multiplying the Weighted Average Damage Award ($79,741.85) times the probability of a plaintiff's liability finding (48%) times the likelihood of winning the motion to dismiss (80%) and subtract the projected out-of-pocket expenses ($1,600). The calculation looks like this:

Net Future Value

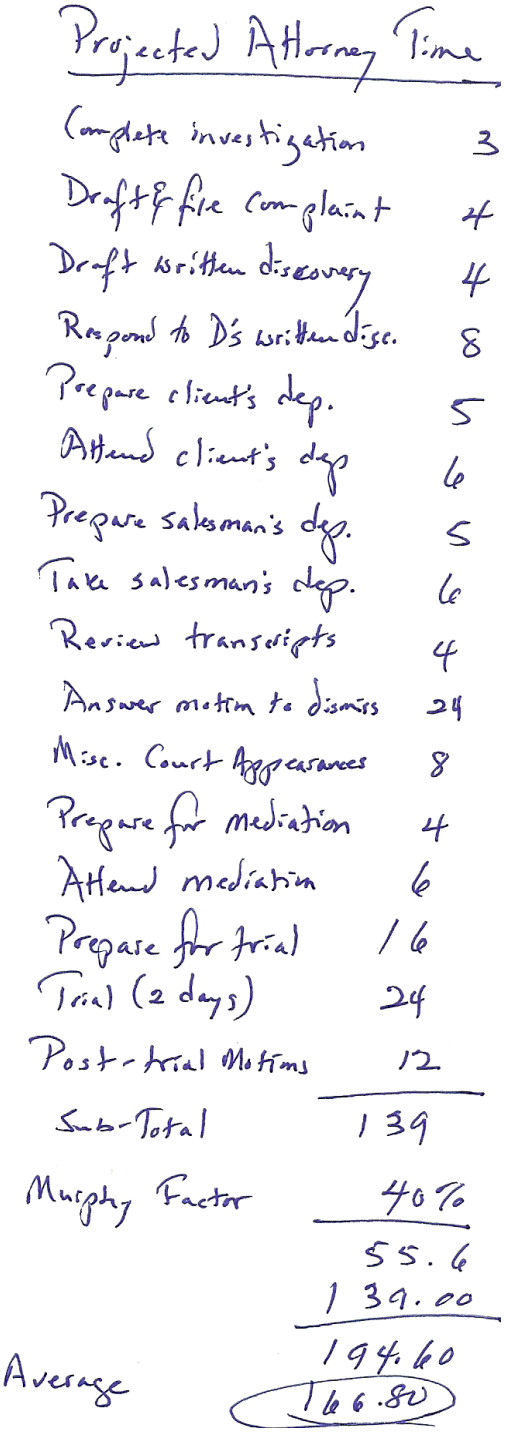
Estimated Verdict	79,742
Liability	48%
Sub-Total	38,276
Motion to Dismiss	80%
	30,620
Expenses	(1,600
NFV	$ 29,020

Jane expects that it will be 38 months before the case would go to trial. A three-year certificate of deposit at her local bank currently is earning 4.25% interest. Using a standard business calculator, she computes the Net Present Financial Value as **$25,371.83**.

It is important to remember that this number is not the settlement value. It is the walkaway number. Based on what Jane knows now and using this analysis, plaintiff will likely be financially better off going to trial (your BATNA) than by accepting a settlement offer below this amount.

The plaintiff may not have to come up with legal fees if he loses, but the defendant must pay a lawyer to defend, win or lose. A rational defendant would factor in the estimated cost of continuing with litigation when deciding what to pay to settle it—hence the "nuisance value" offers in cases that defendants feel have no merit whatsoever.

