LITIGATION RISK ASSESSMENT: A TOOL TO ENHANCE NEGOTIATION

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I. Introduction

Comparisons between final settlement offers and trial outcomes raise serious questions about whether lawyers and clients are making good decisions in the litigation process.¹ Litigation involves the exercise of judgment in complex situations with multiple uncertainties, where common psychological decision-making biases are sure to have influence.² Without clear projections about where the path of litigation is most likely to lead, clients can be anchored in unrealistic expectations about the outcome and the costs of getting there.³ Fundamental to the lawyer’s ethical role is the obligation to provide transparent information about legal rights and risks,⁴ and fundamental to settlement processes is the presumption

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⁴ Stephen G.A. Pitel, Counseling and Negotiation, in Lawyers’ Ethics and Professional Regulation (Alice Woolley et al. eds., 2d ed. 2012). Alice Woolley has suggested that the duty of honesty and candor requires lawyers giving advice to “engage in reasoned explanation of their
of informed decision-making.\(^5\) Rising public policy concerns about the accessibility of justice also bring the litigation process under greater scrutiny. A growing environment of accountability reinforces the lawyer’s obligation to provide open, transparent, and precise advice to clients about the legal processes in which they may find themselves.

This paper begins with a discussion of how “good” and “bad” predictions about litigation risk can affect a negotiation process. It explores how thorough predictions are often missing in the way that lawyers and clients prepare for, and navigate through, their negotiations. Drawing on a recent study of lawyers and law students, this paper summarizes a simple framework for conducting a thorough risk assessment, and then examines the way that it can be used to support the pursuit of settlement. Two conclusions emerge from the study, and in particular from the observation of how law students negotiated a hypothetical civil litigation file. A risk analysis can ground the negotiator and client with a well-prepared reference point (or BATNA, discussed further below) and help identify the bargaining zone, adding strength to decision-making. Further, it can reduce adversarial posturing and even build trust and transparency in negotiation, assisting in the construction of a problem-solving process. This paper seeks to contribute to the development of best practices around the use of risk analysis, and the quest for more responsive and earlier settlement outcomes for clients.

II. Background

A. How Predictions of Litigation Risk are Instrumental to Effective Settlement Negotiation

When litigation is underway, the best option short of a settlement agreement is usually to continue to litigate. A detailed understanding of the "litigation alternative" becomes the point of comparison—how the negotiator knows when to stay or leave the negotiation table. This is the case regardless of which model or philosophy of negotiation the lawyer pursues, along the spectrum from competitive to collaborative approaches.7

Building on this, how a lawyer views her client’s "best alternative to a negotiated agreement" ("BATNA") will be how she defines the walkaway point in any negotiation.8 General assessments of BATNA may be empowering ("if we don’t get the deal we want, then we will litigate"), but can still leave the negotiator rudderless inside the negotiation, and therefore open to being buffeted toward misguided decisions. The most security comes when the negotiator has a very specific understanding of her BATNA, and how it translates into potential terms or values gained in a negotiated agreement. And, as Kiser suggests, a litigant’s BATNA should be "well defined, amply supported by research regarding likely trial outcomes, and broad enough to include all factors, economic as well as emotional, relevant to the BATNA appraisal."9

In his recent book on negotiation theory, Robert Mnookin encourages negotiators to translate a BATNA into a "reservation value," ensuring that the walkaway strategy is assigned a financial value.10 The reservation value is the minimum set of terms (or

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6 ROGER FISHER, ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (3d ed. 2011).
7 In practice, negotiation styles tend to be blended and nuanced, although these theoretical styles tend still to be taught as distinct. See John Lande, A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation, 16 CARDOZO J. CONFLICT RESOL. 1 (2014).
9 Kiser, Beyond Right and Wrong, supra note 1, at 339.
10 ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 20 (2000). It is important to acknowledge that a negotiator can still leave room for integrative value to be identified during the negotiation itself. See id., at 34. Compatible and mutual interests can be uncovered, taking a possible agreement in different directions. In
“price”) that the negotiator would accept rather than take the next course of action (usually litigation). Recognizing that the reservation value can include relationship or psychological (“human”) factors, it should still be understood as a specific value, a number that captures as many considerations as possible. Each side’s reservation value, although usually unknown to the other, will set a “Zone of Possible Agreement.” The difference between the two values creates a surplus available to be divided or allocated in different ways in a negotiated agreement—all presumably acceptable to both parties. In a simple transaction, Mnookin points out, “we might expect the parties to settle somewhere in this range.”

