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Case Decision Making: What's in Your Model?

by Dennis Devine

Every legal case comes with a host of decisions. Some are big and bright; many are small and subtle. Some are not even perceived as decisions due to the chilling effect of convention, personal habit, or law-firm policy. But there are always many questions—and where there are questions, there are decisions. Consider several that arise in a typical case:

1. Is it worth the time and expense to file Motion X with this judge?
2. How will jurors react to Witness Y or Bad Document Z?
3. What will jurors think this case is worth?
4. What are our chances of winning if this case goes to trial?

These questions each involve a decision—the choice to do something or not do something. How are those decisions made? More importantly, how *should* they be made? Let's take a deeper dive into the contents of your case decision model.

Case Decision Inputs

A decision model is a cognitive process used to make a choice that can include various sources of information. Cogntive science tells us there is no one cognitive model that we use to make all of our decisions. And there are at least four sources of information (or "inputs") that can be used to make strategic decisions about a legal case.

One well-known input for case decision making is **reasoned logic**. The core ingredient of reasoned logic is the premise. Premises represent beliefs about what is true in the world. They include the "facts" of the case as understood by an attorney. Premises then are used to inductively or deductively reach conclusions. Reasoned logic is near and dear to the hearts of law school professors, and so very familiar to the attorneys and judges whom they trained. The primary advantages of relying on reasoned logic are speed, transparency, and a certain level of objectivity. Premises can be identified, communicated, analyzed, and argued. No "data" are collected either, so there is nothing to wait on and no cost to pay for it.

Another common decision input is **personal experience**. Experience can be used to identify a present course of action by extrapolating from past events. For legal decisions, experience takes the form of what transpired in previous cases. Relevant experience can be "borrowed" from colleagues via their solicited (or unsolicited) suggestions or anecdotes. It can also be aggregated across a group of individuals (e.g., a trial team).

Relying on experience to make decisions has several notable advantages. No new information need be gathered, so decisions can be made quickly. Decisions based on experience will also necessarily align with our personal theories of how the world operates. Using experience can also be easy, as decisions are essentially arrived at by recalling what "worked" (or

what didn't). Relying on experience can thus mitigate the need for brain-burning cognitive exertion.

Experts are people with considerable experience in a particular domain, and many attorneys are experts when it comes to applying the law or trying cases. Experts are especially likely to rely on their personal experience in making decisions because they have so much of it. This experience often serves them well, but sometimes it can also lead to tunnel vision and confirmation bias. These phenomena tend to limit consideration of available options. And they can afflict teams of experts too, as exemplified by instances of "groupthink."

Reasoned logic and experience probably account for the vast majority of strategic decisions in most cases. There isn't always time, energy, or budget for anything more. But two other sources of information can and should be used at times to make case decisions—either as a supplement to or replacement for logic and experience.

Database research involves systematically acquiring and using archived information from a large set of similar past cases to inform decisions about the present case. Key characteristics of the present case are identified and then a concerted search is undertaken to find similar ("matching") cases. Matching characteristics can include the legal claim, nature of the parties, type of damages, presiding judge, or even court. The goal of doing database research is to find a set of similar cases and see what patterns emerge with respect to the decisions of judges and juries.

The primary benefit of database research is its potential to reveal patterns that would escape detection by personal experience or casual observation. How often does a judge actually grant a motion for summary judgment across all of her cases? What is the average damage award for jury trials of a certain type in a particular circuit? Answers to these questions cannot typically be reasoned out or estimated well from personal experience. Database research can also illuminate patterns that are real but counter-intuitive—including those that conflict with an attorney's limited but dearly held personal experience. The primary disadvantages of conducting database research are practical—access to a good database of cases is required, and it can sometimes be difficult to find a good set of matching cases.

A fourth input for strategic decisions is **case-specific research**. This involves generating new empirical data to answer specific questions about the case at hand. Several methodologies can be used to collect case-specific data—large-sample online surveys, focus groups, and mock trials are three of the most common. With each methodology, selected aspects of the evidence are provided in some form and at some level of detail to a carefully selected set of individuals who serve as mock fact-finders (usually mock jurors but occasionally mock judges). For example, mock jurors can view a bad document, videotaped deposition testimony from a key witness, or summary presentations of the facts and arguments each side is likely to offer at trial. Then the mock jurors provide their opinions, beliefs, and perceptions about the witness, document, verdict, or appropriate award.

Case-specific research can yield rich and detailed insights that inform strategic case decisions. Providing key facts and arguments about a case to a representative sample of mock jurors avoids many of the subjective biases that plague the non-empirical models. Attorneys do not have to try to intuit the way community members will think about the case—they can ask them directly. Using information specific to the case reduces the need for inferential leaps when interpreting the results.

Historically, the primary disadvantages of case-specific research have been cost and time. While this remains true to some extent, technological developments have made it much easier to do case-specific research. In particular, high-quality empirical data can now be obtained quickly and easily via the internet for a fairly low cost. Case-specific research thus represents the gold standard when it comes to generating relevant information about the case at hand—but it tends to be underutilized due to a lingering misperception that it is only worth doing for "big" cases.

How Should Case Decisions Be Made?

Trial attorneys clearly have various inputs they can use to make their case decisions. Reasoned logic and/or personal experience are not the only inputs for important strategic calls. Certainly those sources will suffice for many decisions. But there are many times when an empirical approach (in the form of the database research or case-specific research) offers a better way to make important decisions about a case.

At the beginning of this article I identified four important questions that arise in many cases. In Part 2 (coming soon), we will return to these questions and consider how they are usually answered—and how they might best be decided.

Dennis J. Devine, PhD, MJ

Dennis Devine is an organizational psychologist and litigation consultant with ThemeVision LLC.

He is the author of *Jury Decision Making: The State of the Science (2012)*, a book that summarizes and integrates the scientific research on juries.