

Using the Case Value Analyzer™ to Estimate the Financial Value of a Lawsuit

By Michael Palmer, J.D., Ph.D.

Plaintiff's Analysis			Defendant's Analysis		
	Probability	Gross		Probability	Gross
Low damage estimate		\$0.00	Low damage estimate	15%	\$25,000.00
Med. damage estimate		\$0.00	Med. damage estimate	65%	\$75,000.00
High damage estimate	100%	\$0.00	High damage estimate	20%	\$150,000.00
Weighted Average Damage Award		\$247,346.70	Weighted Average Damage Award		\$82,500.00
Def. SJ Motion	95%		Def. SJ Motion	95%	
Contingency 2	100%		Contingency 2	100%	
Contingency 3	100%		Contingency 3	100%	
D's Liability	29%		D's Liability	60%	
WADA Times Cont. & Liability		\$67,862.04	WADA Times Cont. & Liability		\$47,025.00
Months from claim to judgment			Months from claim to judgment		
Prejudgment Interest	1% x # months	\$0.00	Prejudgment Interest	1% x # months	\$0.00
Projected Final Judgment		\$67,862.04	Projected Final Judgment		\$47,025.00
Remaining Legal Fees	0%	\$0.00	Remaining Legal Fees	100%	\$119,616.75
Remaining Expenses	0%	\$0.00	Remaining Expenses	100%	\$8,268.75
Costs (Lost Cpp.)	100%	\$0.00	Costs (Lost Cpp.)	100%	\$0.00
Costs (Hedonic)	100%	\$0.00	Costs (Hedonic)	100%	\$0.00
Total Costs		\$0.00	Total Costs		\$317,391.75
Projected Judgment Minus Remaining Costs		\$67,862.04	Projected Judgment Plus Remaining Costs		\$364,416.75
Discount Rate	3%		Discount Rate	3.00%	
Months to Verdict	48		Months to Verdict	48	
Present Discounted Value		\$60,197.24	Present Discounted Value		\$323,257.07
Plaintiff's Net Present Financial Value		\$60,197.24	Defendant's Net Present Financial Value		\$323,257.07
Zone of Potential Agreement (ZOPA)		\$60,197.24	to		\$323,257.07
Midway Point of ZOPA (Optimal Settlement)		\$191,727.16			
Defendant's Current Settlement Offer		\$95,000.00			\$22,394.47

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Sample of the CVA Summary Page

A WIN BEFORE TRIAL whitepaper on the estimating and computing the financial value of a lawsuit at any point in time.

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Months before the 2012 election, Nate Silver of *The New York Times* predicted the eventual outcomes of both the Presidential and all open Senate elections with great accuracy – not just who won and lost, but the percentages of the vote as well.¹

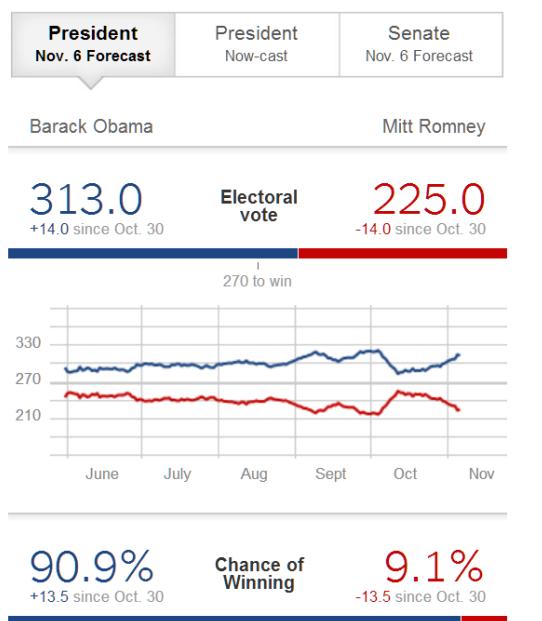
On the other hand, many highly experienced political strategists and pundits such as Karl Rove and Dick Morris got the Presidential election wrong by a wide margin.²

Why did a political novice like Silver do so well, while seasoned strategists like Morris and Rove got it wrong?