Having gone through this exercise, however, Jane has confirmed her initial hunch that she would lose money taking this case on a contingency-fee basis, something she no doubt realized without doing any calculations. (And her client would lose money paying her hourly fee to pursue it.) But just to complete that aspect of the computation process, Jane does a quick forecast of the time she would put in as shown on this piece of scrap of paper:



Projected Attorney Time

Complete investigation	3
Draft & file complaint	4
Draft written discovery	4
Respond to D's written disc.	8
Prepare client's dep.	5
Attend client's dep	6
Prepare salesman's dep.	5
Take salesman's dep.	6
Review transcripts	4
Answer motion to dismiss	24
Misc. Court Appearances	8
Prepare for mediation	4
Attend mediation	6
Prepare for trial	16
Trial (2 days)	24
Post-trial Motions	12
Sub-Total	139
Murphy Factor	40%
	55.6
	139.00
	194.60
Average	166.80

Here again, Jane is after a range of hours within which you are confident that the actual number will lie. One way to produce this range is to make her best estimate and then add a Murphy Factor of 40%for things that could go wrong or unforeseen developments that could add to her time. Her low-end estimate is 139 hours. After adding in the Murphy Factor of 55.60 hours, she gets a high-end estimate of 194.60. The average is (139 +194.60)/2 or 166.80 hours.

Wow! At $225/hour the value of Jane's time through final judgment is likely to be **$37,530**. The estimated net future value of the case is only $29,020. 40% of that is $11,600. Thus, if she can't settle this case well before trial, she stands to lose $25,922 in the value of her time—even if the jury decides in her favor. She had a hunch that it would not pay to take this case if she has to try it, but maybe she did not realize it was so out of balance.

Jane shows these numbers to the Karl Narovich to help him understand that his case does not have as much value as he thinks and would be a losing proposition for her if it could not be settled well in advance of any trial.

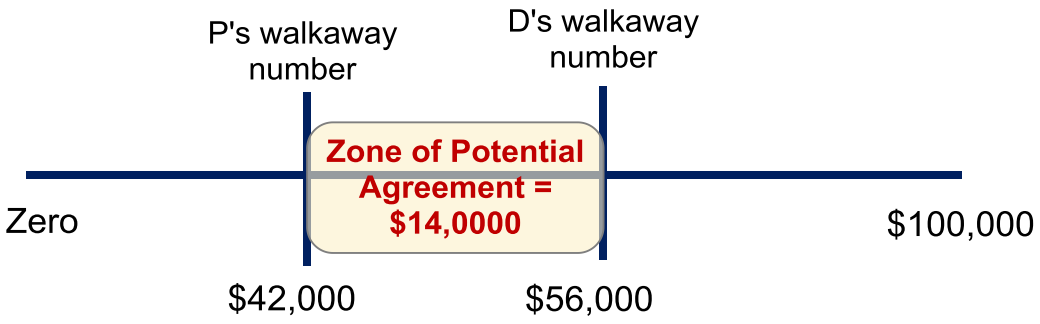
Karl sees her point but asks, "What if you put in only 10 hours of time in an effort to negotiate a settlement without filing a lawsuit, and I agreed to pay you 20% of any settlement amount?" In essence, Karl is asking Jane to invest $2,250 to try to get him some money now. Under this arrangement, Jane would break even with a settlement at $11,250. Thus, any settlement Jane can negotiate north of $11,250 with only 10 hours of her time, will be a net gain from her perspective.

How likely is it that Jane would be able to negotiate such a settlement? That depends in large part on how the defendant sees the case. If its representatives conduct a similar analysis to yours, would they have an incentive to settle the case for more than $11,250? If so, by how much more? To answer that question, let's go to the next chapter for a discussion of the Zone of Potential Agreement.

CHAPTER 27:

THE ZONE OF POTENTIAL AGREEMENT

Because the plaintiff's costs are subtracted from the verdict and the defendant's costs are added to it, the net present financial value for the plaintiff is a lower number than the NPFV for the defendant. That creates what Howard Raiffa calls the Zone of Potential Agreement (ZOPA). The basic concept is simple. If the plaintiff's walkaway number is lower than the defendant's walkaway number, then there is a zone within which the numbers overlap. Agreement should be possible:[69]



In this simple graphic, plaintiff will walk if the last settlement offer is less than $42,000. Defendant will walk if plaintiff's final demand is greater than $56,000. They thus have $14,000 to play with. Each would *feel* better off if they just split the difference. Defendant would pay and plaintiff would receive $49,000, a $7,000 improvement on their respective walkaway numbers.

