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Ending cases: Risk analysis and client duties

QUALITY RISK ANALYSIS CAN PRODUCE DIGNIFIED CASE RESOLUTIONS IN WHICH THE LITIGANTS ARE ABLE TO EXERCISE FAR GREATER CONTROL

Are you thinking about a case right now? Even in the back of your mind? Then you are doing it. You are engaging in risk analysis. All cases end. They end either voluntarily by settlement or involuntarily by verdict. Risk analysis is present in every case. No case escapes risk analysis. Every lawyer does it. Many without even knowing they are doing it. So why not focus on it? We do so in this article.

What exactly is risk analysis?

Put simply, risk analysis is an assessment of the outcome of a case expressed as a percentage. Risk analysis is usually multi-faceted, and will include an assessment of risk for a number of "pivot points" in a case. For example, in a bodily-injury case, risk analysis will start with an overall assessment of the plaintiff's gross damages (meaning the reasonable range of damages a plaintiff may recover if fault was not at issue and the case was tried just on damages alone). Then, pivot points are assessed. Pivot points emerge as the case evolves, and it is important to understand that risk analysis is *organic*. What may appear to be a great case once started can become a poor case as it evolves from its court filing date to its trial date.

In a bodily-injury case, key emerging pivot points for which both sides will do risk analysis include an assessment of plaintiff's contributory fault, an assessment of all codefendants' comparative fault and any nonparties against which a defendant may channel fault (the so called "empty chair defense"), an assessment of pretrial defense motions such as a motion for summary judgment, and an assessment of whether anticipated motions in limine will be granted (i.e., attacks on the admissibility of expert opinions or other key evidence at trial). Of course, assessing the believability, or credibility, of important witnesses (including, but not limited to, experts) after they are deposed are also key pivot points. Collision reports, opinions and statements in treating doctor records, and the written reports of experts produced before their depositions, can also be thought of as pivot points for risk analysis.

Example: Breach of contract

Here's a simple example of risk analysis in play: A sues B for breach of a $100,000 contract. The outcome is either $0 or $100,000. There can be no in-between. A and B exchange the universe of relevant and non-privileged information in the case through pretrial discovery as it evolves and moves closer to trial. Discovery is over, and now A and B take stock of the claims, defenses, and evidentiary support for both.

After considering all available information, assume A's evaluation of his chances for winning at trial is 70 percent. The settlement value of his case, in his mind, is therefore $70,000. If B also assesses that A has a 70 percent chance of prevailing at trial, then they both agree and, by default, there is a settlement (rational litigants will not go to trial if both agree on the outcome beforehand).

I'M GLAD WE SETTLED OUR CONFLICT THIS WAY. WAR IS EXPENSIVE.

When risk analysis on both sides produces extremely similar predictions that they essentially match, then behavioral scientists call this a *convergence* of risk analysis. If both sides have assessed key pivot points and their predictions of the outcome of a case do not match, then they call this a *divergence* of risk analysis.

To illustrate a divergence of risk analysis, we can tinker with the above example. Assume that B has assessed that A only has a 50 percent chance of winning at trial after performing his risk analysis. There is a divergence of risk analysis. And, it can be quantified. The divergence is expressed as a percentage of 20 percent. In other words, the gap separating the litigants from convergence of risk analysis and settling the case is only 20 percent, which is not too bad.

Divergence tactics

When confronted with a divergence of risk analysis, apply three steps. First, become brutally objective. Often lawyers view cases through a clouded lens that produces distorted risk analysis. Shed subjectivity and bias, and strive for objectivity.

Second, amplify your risk analysis on issues that have fallen into the divergence gap. Ask yourself in which direction will the outcome of these issues likely gravitate as the case approaches trial. Toward you, or toward your opponent. In essence, you are conducting a continual and further, detailed review of key pivot points so you can adjust your risk analysis and strive for convergence.

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In larger cases, granular risk analysis may entail exercises such as running the case through one or multiple focus groups. For virtually any sized case, the "market value" range of the case can be determined from a thorough evaluation of verdicts and settlements of prior similar cases, easily accessible online through any reputable legal publisher. And let's face it, there are multiple, similar, preexisting iterations of virtually every bodily injury case in the court system now. Legal theories of liability and defenses may trend, as well as new trial tactics and themes, but no bodily injury case in the court system now is truly novel. A close variation of it has come through the system before, and likely many, many times.