Put simply, Silver used a statistical model and an evaluation method. The partisan strategists were victims of the Overconfidence Bias and the Wishful Thinking Effect.³

Silver built his statistical model before the 2008 election and tweaked it over the past four years. His method consisted of selecting and evaluating the relevant information and feeding it into a collection of mathematical formulas, which churned out revised predictions as new information became available. His method told him which information was relevant (polling data, economic indicators, etc.) and how to adjust raw data for such things as biased polling results.

Silver's secret lay not in some special genius about political elections. (Before he began concentrating on political races, Silver was a Sabermetrician, making predictions about baseball players.) Nor is it just that he is smart (although he is). Rather, Silver applied his own intelligence intelligently, using sophisticated tools that assist human intelligence, where it otherwise is not up to the task.



¹ See <http://fivethirtyeight.blogs.nytimes.com> for Silver's final forecast.

² Morris predicted with near certainty even on election night that Mitt Romney would win by a "landslide." See video of Morris making his prediction on Fox News on November 5, 2012, http://www.realclearpolitics.com/video/2012/11/05/dick_morris_stands_by_prediction_romney_will_win_325_electoral_votes.html.

³ "The Overconfidence Bias" is the name scientists use to designate the human tendency to believe our predictions have greater accuracy than is generally true. Instead of saying, for example, that there is insufficient information to predict more than a range of, say, 30 to 60% probability, we tend to choose the high end of such a range, particularly if it is an outcome we favor. Over the past 40+ years, judgment and decision-making scientists have published hundreds of studies on overconfidence. An incisive presentation of this knowledge is available in Daniel Kahneman, *Thinking, Fast and Slow* Part III, 199-268 (New York: Farrar, Straus and Giroux, 2011).

What about Dick Morris, who predicted with near certainty even on election night that Mitt Romney would win by a “landslide?”

Where and, more importantly, why did he go wrong?⁴ He is, after all, a seasoned veteran of many political elections, comparable in experience and expertise to a senior litigator with 30+ years of trying cases. To answer the question completely would require a book-length discussion of subconscious biases and heuristics. But I can provide a brief summary of the explanation here.



Click on picture for video

Hundreds of independent studies have shown that professionals—including lawyers, auditors, physicians, money managers, political scientists, and others—consistently make inaccurate predictions while simultaneously thinking that their predictions will be on the money.⁵ The phenomenon is called the Overconfidence Bias; it is as much a part of our mental equipment as our ability to hear sounds and see colors.⁶

In his magisterial book, *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients*, Randall Kiser shares the results of two studies of thousands of cases, one in California and the other in New York, showing that about 60% of plaintiffs and 24% of defendants got worse results at trial than they could have achieved by accepting the last settlement proposal—not counting the additional time, money, and grief it cost to get a final judgment.⁷

Sad to say, most of us are like Dick Morris, at least some of the time. Few can claim the accuracy of Nate Silver.

⁴ Morris provided his own answer to this question in an article on DickMorris.com entitled “Why I Was Wrong” (<http://www.dickmorris.com/why-i-was-wrong/#more-10133>). I leave to others the discussion of the flaws in Morris’s analysis of his overconfident prediction.

⁵ See, e.g., Jane Goodman-Delahunty, Pär Anders Granhag, Maria Hartwig, and Elizabeth Loftus, “Insightful or Wishful: Lawyers’ Ability to Predict Case Outcomes,” 16(2) *Psychology, Public Policy, and Law* 133 (2010); Marijke Malsch, *Lawyers’ Predictions of Judicial Decisions* (doctoral thesis, University of Leiden, The Netherlands, 1989); Derek J. Koehler, Lyle Brenner, and Dale Griffin, “The Calibration of Expert Judgment: Heuristics and Biases Beyond the Laboratory,” in Thomas Gilovich, Dale Griffin, and Daniel Kahneman, *Heuristics and Biases: The Psychology of Intuitive Judgment* 686, 705 (Cambridge: Cambridge University press, 2002); Elizabeth Loftus and Willem A. Wagenaar, “Lawyers’ Predictions of Success,” 28 *Jurimetrics Journal* 437 (1988). Cf. Randal Kiser, *Beyond Right and Wrong*, *supra*, 124-126. References for the other professions mentioned are available on request.

⁶ Over the past 40+ years, judgment and decision-making scientists have published hundreds of studies on overconfidence. An incisive presentation of this knowledge is available in Daniel Kahneman, *Thinking, Fast and Slow* Part III, 199-268 (New York: Farrar, Straus and Giroux, 2011).