[69] Howard Raiffa, *Negotiation Analysis: The Science and Art of Collaborative Decision Making* 110-115 (Cambridge: The Belknap Press, 2002); Howard Raiffa, *The Art and Science of Negotiation* (Cambridge: The Belknap Press, 1982).

Thus, the actual settlement value of a case can be and often is higher for plaintiffs and lower for defendants than their respective net present financial values. The ZOPA is one of the reasons why so many cases settle. The ZOPA creates value for both that neither side has standing alone. A rational negotiation process is, among other things, one of claiming and distributing that value.

The problem is that neither knows the other's walkaway number. (A mediator might discover them both, but mediators report that this happens less often than one might suppose.)[70] If you have done a thorough analysis of interests and the net present financial value from each side's perspective, however, it should be fairly easy to estimate the Zone of Possible Agreement.

Why bother? Doesn't it all come down to a game of positional haggling in the end anyway?

Yes, it does. But think of it this way. Suppose you could obtain intelligence about the other side's walkaway number. Do you think that would give you additional strength in the haggling process? Of course it would. By knowing precisely the point at which they are prepared to walk, you can structure your own offers in a way that you push right up against that walkaway number. You know when to stop. You can claim the maximum value from the ZOPA for your client. And you don't blow the possibility of a deal.

[70] *See, e.g.*, J. Anderson Little, *Making Money Talk: How to Mediate Insured Claims and Other Money Disputes* (Chicago: American Bar Association, 2007).

Moreover, if you know the other side's walkaway number, you know whether there is a ZOPA. If none exists, then either you spend your time trying to change the other side's view of their NPFV, you reexamine your own estimates (you could have made a mistake), or you terminate settlement discussions because they are not likely to be fruitful.

If you can estimate a ZOPA with 90% accuracy, then negotiating a settlement should be easier than otherwise. If a ZOPA does not exist, then there may be little point in pursuing settlement negotiations.

ZOPA Analysis Applied to Karl's Case

In the previous chapter we determined that Karl Narovich's claim against the insurance company has a net present financial value *for him* of $25,371.83. That number is not the settlement value of the case. To discover the settlement value, we need to calculate the Net Present Financial Value from the defendant's perspective as well and use that number to determine the Zone of Potential Agreement (ZOPA), if any.

Because Karl wants an answer today, Jane decides to assume that defense counsel will charge roughly the same rate as she, will spend about the same amount of time, and will have approximately the same amount of expenses. On that assumption, the lawsuit would cost the insurance company $39,130 ($37,530 on legal fees plus $1,600 on expenses) even if it wins. If the company loses, it stands to be out as much as that amount plus the likely verdict of $29,020 for a total of **$68,150** (net future financial value). The Net Present Value of that amount is $59,583.

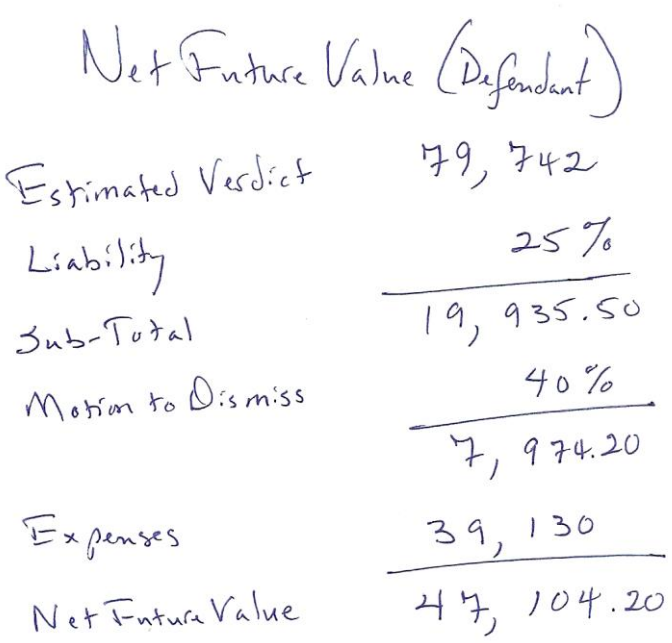
Thus, the Zone Of Potential Agreement (without regard to any other interests the parties may have) is between $25,372 and $59,583, a spread of $34,211. In other words, each side will be better off resolving the case **now** somewhere between those two numbers than by going all the way to final judgment. The average of those two numbers is $42,477, which would be a decent settlement number for each side. (The "now" is important. After discovery and a ruling on the motion to dismiss, case values change. They change even more once defendant has few remaining fees and expenses. At that moment, the ZOPA would be much narrower, if it existed at all.)

