4-7-2020

LIRA @ CPR

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APRIL 7, 2020 | JOHN LANDE | LEAVE A COMMENT

This post summarizes presentations, data collected, and discussion in the "Risky Business: A Toolbox for Managing Litigation Interests and Risks" program on February 28, 2020 at CPR's annual meeting. There never is enough time to cover everything you want to say, so this post elaborates the discussion at the program.

Based on our book, *Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions*, Michaela Keet and Heather Heavin described a range of sophisticated electronic tools as well as a simple framework to help lawyers assess litigation interests and risk and to guide clients in making the best possible decisions in litigation and other dispute resolution processes. Here's the powerpoint describing ways to conduct litigation interests and risk assessments (LIRA).

This post is the first in a three-part series. The next part describes various early dispute resolution methods. It includes summaries of presentations at our CPR program by Duncan MacKay, Deputy General Counsel & Chief Compliance Officer of Eversource Energy, and Conna Weiner, a mediator and arbitrator at JAMS and CPR, who described their experiences and perspectives.

The third part presents a framework of dispute prevention and early dispute resolution processes.

Survey

We started the program by conducting a survey of the attendees ("CPR survey"). We asked multiple choice questions that were displayed on the screen and people responded by using "clickers" at their tables. We got 60 responses and I would guess that there were about 150 people in the audience, which would make for a 40% response rate. The respondents were outside counsel (42%), private neutrals (30%), inside counsel (13%), and others (15%). Of the outside counsel, 88% were partners, 4% were associates, and 8% were others. Of the inside counsel, 43% were the general counsel and 57% were other lawyers. The questions about LIRA practices generally were addressed to the lawyers and there were 33 lawyers in the

sample. You can click here to see the full data; the responses are discussed below. Some of the language is cut off in this document but you can see the full text in the powerpoint.

A Simple Framework for Calculating BATNA Values and Bottom Lines

Litigation interest and risk assessment involves calculating the value of BATNAs (best alternatives to a negotiated agreement) and bottom lines to help parties make good litigation decisions. In many legal cases, monetary issues are the only or predominant issues in the case. In these cases, it's important to make the best possible numerical assessments of the likely court outcome as well as the tangible and intangible costs of continuing to litigate the case going forward. Since most lawsuits are settled, calculating the value of BATNAs and bottom lines is essential to develop good negotiation strategies.

Lawyers and mediators conduct LIRAs all the time, though often not as explicitly and systematically as possible – and they don't use this term. The framework outlined in our book enables practitioners to systematically conduct LIRAs. It can be readily tailored to each case, including cases involving significant non-monetary issues. For simplicity, this post focuses only on monetary issues.

Calculating BATNA Values. In legal disputes, the BATNA value is the expected outcome in court (or arbitration, if applicable). In many cases, the BATNA value is a critical consideration in negotiation strategy as parties seek to get the most favorable outcome either in negotiation or at trial. Even when parties seek mutual gain or agreements based on general norms, it is important to assess the BATNA value as a "trip wire" to end negotiation if the parties can't agree.

Calculating BATNA values also can be helpful in developing litigation strategy. To make the best estimate of these values, people must consider the strengths and weaknesses of their legal cases. This assessment can lead them to conduct discovery and legal research to take advantage of their strengths and shore up their weaknesses.

In the CPR survey, almost all lawyers said that they conduct early case assessments (ECA) routinely in most types of cases, in certain categories of cases, or on a case-by-case basis. Only 11% said that they rarely use ECAs.

There are many ways to conduct ECAs and estimate likely court outcomes. When lawyers have handled many similar cases (or consult with others who have done so), they simply consider similarities and differences between the current case and past cases. This is particularly appropriate when the cases are fairly routine, there aren't significant legal or factual uncertainties, and/or there is a relatively small amount at stake.

When there are significant uncertainties, lawyers generally do legal research to find similar cases, which can help make better estimates of the likely court outcomes. In recent years, various companies have provided "big data" and artificial intelligence services to better identify similar cases and estimate likely court outcomes. Our survey suggests that lawyers in CPR member firms rarely use these services.

Decision trees help lawyers identify key uncertainties in a case and estimate probabilities and consequences of the contingencies. Decision trees are used to produce estimates of court outcomes using quantitative assumptions. Decision trees can be very helpful to identify risks and highlight uncertainties about particular issues as well as the outcome of litigation generally. Lawyers can vary the assumptions to consider how different assumptions would affect the estimated court outcome.

A little more than half of the people in the CPR survey said that they virtually never use decision trees, 24% said that they do so in a substantial proportion of their cases but less than half, 12% said that they do so in about half of their cases, and 12% said that they do so in most of their cases.