⁷ Randall Kiser, *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients* 89-140 (New York: Springer, 2010). Every litigator should read this book and consult it often.

Hedgehogs and Foxes

Wanting to understand misprediction better, Philip Tetlock embarked on a 20-year longitudinal study of the public predictions of social scientists.⁸ The results confirmed the persistence of the overconfidence bias. No surprise there. But Tetlock dug deeper and found a distinction between two types of cognitive styles, which he labeled hedgehogs and foxes, taking the labels from an essay by Isaiah Berlin,⁹ who in turn took his inspiration from a fragment from the Greek poet Archilochus: “The fox knows many things, but the hedgehog knows one big thing.”



Tetlock described the difference in cognitive styles as follows: “The intellectually aggressive hedgehogs knew one big thing and sought, under the banner of parsimony, to expand the explanatory power of that big thing to ‘cover’ new cases; the more eclectic foxes knew many little things and were content to improvise *ad hoc* solutions to keep pace with a rapidly changing world.”¹⁰

Or as the late master litigator John Tucker once put it to colleagues at Jenner & Block, lawyers who represent plaintiffs and defendants promiscuously tend to have better judgment about each case than those who specialize and represent only one type of client. The first are foxes, the latter hedgehogs.

Tetlock found that all social scientists in his study displayed the overconfidence bias. But foxes were much less afflicted by it than were hedgehogs. In other words, it pays to know many things. Having multiple perspectives on the matter under consideration helps calibrate our predictive judgments.

The Win Before Trial Method of Case Valuation

Is it possible for litigation professionals to estimate the financial value of lawsuits using a method and tools similar to those Nate Silver used to predict the election? Can litigation professionals protect themselves from overconfidence and other biases¹¹ by

⁸ See Philip E. Tetlock, *Expert Political Judgment: How Good Is It? How Can We Know?* (Princeton: Princeton University Press, 2005).

⁹ Isaiah Berlin, *The Hedgehog and the Fox* (London: Weidenfeld & Nicolson, 1953).

¹⁰ Tetlock, *supra*, at 20-21.

¹¹ Several independent studies have shown that lawyers – like auditors, physicians, money managers, political scientists, and almost all other professionals – consistently make inaccurate predictions while simultaneously thinking that their predictions will be on the money. See, e.g., Jane Goodman-Delahunty, Pär Anders Granhag, Maria Hartwig, and Elizabeth Loftus, “Insightful or Wishful: Lawyers’ Ability to Predict Case Outcomes,” 16(2) *Psychology, Public Policy, and Law* 133 (2010); Marijke Malsch, *Lawyers’ Predictions of Judicial Decisions* (doctoral thesis, University of Leiden, The Netherlands, 1989); and Elizabeth Loftus and Willem A. Wagenaar, “Lawyers’ Predictions of Success,” 28 *Jurimetrics Journal* 437 (1988). See generally Derek J. Koehler, Lyle Brenner, and Dale Griffin, “The Calibration of Expert

using a method to predict litigation outcomes with greater accuracy than we currently achieve?

I believe we can. The Win Before Trial Method of Case Valuation and the Case Value Analyzer™ help make this possible. Both constitute a way for hedgehogs to think more like foxes and for foxes to be better foxes.

The WBT Method breaks down the net present financial value of the case into four main outcome predictions and their respective probabilities:

1. The probability that the judge/jury will find the defendant liable to the plaintiff.

Liability
2. The probability that some major contingency will occur that dramatically affects the viability of plaintiff's case or disposes of it altogether (e.g., summary judgment, death of an undeposed indispensable witness, change in the law midstream such as in *Erie v. Tompkins*).

Contingencies
3. The weighted average of a range of possible damage awards.

Damages
4. The total *remaining* costs that each side will incur to get a final, executed judgment.

Costs

Various and many are the things that influence the values of each the four components. In most cases, the admissible evidence and the law will have the biggest effect on the probability of a liability finding and the amount of damages. The advocacy skills of the lawyers play a major role in the values of these components as well. The composition and prejudices of the jury, the jurisdiction, the judge, the type of case, and much more can be factors too.