Third, reach out to your opponent. These days, many lawyers enlist a quality mediator as a meaningful way to reach out to their opponent while remaining adversarial. And, once you begin to employ this third step, continually testing your opponent and engaging in brinkmanship starts to become less important and counterproductive.

Duty to clients

What about trials? Why not just use a time honored (and very expensive) method of resolving disputes by airing out all of the admissible facts before a panel of lay persons who act as credibility assessors? Sure, trials are one method of resolving a dispute. But remember, as a lawyer you will never get to trial without conducting some form of risk analysis on the way. And if you go to trial without engaging in proper risk analysis, you begin to run afoul of your duties to your client. This is where the legal malpractice lawyers step in.

Remember, you owe two primary duties to your client. First, you must manage the client's case within the standard of care. (*Smith v. Lewis* (1975) 13 Cal.3d 349.) Just like a doctor must treat his patient within the standard of care. The 600 series of the California Approved Civil Jury Instructions ("CACI") are labeled "Professional Negligence," so they are to be applied in any professional negligence case. Yet the majority of the series is drafted against the backdrop of a legal malpractice claim. The language of CACI nos. 601-604 make this very clear.

Second, you owe your client a fiduciary duty. (*Styles v. Mumbert* (2008) 164 Cal.App.4th 1163.) Put simply, the fiduciary duty is a much higher duty centered around the trust inherent between lawyer and client. CACI no. 4100 defines fiduciary duty, and though drafted against the backdrop of corporate officer or broker actions, it applies equally to lawyers. The key language imposes a duty "to act with the utmost good faith and in the best interests" of the client.

Accordingly, lawyers who march toward trial without engaging in proper risk analysis are committing legal malpractice and potentially violating their fiduciary duty to their clients.

Greater control with risk analysis

This is not to say jury trials should be abandoned. Jury trials are important for another reason. The most important feature of a jury trial (in particular a civil jury trial where money, not liberty, is at stake) is the power to force a voluntary pretrial resolution. There has to be something against which to analyze risk. Trials are it. Keep in mind that in the California courts, the civil "jury trial rate" is about 3 percent. Which means that, statistically, for every batch of 100 civil cases filed, only 3 will be tried to verdict. Conversely, roughly 97 percent of the litigants and their lawyers have engaged in risk analysis and the analysis eventually converged (noting, of course, that a smattering of cases are thrown out on summary judgment or other pretrial method of involuntary case disposition).

Involuntary resolutions (or a failure of risk analysis to converge) are caused by sloppy risk analysis. The fix: Learn risk analysis. Live it. Breathe it. Lawyers owe their clients a duty to engage in risk analysis properly, and there is no escaping it, so lawyers should embrace it. It is ongoing. It should be started immediately, and maintained, after first contact with the client, including implementing steps one to three above (objectivity, amplification, and communication with your opponent).

Institutional clients (often liability insurers) are masters of risk analysis and demand it of the lawyers they hire. So, if you practice plaintiff-side bodily-injury law, why not get on the same page? There is certainly nothing wrong with jury trials, and the ability to competently conduct a jury trial is a critical skill to have. But it is the ready *access* to a jury trial that is most important. Just like the United States should have a robust and ready military, even though it should not constantly be deployed.

The point of this article is to highlight the presence of risk analysis in every case and encourage lawyers to take it seriously, and strive for risk analysis convergence. You will not be relinquishing any toughness or notoriety as a trial lawyer. Risk analysis encapsulates the lawyer the moment the attorney-client relationship is formed. It rides in the front seat with you on the entire trip of the case, and therefore managing it properly is crucial. Not only will you avoid professional liability claims, but quality risk analysis will also produce dignified case resolutions in which the litigants are able to exercise far greater control, with less expense, over the outcome.

James Kamanski operates his own firm in West Los Angeles and has 23 years of experience in tort litigation, centering primarily on bodily-injury cases but with a background in legal malpractice and ethics law as well. His current practice focuses on the defense of bodily-injury claims, ranging from mid-level losses to catastrophic injury. He attended San Diego State University, graduating with Dean's List Honors in his final three semesters, and attended McGeorge School of Law.