Many things, of course, impede such an easy result. Except in the most open and collaborative negotiations, neither party will be aware of the other’s reservation value. The pressure to gain as much value as possible may lead to bluffing behavior, or at the very least, to take cautious and protective approaches to information-sharing, in particular about one’s walkaway point. These are the strategic pressures and opportunities, which will exist in every negotiation. However, an undefined BATNA, or a knee-jerk reservation value not carefully constructed, will create significant disadvantage for a client inside the negotiation process. Clients and their lawyers will be more susceptible to cognitive biases (such as being “anchored” to the starting points named in pleadings), encouraging false bargaining zones, and the potential to walk away from offers which—on a thorough evaluation—ought to be considered.

B. How Lawyers Tend to Assess and Communicate Risk

Despite the importance of BATNAs in a negotiation process, lawyers are typically reticent to make predictions about the course and outcome of litigation. As part of a study to explore how lawyers view and employ risk assessment methods, we interviewed a sample group of experienced professionals: private practitioners, senior in-house counsel, litigation risk assessment consultants, and others. We also looked closely at operational models for risk assessment, and reviewed them with lawyers who work with those

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11 Mnookin, supra note 10, at 20.
12 Id.
models. Participants in this study (the general results of which are discussed elsewhere) confirm lawyers' general preference for "informal" approaches to risk analysis, characterized by imprecise and qualitative language.\textsuperscript{13} Many lawyers do view litigation predictions as inherently "subjective," making the exercise a "very amorphous evaluative thing."\textsuperscript{14} Adding to this is the worry that formal and

\textsuperscript{13} Seventeen professionals were interviewed at this stage of the study. Twelve interviewees were Canadian, four were American and one was European. Among the lawyers, eight were private practitioners; three had longtime careers primarily as senior in-house counsel; four were included because of their considerable experience in risk assessment in the legal arena—having developed risk assessment models, written about risk assessment and/or acted as consultants on the topic. Interviewees also included an actuary and a high-profile mediator known to use risk assessments in his mediation practice. For ease of reference, participants in these interview groups are identified as "Lawyers 1–8," "Corporate Counsel 1–3," "Risk Assessment Consultant 1–4," "Actuary," and "Mediator." Our methodology was qualitative, exploring the subjective experience and reflections of these seventeen professionals. Our interview template identified general and open-ended questions, and allowed the participants to identify issues of relevance as well. Most interviews were one to two hours in length, via telephone. Four lawyers were interviewed in person. Study participants were identified as key informants, and results were analyzed using a grounded theory method. Longer interviews were tape-recorded and transcribed. We also observed two risk analysis training workshops, involving experienced commercial litigators from Toronto, Ottawa, Calgary, Edmonton, Vancouver and Chicago. Ten of these lawyers had twenty or more years' (up to thirty-eight years at the top end) experience in commercial litigation. The results of this empirical research were originally presented in Heather Heavin & Michaela Keet, The Path of Lawyers: Enhancing Predictive Ability through Risk Assessment Methods (Oct. 5, 2016) (on file with author) [hereinafter Heavin & Keet, The Path of Lawyers]; and more recently summarized in Heather Heavin & Michaela Keet, Litigation Risk Analysis: Rigour, Transparency and Informed Decision-Making in the Management and Settlement of Litigation Files, (forthcoming 2017). Earlier pieces of literature anticipate the same behavior among lawyers. For example, John Wade also observes that lawyers often only list "the trilogy of legal risks (delay, cost, uncertainty of judicial decision) . . . omit personal and business consequences, use vague terms such as 'no guarantees', 'who knows what a judge will do,' and rarely set out risks in precise, one-page written form, relying instead on long opinions which are difficult to understand, or anecdotal predictions in passing conversation with the client." See John Wade, Systematic Risk Analysis for Negotiators and Litigators: How to Help Clients Make Better Decisions, 13 BOND L. REV. 2 (2001). Author Jeffrey Senger explains, "Attorneys have not traditionally focused on decision analysis in litigation and negotiation. While business clients are accustomed to looking rigorously at risk and are trained to do so in M.B.A. programs, lawyers often have little experience with this mode of analysis and receive no training in the field in law school." Jeffrey M. Senger, Analyzing Risk, in The Negotiator's Fieldbook: The Desk Reference For The Experienced Negotiator 445, 452 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006). See generally Daphne Dumont, Better . . . Or Worse?: The Satisfactions and Frustrations of the Lawyer-Client Relationship, in Why Good Lawyers Matter (David L. Blaikie, Thomas Cromwell & Darrel Pink eds., 2012).