The Case Valuation Formula

It is readily apparent that the complexity of even one component of case valuation far exceeds the capacity of our short-term memory. Without some tool (or set of tools) to assist our thinking, we are likely to focus too much on some aspects while neglecting others.

The first such tool is a simple formula for computing the net present financial value of a lawsuit from both the plaintiff's and defendant's perspective:

Judgment: Heuristics and Biases Beyond the Laboratory," in Thomas Gilovich, Dale Griffin, and Daniel Kahneman, *Heuristics and Biases: The Psychology of Intuitive Judgment* 686, 705 (Cambridge: Cambridge University press, 2002).. Cf. Randal Kiser, *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients* 89-140 (New York: Springer, 2010).

Plaintiffs:

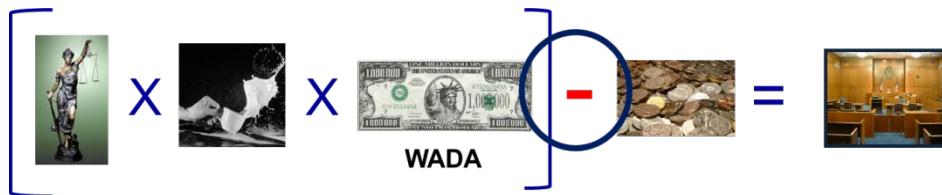
$$[P(L) \times P(C_{1..n}) \times D] - \text{Costs} = \text{NPV}$$

Defendants:

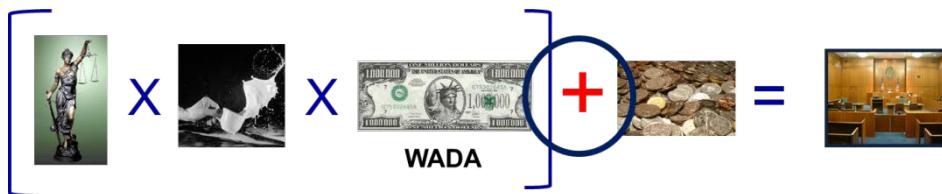
$$[P(L) \times P(C_{1..n}) \times D] + \text{Costs} = \text{NPV}$$

P = probability, L = Liability, C = Contingency, D = estimated weighted average damage award, Costs = costs, and NPV = net present financial value.¹²

Plaintiff's Formula



Defendant's Formula



Stated in words, the probability of a liability finding multiplied by the probability of each known remaining contingency times the projected weighted average damage award minus the remaining costs equals the net present financial value (NPV) for the plaintiff. The only change in the defendant's formula is the *addition* rather than the subtraction of the costs: $[P(L) \times P(C_{1..n}) \times D] + \text{Costs} = \text{NPV}$

An experienced litigator should be able to get a decent approximation of the value of a lawsuit at any point by spending 20-30 minutes estimating each of the four components and then computing the result on the back of an envelope. This quick-and-dirty estimate will produce better results in most cases than unassisted intuitive judgments. This is particularly true for unusual cases or cases in areas where we have limited experience.

¹² This simplified version of the formula does not include the elements for computing the present discounted value of the result (which is built into the Case Value Analyzer™). When doing a back-of-the-envelope calculation, however, you can compute this number with a financial calculator by entering the envelope result as the future value, entering the number of months until trial and the discount rate (interest rate) and then solving for present value.

Remember, Garbage in = Garbage out. If the estimates of each of the components are bad, the final result (NPFV) will be bad as well. But if we put in golden estimates, we will get golden results. It is critical, therefore, to take reasonable steps to gather sufficient information to get the best quality estimates possible.¹³

The Case Value Analyzer™ (CVA)

The Case Value Analyzer™ helps litigation professionals and mediators manage the complexity associated with estimating the values of each of the four components of the case valuation process. It is a software program designed to help conduct detailed analyses of the evidence, arguments, and extraneous factors that affect case outcomes and to use those analyses as the basis for probability estimates on liability, contingencies, and damages.

To analyze a case, we set up a CVA for each party. In addition to a summary page, there are additional pages on which we enter information about damages, costs, and each element of the cause of action. For example, in a *quid pro quo* sexual harassment case, the plaintiff must prove each of six elements by a preponderance of evidence to make out a *prima facie* case. We include a page for each of those elements.

