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Case Decision Making, Part II: What's in Your Model?

by Dennis Devine

April 2021

All legal cases involve a host of important decisions. In litigation or in preparation for trial, consider these:

1. Should we file Motion X with this judge?
2. How will jurors react to Witness Y?
3. What will jurors think the case is worth?
4. What are our chances of a favorable judgment if this case goes to trial?

In Part I of this series of articles on case decision making, I focused on four cognitive inputs for making strategic case decisions. Those inputs are:

- reasoned logic,
- personal experience,
- database research, and
- case-specific research.

Now let's consider how case decisions are typically made—and how they could be made better.

Should we file Motion X?

Decisions about motions arise frequently, often at multiple points in a case. Most attorneys make these decisions using reasoned logic. In other words, they try to rationally assess how likely the judge would be to grant the motion in question. This belief will no doubt be influenced by an attorney's personal experience. It would be difficult, if not impossible, to ignore one's past success (or lack thereof) with a particular motion (or judge) when making a decision about a present case.

Reasoned logic and personal experience are certainly relevant and useful here—but they have their limits. One problem is opaqueness. No formula can precisely gauge the strength of a brief before it is written. Persuasiveness can be difficult to assess even *after* a brief has been crafted. And personal experience reflecting the precise nexus of judge, motion type, and other relevant factors is often lacking. Sometimes no one on the trial team (or in the firm) even knows the judge. Then what? Finally, focusing on the strength of one's argument may divert attention from another key factor—the judge herself.

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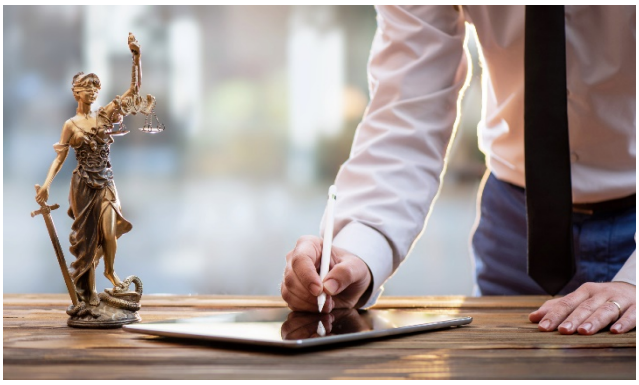
Other sources of information can be helpful when deciding on motions. In particular, database research and associated legal analytics can quickly provide empirical data concerning how often a particular judge *actually grants* Motion X.

I have frequently researched judges' "grant rate" regarding motions for dismissal or summary judgment. Those rates often differ dramatically across judges. Sometimes rates vary across motion types for a particular judge. These fluctuations expose the limits of trying to assess the merits of filing a motion based solely on reasoned analysis and personal experience.

In contrast, database research can supply quantifiable targeted information about judges' tendencies on key rulings. Knowledge of these decision-making dispositions can be obtained quickly and easily these days, especially for federal judges. And they can be very enlightening.



What should we do about Witness Y?

If you are a trial attorney, you know these people—key witnesses who are distinctly "uncharismatic." Or who tend to say cringe-inducing things. Or behave in a peculiar, credibility-shrinking manner. How will jurors react to the testimony of these individuals?

In deciding how to handle such witnesses, most attorneys probably assume jurors' reactions will coincide with their own. We all tend to trust our personal evaluations and assume other (rational) people share them. We form impressions every day and they usually seem to work for us. And trial attorneys have to assess and evaluate people all the time as part of their professional careers. Why wouldn't jurors see things as an attorney does?

Well….

Social science tells us jurors often respond very differently to the people and events associated with a trial. I have studied and researched juries for more than 20 years. I have surveyed jurors after hundreds of trials. If I have learned anything, it is that jurors often view the same case very differently. Even after hearing the same evidence and arguments, they don't necessarily agree. That's why deliberation is usually needed. So it's risky to assume any one attorney's view of a witness will hold for a group of community members.