\textsuperscript{14} Interview with Lawyer #1, conducted by the author, via telephone, on January 17, 2013. "Most lawyers . . . don't actually believe that there's any scientific principle that will help. They actually believe that their case is unique . . . which then justifies a gut response to their case." Interview with Corporate Counsel #1, conducted by the Author, via telephone, on April 30, 2012.
precise assessments of litigation risk will “scare the client away.”  

For a number of reasons, informal and vague discussions of litigation risk are prevalent, leaving troubling gaps in what clients hear and understand.

Lawyers also tend not to articulate, assess, or value the full range of ways that the litigation process itself may impact a client, should it continue. For individuals caught up in litigation, the impact may be broad, including psychological and other intangible costs. While a legal problem remains unresolved, people may experience “decreasing physical health, high levels of stress and emotional problems, and strains on relationships among family members.” Even organizations and corporations may be affected in indirect or intangible ways by litigation, which are often overlooked by litigators. Such costs include the internal corporate costs of human resources, business relationships, reputation, and other factors. Corporate clients may view such concerns as extremely important, and worth factoring in, even if not easy. In addition to overlooking internal costs to the organization, lawyers (especially outside counsel), can be equally vague about actual litigation costs.

Without specific forecasts about likely litigation outcomes and a chance to reflect critically on the various costs of getting there, clients can easily continue operating with inflated expectations and unfounded confidence about litigating. Without pointed advice, clients can still be vulnerable to ‘selective deafness’:

Anecdotally, many (legal) representatives tell mediators that they have “advised the client about the risks.” However, when mediators ask clients in private about the risks of not settling, the client has heard selectively or not at all, or the client speaks

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15 A worry expressed in the interview with Lawyer #6; interview conducted by the Author, via telephone, on May 2, 2012.

16 “We’re assessing liability and damages, but we’re missing the broader interests of the client.” Interview with Lawyer #5, conducted by the Author, via telephone, on December 12, 2013.


18 Interviews with Corporate Counsel #2 (conducted by the Author, by telephone, on October 15, 2013) and with Corporate Counsel #3 (conducted in person by the Author, on January 16, 2013).

19 Interview with Corporate Counsel #2, see id.
in vague generalities about the high costs of litigation, or unpredictable nature of the behavior of judges or other decision-makers.\(^\text{20}\)

In sum, lawyers may be assessing and communicating litigation risks, but often—and often enough to be of concern—use informal approaches and vague language, and fail to factor a full range of risks into the analysis. Without systematic methodologies that cover all relevant factors and put the results in concrete terms, clients are arguably left to make decisions without the best available information. This impedes progress in a negotiation.

C. \textit{Filling the Gap: Constructing a Litigation Risk Analysis}

Since the 1980s, legal decision support systems have been available to help in the methodical projection of litigation risk.\(^\text{21}\) They have not been widely used, or even publicly available, until recently.\(^\text{22}\) On the market now are a range of products and tools including checklists, decision analysis software, data-mining tools, and other forms of probability analysis.\(^\text{23}\) Such services are moving in the right direction, but are impeded by lawyers’ discomfort with software tools, especially when it comes to decision analysis methods, diagrammatic logic, and the probability assignments, which are inherent in a full risk assessment.\(^\text{24}\) Litigators understand the conceptual value of assessing litigation risk, but are left without user-friendly models for taking on this task.

It is possible to boil risk assessment down into several simple, critical assessments. These assessments aim at breaking down the complexity of a legal dispute, counteracting intuitive and often biased judgment, and allowing slower cognitive processes to guide the process. I have elsewhere proposed a simple, practical framework for litigation risk analysis, which includes the following basic stages and steps.\(^\text{25}\)

\(^{20}\) Wade, \textit{supra} note 13, at 14.
\(^{22}\) See id.
\(^{24}\) See id.
\(^{25}\) See Heavin & Keet, \textit{Litigation Risk Analysis: Using Rigorous Projections to Encourage and Inform Settlement}, \textit{J. Arb. & Mediation} (forthcoming Fall, 2017) for a full discussion of this simple, practical model and the tensions which are inherent in any systematic risk assess-
The first stage develops the projection of litigation outcome, initially by weighing the likelihood that a breach of law will be established. It breaks down the legal claim (and then defenses) into component parts and identifies areas of uncertainty in the applicable law, evidence, or a combination of these elements. Thorough assessments involve numbers. Once the elements of the claim and risk factors (legal and evidentiary) are identified, a numerical probability of success is assigned to each uncertainty. Independent risks should be aggregated. This will produce an overall assessment of the probable finding of liability.