To assess the sufficiency and weight of evidence for each element, we use a modified version of the Pro/Con Decision-making Tool invented by Benjamin Franklin.¹⁴ Having collected and sorted the evidence, arguments, and extraneous factors likely to influence the jury's decision on a given element, we then estimate the probability that the jury will decide in plaintiff's favor on that element.

¹³ Nate Silver's predictions depended both on the appropriateness of his model (analogous to the case valuation formula here) and the quality of the information he fed into it. As he explains in his book, *The Signal and the Noise: Why So Many Predictions Fail but Some Don't* (New York: the Penguin Press, 2012), he had to weight the different opinion polls he used in terms of their reliability in order to make them useful. He could not simply take an average, because some were historically much less accurate than others.

¹⁴ Benjamin Franklin described this device in a letter, dated September 19, 1772, to fellow scientist Joseph Priestly, who had written asking his advice on some now unknown matter. Franklin said he was unable to provide any substantive advice but told Priestly how to go about making the decision for himself. Draw a line down the center of a piece of paper and write "Pro" over the left column and "Con" over the right. Over the course of 3-4 days, jot down every thought that comes to mind in favor or against the decision under consideration. Then strike through each thought in the left column that is of roughly equal weight to those in the right. Upon completion of this exercise, if one column still contains supporting reasons, decide the matter in that way. Franklin wrote that this tool might be called a moral or prudential algebra.

In the modified Franklin Pro/Con Tool that is used in the CVA, we enter numerical weights for the various items of evidence or arguments, add up the weights for each column, and then determine which column has a larger number. But anyone using this template can also strike through roughly equivalent entries on each side just as Franklin did.

We then aggregate the probability estimates for each element and multiply those percentages times each other to get the estimated probability of a finding that the defendant is liable to the plaintiff.

Having performed similar analyses for each component of the case valuation formula, we then bring the results forward to the summary page, like that shown here, which contains additional spaces with which to compute prejudgment interest and present discounted value. This template is also set up to compare the results from each side's estimates and to determine whether a Zone of Potential Agreement exists.

I have used this tool in my mediation work to help each side see previously unrecognized strengths and weaknesses of their respective cases as well as to discover ways each can get a better outcome than the likely result of a trial. One of the lawyers in a mediation remarked: "You should patent this." After a demonstration to a group of senior litigators, another lawyer asked: "Can I pay you not to show this to plaintiffs?"

Some of the Benefits

The CVA assists your thinking by helping you feed the best available information into your subconscious, which then performs a kind of black-box magic and produces intuitive judgments and insights that would otherwise be unlikely to occur.

The Case Value Analyzer:

- ✓ captures and retains thought in a systematic and easily accessible way, thereby freeing the mind from having to think about/remember everything and from nagging doubts about whether she has forgotten anything;¹⁵
- ✓ helps generate awareness and insights that otherwise might be missed by requiring the litigation professional to focus on specific aspects of the case, including the strengths/weaknesses of the opposing case;
- ✓ makes the impact of new developments on the overall value of the case more readily apparent;

¹⁵ You can always go back and re-examine what went into a judgment about a particular element or component and ask whether you should add more evidence, change an argument, modify a probability judgment etc.

- ✓ forces the litigation professional to think through each element and affirmative defense, thereby helping her spot severe weaknesses, while mitigating the confirmation and overconfidence biases;
- ✓ highlights weaknesses that the confirmation bias tends to suppress but that lawyers must address if they want to win;
- ✓ creates a written record that the lawyer can use to explain the basis of her judgments about the case to clients and other interested parties;
- ✓ can be updated at any time with new information; and
- ✓ contributes to an overall litigation strategy.

Try It Out

It is not possible in this short space adequately to describe what the Case Value Analyzer™ does or how it works. I invite you to get in touch (mike@winbeforetrial.com) for an introductory demonstration.

Or sign up for the next edition of the *Winning Settlements Workshop* at the Win Before Trial website, which includes a thorough demonstration and explanation of the Case Value Analyzer™, using both sides of a hypothetical sexual harassment case.

The CVA *assists* thinking. It doesn't replace it. When used well, however, it can supercharge your decision-making skills.



WIN BEFORE TRIAL provides tools, resources, and advice that help lawyers and their clients develop litigation and settlement strategies to obtain the best possible results.

For more information, visit our website, www.WinBeoreTrial.com, call 802 870 3450, or write mike@winbeforetrial.com.