Some members of the audience expressed wariness about using decision trees. For example, a mediator noted that the results are based on fallible assumptions so that, considering the range of plausible assumptions, decision tree results fall within a very wide "confidence interval." Because decision tree results seem precise, parties may unduly "anchor" their assessments on the figures produced in this process. This can entrench pre-existing assessments if lawyers use overly optimistic assumptions in a decision tree. While this concern was directed at decision trees, it is a risk of any numerical analysis, which can disrupt or reinforce parties' negotiation strategies.

Even so, lawyers may find decision trees (and other visual tools for explaining litigation risk) useful in explaining risks to their clients. When counseling clients, it is important to caution them about what they can and cannot properly infer from decision trees.

Michaela and Heather developed a simple framework to estimate the likely court outcome, which is illustrated briefly in the powerpoint and in more detail in our book. This framework is based on the logic of a decision tree, structured around what has to be proven in each particular case. It presents a series of analytical steps that any lawyer (or third party neutral) can follow without having to develop a decision tree.

The CPR survey results are consistent with what we have heard about many lawyers' discomfort with using quantitative methods for estimating likely court outcomes. These methods generally aren't taught in law school, many lawyers aren't comfortable making detailed

mathematical calculations, some doubt the validity of the results, and some feel that using these methods would not help them make decisions or communicate effectively with clients.

Considering that lawyers and clients often are already anchored in quantitative assessments at the start of a case, doing a systematic assessment of litigation risks can make assessments more realistic no matter how they develop their estimates.

Even if lawyers prefer to use methods other than mathematical calculations, they and their clients would benefit from the process of systematically identifying substantial risks, considering the likelihood of outcomes of various issues, and estimating the likely liability. It's very helpful to write down these considerations, even if it's just a list, and do it far enough in advance to let the analysis sink in.

Calculating Bottom Lines. For parties to make good litigation decisions, they need to know more than an estimated court outcome. They also need to estimate the future tangible and intangible costs of going to trial.

Lawyers should always consider if settlement would be in their clients' interests, and parties' decisions about settlement are affected by the estimated tangible and intangible cost of proceeding to trial. Most cases are settled, and parties' concerns about the litigation costs often are major factors in decisions to settle. Lawyers and parties typically set "bottom lines" for settlement by making adjustments to their estimates of the court outcome. Thus plaintiffs generally are willing to accept less than these estimates and defendants are willing to pay more.

It would help parties make decisions if they systematically develop quantitative bottom lines. This is difficult because it is hard to estimate the tangible costs and hard to value the intangible costs. Our research suggests that many lawyers don't do so, or at least not in much detail.

Obviously, the amount of legal fees and expenses (which we refer to as "tangible costs") in a legal case is very hard to predict precisely because there are so many variables. This is particularly difficult because these costs are affected by decisions of opposing parties and courts.

About half of the lawyers in the CPR survey said that their company or firm maintains an internal database of dispute characteristics, process used, and/or outcomes. We didn't ask if the databases include data about the legal fees and expenses, but presumably the databases could include such data. While the data from other cases can't predict the amount of legal fees and expenses in a given case, it should enable lawyers to make better estimates

based on the range of these amounts in prior cases and factors such as length of litigation, dispositive motions, and amount of discovery, among others.

It is hard to quantify intangible costs because there are no objective metrics and the amounts would reflect the parties' subjective values. Intangible costs include harm to internal operations, damage to reputations or relationships, diversion of time from business activities, and loss of opportunities.

Having litigation linger over a period of time is a significant intangible cost. Conna Weiner recounted that when she worked as an inside counsel, the CEO told her that he would rather lose quickly than win slowly. Duncan MacKay noted that getting resolution in itself is an important interest as businesses want to avoid uncertainty. One member of the audience noted that continued litigation can depress the valuation of companies which, in turn, can reduce their ability to get credit.

These are important business interests that parties really care about. Lawyers often discuss them with clients, with varying degrees of depth and emphasis.

The CPR survey suggests that many lawyers generally do not assign monetary values to intangible costs of litigation. Almost two-thirds said that they rarely do so, and another 18% said that they do so in a substantial proportion but less than half of their early case assessments.

Failing to quantify intangible costs creates the risk that these costs will be ignored or discounted when parties make negotiation and litigation decisions. Although there is no objective value to these costs, lawyers can discuss with clients *how much they value* particular interests and risks affected by continued litigation. Our book provides detailed suggestions and materials, including checklists of issues to discuss with clients. We summarize these techniques in our article, *The Importance of Quantifying Intangible Litigation Costs*, published in the February 2020 issue of CPR's *Alternatives* magazine.

Our book shows that lawyers have an ethical obligation to do litigation interest and risk assessments. Obviously, this is much easier said than done. Our book provides practical guidance and forms to help lawyers perform this critically important task.

Lawyers should conduct LIRAs early in each case and update them periodically as needed throughout the case. The next part describes various early dispute resolution methods.

ASSESSING INTERESTS AND RISKS BATNA BOTTOM LINE BUSINESS DISPUTE RESOLUTION
DISPUTE RESOLUTION PRACTICE INTERESTS AND MOTIVATION NEGOTIATION