However, these figures are based on the assumption that the defendant reaches the same conclusions about a probable liability finding (48%), the weighted average damage award ($79,741.85), the likelihood that plaintiff will win the motion to dismiss (80%), and a projection of defendant's legal fees and expenses totaling $39,130. It is a virtual certainty that none of these assumptions is correct.

The task, therefore, is to discover how a rational defendant looking at the same evidence is likely to see the case. In Karl's case, the damages—if allowed at all—are fairly cut and dried. The defendant can quibble about some expenses, but, for the most part, it will not be able to mount a serious challenge to the overall total. Accordingly, we'll keep the weighted average damage award at $79,741.85.

Defendant is likely, however, to see the likelihood of success on the motion to dismiss and the probability of a liability finding much differently from plaintiff. If Jane were representing defendant, she might think she had as much as a 60% chance of

winning the motion to dismiss and a 75% chance of convincing the jury that her client is not liable to the plaintiff. (In other words, plaintiff has a 40% chance on the motion to dismiss and a 25% chance on liability, which means that he has only a 10% chance of ultimately winning. .40 X .25 = .10.) If we plug those numbers into the same formula we used to compute plaintiff's net present financial value, we get the following results:



The present discounted value of $47,104 for a 38 month period at 4.25% is $41,182, which is the net present financial value from defendant's perspective

Thus, even if defendant thinks that it has a 90% chance of winning the case through a motion to dismiss or a liability finding in its favor, there is still a zone of potential agreement: $25,372 to $41,182, a spread of $15,810.

Given these assumptions about the value of the case from defendant's perspective, defendant will likely be *financially* better off paying plaintiff anything less than $41,182 than by going to trial. That does not mean that defendant will, in fact, pay anything close to that amount. Corporate defendants in general and insurance companies in particular frequently prefer to pay a lawyer to defend a case they see as having little merit to giving even part of that defense budget to the plaintiff. "Millions for defense; not one cent for tribute."

But there is nonetheless likely to be a "nuisance value" number that the insurance company would willingly pay to make this case go away. In its worst case analysis, the defendant is looking at a potential exposure of over $120,000. Even though the chances are remote, the impact of being wrong or of getting a rare jury or of encountering some unknown unknown—some Black Swan—would be significant.

So from Karl's perspective and from Jane's as his potential attorney, it probably makes sense to invest some time and effort trying to negotiate a settlement. Jane could accept his offer to spend up to 10 hours trying to reach an agreement with the insurance company. Both she and he can walk away if unsuccessful. She would be out $2,250 worth of her time; Karl would be no worse off than now. Even a $12,000 settlement now would put much needed money in his pocket and would mean a slight profit for Jane. (Moreover, she might gain a client as a source of future business.)

Having a good handle on the zone of potential agreement in this case makes it possible for Jane to make an informed, rational decision about whether to represent

Karl. And the entire analysis gives Karl a sense of the level of probability that he will recover part or all of his damages.

Not A Bad Return on a 60-Minute Investment

By using the 60-Minute Method to estimate the value of the case, you have substantially increased your explicit knowledge of the case and the implications of taking it on a contingent-fee basis. You have likely gained some control of your impulses. You can make a much more rational judgment about whether to accept the case. And you have probably uncovered potential strategies (e.g., get a settlement or dismiss the case) that you otherwise may not have considered.

Keep in mind that this is the *quick* version, the *60-minute* method. It is inexpensive in time and money to apply and produces remarkably valuable information for the effort expended. But the information is not as complete as you would get with a more extensive inquiry. Your level of uncertainty about whether your estimates are correct may be higher than you would like. There are ways to drill down into the data of a given case—especially one in which discovery has been going on for several months—that will substantially reduce your uncertainty about future events. (These will be explored in Volume II of this work. Some guidance on the more detailed analysis is available for readers of this book at www.WinBeforeTrial.com.)