Case-specific research offers an excellent data-based way to forecast how fact-finders will react to a shaky witness. **Why guess what community members will think when you can just ask them?**

Focus groups work especially well for answering these types of "reaction" questions. Diverse panels can be recruited from the relevant community, shown videotaped deposition testimony (and/or bad emails), and asked about their reactions. Traditionally collected in person, focus group data can now be gathered online from residents of the trial jurisdiction. Online focus group research offers unparalleled convenience for trial attorneys. There is no cost or hassle associated with travel. Attorneys can watch (and re-watch) all focus group discussions from the comfort of home.

Getting data on community members' reactions—hearing their thought processes and assessing the degree of consensus that emerges—can be very helpful in deciding what to do about Witness Y.

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What is this case worth?

If the case is about money, it's helpful to know what the case is worth to those who will eventually decide the issue at trial. Most attorneys probably use reasoned logic in conjunction with the facts of the case to decide this question. Maybe the result is tempered by personal history for those with trial experience. But relying on these things is risky.

Attorneys are trained to make decisions according to the dictates of the legal profession—jurors are not. Attorneys also know much more about their case than the jurors—and this "extra" information often spoils any attempt to objectively predict how jurors will view the case. So jurors and attorneys often value cases very differently.

In addition to logical analysis, empirical data can substantially inform case valuation decisions.

One strategy is to conduct database research to determine how real juries valued similar previous cases. The distribution of jury awards in these comparison cases can provide a sense of the range of potential awards and the amounts that might be most likely to occur in the event of liability. Database research might even be able to isolate the impact of contextual variables that inflate or deflate awards when present.

Case-specific research represents a second strategy for informing case valuation with empirical data. Dollar awards can be obtained from a set of mock jurors provided with the essential facts of the case. Statistical techniques can then be applied to simulate the decision making of a large number of juries drawn from the pool of mock jurors for added rigor and precision. Predictive algorithms based on group member preferences have been found to be good at forecasting the awards of mock *juries* charged with determining damages.

Case-specific award data can now be collected easily from a large sample of community members, often residents of the jurisdiction itself. Empirical data such as these can provide a sense of what the community thinks is an appropriate dollar value based on the facts of the present case—something that cannot be obtained from logic or personal experience.

Should we take this case to trial?

Most cases of course do not end up going to trial. But in those eluding a quick disposition, the question of going to trial usually arises at some point. And when it does, it dominates all other decisions.

As with most strategic decisions, this one too is probably based most often on reasoned analysis plus the dictates of experience. But there is so much to consider and so much that is unique to a

particular case that logical deduction and previous experience often have limited value. The many variables to assess and weigh along with the many "unknowns" associated with every case often yield a multitude of potential trial scenarios. Trying to take all of this into account can be overwhelming. It may also lead trial attorneys to fall back on rules of thumb (e.g., never go to trial) or simpler decision strategies that leave out key considerations.

Case-specific research can be very helpful in making this ultimate strategic decision. And the form of case-specific research best suited to informing this decision is often the mock trial. Mock jurors are provided with the key facts of the case in an adversarial format and then give their opinions about the appropriate outcomes.

A simulated trial cannot of course capture all the information, emotion, and "noise" of a real trial. But the goal is to create a decision environment that corresponds reasonably well to an actual trial. The ideal mock trial involves attorney presentations, cross-examination, realistic legal instructions, and the opportunity to deliberate. The more of these factors present in the mock trial, the more generalizable the results are. Well-done mock trials can provide invaluable information about the likelihood of winning a case.

The traditional knock against mock trials is that they are resource-intensive. In other words, they take considerable time, effort, and money to do well. But this is changing. Mock trials can now be done online fairly easily. And with many courts now beginning to conduct actual trials online in a remote fashion, mock trials may come even closer to approximating the real thing.

A larger decision model

All cases involve many strategic decisions. Most are made using reasoned analysis or experience-based intuition. This works fine for some case decisions, but not all. Many strategic decisions would benefit from additional information that research can provide. Nowadays, useful real-world empirical data can be obtained quickly and easily for many case-related strategic decisions. "Data" is ultimately information, and more information often translates into better case decision making.