But already, in only 60 minutes, you have reduced your uncertainty about the case and put both yourself and your client in a position to make better choices. That's not a bad return for the effort invested.

The 60-Minute Method is the Basic Framework

The basic structure of questions and formulas is the same for more detailed and complicated case analysis as it is for the 60-minute method. You will always need to know (a) the probability of a liability finding for the plaintiff, (b) the range of likely damage awards if all evidence is admitted, (c) the probability of positive outcomes of each contingency that will affect what causes of action and evidence the jury may consider (dispositive contingencies), (d) the future cost of getting a final judgment, (e) the net future value, and (f) the present discounted value of the net future value.

On each of the first four parts of the method outlined above, we can gather and organize more information and achieve better estimates. In the jargon of the corporate world, we can "drill down" into the mass of available data to bring up details that enhance our understanding. The methods for doing this are described in this section. They take time and, therefore, cost money. We can vary the level of detail and intense focus with each set of questions in order to spend our resources wisely. And it is possible to determine whether the benefit of getting better estimates exceeds the cost of doing so.

For large or important cases you may need much greater precision in your estimates than is generally possible in 60 minutes. To increase your level of confidence in all of your estimates and to narrow the ranges, you will need to **reduce your uncertainty** about likely outcomes of future events and to **manage the complexity** of factors that affect those outcomes. You need, in other words, more information

organized well. The tools and techniques for doing that are beyond the scope of this book, but an introduction to them is available at the accompanying website: www.WinBeforeTrial.com.

SECTION V:

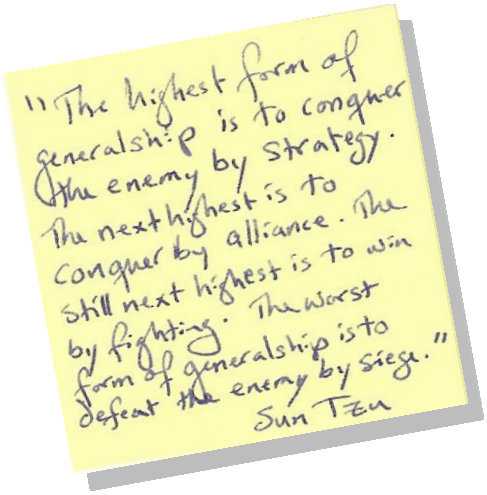
READY, AIM, FIRE: THE SETTLEMENT PLAN

CHAPTER 28:

THE CONTENT OF THE SETTLEMENT PLAN

In the discussion of litigation strategy in chapter __, I identified six questions pertinent to settlement strategy:

1. What do we want/need? (Mission)
2. What must we do to get it? (Means)
3. What constraints impinge on our ability to get it? (Limitations)
4. What will it cost to get it? (Costs)
5. What are the likely consequences of each alternative course of action? (Consequences)
6. When should we take which steps? (Timing)



Having gained an in-depth understanding of the interests of all parties who can influence a settlement decision and having prepared an analysis of the net present financial value of the case from each side's perspective (i.e., its BATNA), you are now in a position to answer those questions as you prepare a settlement plan.

In preparing a settlement plan, the lawyer and client should review these six questions as they focus on three main tasks:

1. Set the **target** settlement terms.

2. Set the **walkaway terms**, the minimum the client must achieve in a settlement before she breaks off and continues with the litigation.
3. Determine the appropriate **investment** needed to obtain sufficient information to negotiate an optimal settlement.
4. Set the **timing**. When should settlement talks be initiated or pursued?

Target Settlement Terms

The target settlement terms should grow out of the answers to the first five strategic questions. What we want? What is required to get what we want? What constraints limit our ability to get what we want? What will it cost? What are the consequences of alternative courses of action? **[What's best for the client? Options development.]**

The interest analysis tells us the relative priorities among client's various wants and needs. The case valuation tells us what is possible if we don't reach a settlement agreement. They set the frame for what is realistically possible as a settlement goal.

It makes sense to **set the target monetary amount at the high/low end of the Zone of Potential Agreement and to articulate any other settlement terms necessary to satisfy your client's interests**. (High for plaintiff; low for defendant.) In other words, seek to claim as much of the value available in the ZOPA as feasible plus any non-monetary terms (e.g., apology or non-compete agreement) that will help satisfy your client's interests. Winning Before Trial is not about being nice or dividing the pie equitably. In fact, it is your fiduciary duty to get the best possible deal for your client, regardless of the impact on the other side.

But do not confuse hard-nosed bargaining with belligerence or efforts to force the other side into submission. Settlement requires the cooperation of both sides. And you will not get their cooperation unless they too believe they are getting a deal that satisfies their interests reasonably well and is better than their BATNA. Accordingly, you must continually factor in the other side's interests and their likely financial valuation of the case. Doing so may help you come up with a settlement package to which they can say yes.

Walkaway Terms

To devise a good settlement plan you must know not only what you want; but you must also know what you will not accept. You must know in advance the point at which your client's total package of interests will most likely be better served by walking away than by saying yes to the other side's proposal. Typically, but not always your walkaway will be equivalent to the value of your BATNA. At times, plaintiff's package of interests may dictate a number that is lower than the net present financial value of a trial, as defendant's interests might analogously call for a higher number.

Failure to know your walkaway terms—the minimum you must have—renders you and your client vulnerable to numerous subconscious decision traps and biases that can easily lead to sub-optimal settlements. It is like going to an auction without knowing in advance the highest amount you are willing to pay. You can easily get caught up in the contagion of the moment, asking later how you ended up paying $18,000 for a vase experts value at no more than $12,000.

As a rule, **set the walkaway terms at the net present financial value for your client or lower/higher as dictated by your client's interests and risk tolerances**. If a plaintiff cannot afford to take any risk of loss, then the walkaway number may be lower than even the net present financial value. Similarly, a defendant may need to pay more than the case is worth to avoid trial. Know what you are prepared to give up and what your minimum is for any negotiated agreement at this time. In particular, know how much money you are willing to concede to get an intangible good that is high in your client's interest package.

Investment in Discovery and Pre-Trial Motions

Because you are devising a settlement plan at the outset of the case (not on the eve of mediation!), you should consider the projected costs for the entire case. From the settlement preparation perspective, you spend money on the case to buy information, that is, to reduce uncertainty. It is like paying for a structural engineer to inspect a building you might want to buy. In your settlement plan, therefore, you look at discovery and pre-trial motions as investments in knowledge. How much do you need to invest to obtain the amount of information that will enable you to negotiate an optimal settlement?

The problem is that the level of information for each side at the outset of the case may be such as to produce an unsatisfactory estimate of the net present financial value. Having no discovery, the plaintiff may need to allow for contingencies that may or may not materialize. Such contingencies lower the net present financial value. The

defendant may likewise need to depose plaintiff and any expert witness to come up with a net present financial value on which serious settlement discussion could be based. Recognition of the value of discovery in helping parties better understand the financial value of their respective cases is one reason why some courts require mediation only after discovery has been completed.

The trick, of course, is to spend no more time and money than necessary to have sufficient information with which to achieve a settlement that best satisfies your client's interests. You should make an effort in your settlement plan to project when that point will likely occur and prepare to initiate settlement talks if the other side has not already done so.

Timing

From the plaintiff's perspective, the ideal time to pursue settlement negotiations is when she has sufficient information to compute her maximum net present financial value of the case and the defendant likewise knows its maximum exposure but has not yet spent most of its defense costs. From the defendant's perspective, the best time to settle is when plaintiff is operating under the greatest uncertainty and neither side has incurred substantial legal fees and costs.

Why is this so?

It works like this. Defendant will have the greatest incentive to settle on terms acceptable to plaintiff when it is confident that it has a high risk of having to pay a substantial jury award but has not yet spent much to defend the case. The cost/benefit

analysis will push the rational defendant to cut a deal quickly because it likely can buy the case for less than might be the case later on and it will save on-going legal fees and costs at the same time. The same logic holds for the rational plaintiff. The plaintiff has no interest in incurring additional fees and costs or (in a contingent fee case) waiting to get paid. The value to the plaintiff of money now inures to defendant's benefit.

Similarly, a rational defendant would like to get plaintiff to settle when her estimated net present settlement value is low because there are several outstanding dispositive contingencies and other uncertainties about how the evidence will develop in discovery. Not only can defendant save fees and expenses by settling early; it can also catch plaintiff at a moment of greatest uncertainty.

Once costs are sunk, both sides become more entrenched. They are mentally less inclined to view the net present settlement value without regard to what they have already spent. We tend to want to stay in to see the river card even if the smart play is to fold. This sunk-cost bias[71] is demonstrably irrational. But it affects the behavior of lawyers and their clients.

Thus, the general timing rule is: **Pursue settlement negotiations when the outstanding uncertainties and remaining costs yield a net present financial value that best meets your client's needs and puts the greatest pressure on the other side**.

[71] See, e.g., Hal R. Arkes and Catherine Blumer, "The Psychology of Sunk Costs," 35 *Organizational Behavior and Human Decision Processes* 124-140 (1985).

Settlement Planning is Iterative

As a case progresses, new information is acquired, contingencies are resolved, and more details are added to the parties' respective stories. The settlement plan you create at the outset of the case will be obsolete no later than six months after discovery is underway. Your client's interests may change; but the net present financial value almost certainly will be different.

Changes in interest priorities and case value can have a substantial impact on your client's target settlement terms, her walkaway terms, and timing decisions. Revisiting your settlement plan once every 4-6 months to make sure it is up to date will help you be prepared at any given moment to respond to a serious settlement proposal from the other side.

CHAPTER 29:

THE SETTLEMENT PLAN DOCUMENT

A settlement plan should always be written out—even if on the back of an envelope. Preferably, it should be in the form of a document that can be shared and edited easily. It should have the following minimal parts:

1. Summary of the interests of the key stakeholders
    a. Plaintiff's side
        i. Client (decision maker)
        ii. Others who have influence on client's decision
        iii. Attorney/law firm[72]
    b. Defendant's side
        i. Client (decision maker)
        ii. Others who have influence on client's decision
        iii. Attorney/law firm
2. Summary of Each Side's Net Present Financial Value (BATNA)
    a. Plaintiff
    b. Defendant
3. The Parties' Target Settlement Terms
    a. Plaintiff

[72] Ethically, the attorney's interests should have no bearing on the decision to settle; but practically, they often affect the decision-making process.

i. Gotta Haves & Must Avoids

ii. Would Really Like to Haves & Better to Avoids

iii. Might Be Nice to Haves & Not So Bads

b. Defendant

i. Gotta Haves & Must Avoids

ii. Would Really Like to Haves & Better to Avoids

iii. Might Be Nice to Haves & Not So Bads

4. The Parties' Walkaway Terms

a. Plaintiff

i. Minimal acceptable dollar amount

ii. Minimal non-financial terms

b. Defendant

i. Maximum payable dollar amount

ii. Minimal non-financial terms

5. Investment in discovery, pre-trial motions, and internal case analysis

a. State what you need to know to reduce your level of uncertainty about future events that permits you to fashion a good settlement proposal.

b. State how you can obtain this information (depositions, document discovery, focus groups, motions, interviews, investigations)

c. State what it will cost to get it

6. Timing

a. State when you expect to have the information and analysis with which to conduct productive settlement negotiations.

b. State when you expect the other side to be similarly ready.

c. Determine whether it is better to proceed in direct negotiations or with the help of a mediator.

Preparing a written settlement plan focuses the attention and makes us aware of gaps in our knowledge. The task of asking and answering strategic questions produces insights that guide our work on trial preparation as well. And the settlement plan provides the basis for transparent, productive discussions with clients and others.

"Would you tell me, please, which way I ought to go from here?"

"That depends a good deal on where you want to get to," said the Cat.

"I don't much care where," said Alice.

"Then it doesn't matter which way you go," said the Cat.

"So long as I get somewhere," Alice added as an explanation.

"Oh, you're sure to do that," said the Cat, "if you only walk long enough."

Lewis Carroll, *Alice in Wonderland*