The second step in Stage One of the analysis is the calculation of damages. Which remedies are available given the causes of action? What are the estimated damages, determined by reference to each itemized head of damages and the probability of proving each head of damage? Graphical models can be especially helpful in working through projections. Likely outcomes under each head are added together, for an overall prediction on damages. The final step in Stage One of a risk assessment is to aggregate projections for liability and damages. Risks attached to proving liability and damages often exist independent of the other. The overall probability under liability and the overall projection of damages should now be multiplied, for a realistic reference point on expected legal outcome.

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26 For a risk assessment to produce an economic measure, it should include the probability assessment, although lawyers may be uncomfortable working with probabilities. See Donald R. Philbin, Jr., The One Minute Manager Prepares for Mediation: A Multidisciplinary Approach to Negotiation Preparation, 13 HARV. NEGOT. L. REV. 249, 261–62 (2008). Probabilities on separate variables (each of which requires independent proof) need to be multiplied to produce an overall prediction of the claim's strength.
Stage Two of the analysis develops the projection of litigation costs. Now that a projection on outcome has been developed, the lawyer must assess the impact of “getting there” viewed from the perspective of the client. For this calculation, lawyers tend to focus first on legal fees and expenses—the client’s tangible out-of-pocket costs. A multi-dimensional assessment of process costs includes much more. Which client interests are engaged or put at risk in continued litigation and trial? How can the gains or losses, in terms of the client’s process interests, be quantified? This requires anticipating the impact of the stages of the litigation leading to trial, in both monetary and non-monetary terms. Internal impacts must be considered, including human and organizational energy (time, emotional energy, psychological strain); the internal environment of the family or organization; and issues of identity and reputation. External impacts must also be explored—on relationships (family, business, community) and on larger individual or commercial networks; third parties, direct or indirect; and opportunities (the advancement of life or organizational goals). It is difficult for clients to predict the impact of legal processes—as distinct from legal outcomes—on their individual lives, but they can be guided through such a reflective exercise with thoughtful questions. The impact on litigants can be positive or negative. In the commercial context, of course, impact should also be translated into organizational terms. Either way, clients should be encouraged to assign monetary values to drains on their psychological, emotional, social, and financial resources.

The final step is to calculate the expected value of the action: a simple subtraction of overall projected process costs from expected outcome. The calculation produces an economic value, which is not intended to predict what will occur during a trial, but rather a mathematical construct. The calculation provides a more balanced

27 To be thorough, the estimate of legal fees and expenses ought to be broken down category by category and stage by stage.

28 For a general discussion about client financial interests and the idea of offsetting, see John Lande, Good Pretrial Lawyering: Planning to Get to Yes Sooner, Cheaper, and Better, 16 CARDozo J. CONFLICT RESOL. 63 (2014).


30 See Adams, supra note 25, at 128. Also, Doug deVries offers an explanation for why the risk assessment result ought not to be viewed as a prediction of actual results, but operates still as an extremely useful “assessment of value.” See Doug deVries, Mediation: Decision Analysis and Risk-Assessed Value, 3-4, DE VRIES DISP. RESOL. http://www.dkdresolution.com/articles/decision-analysis.pdf.
reference point: the 'risk-assessed value,' third1 the 'expected monetary value (EMV),' third2 or even the 'net present expected financial value (NPEFV).' third3 The expected value operates as a realistic point of comparison for the client who is trying to decide whether to proceed with litigation, accept or present a settlement offer, or abandon the action, today.

II. DISCUSSION: A SIMPLE, PRACTICAL RISK ASSESSMENT FRAMEWORK IN ACTION

Boiled down to its essential steps, a risk analysis is therefore not conceptually complex, and yet, we know from the feedback of lawyers that it may still not be easy 'in action.' Interviews with lawyers confirm that the application of mathematical principles (such as probability) can be challenging, inside a legal analysis. Although some guidance exists in the literature for how to correctly construct such an analysis, little has been written about how risk assessments affect negotiation. Questions therefore remain: what impact can a simple risk assessment have in the preparation of a file; and what impact might it have on the settlement process?

In 2015, the Author used the Negotiation course taught to second and third year law students at the University of Saskatchewan as an opportunity to introduce a module on litigation risk and then test its use. Using a simulated personal injury litigation file to set the stage, law students were taught the above framework for doing risk assessment, given ample preparation time, video-taped while they negotiated, and then asked to evaluate what happened.

Working with students in this way has been a window into the impact of different negotiation strategies and treatments of the risk assessment step. Some law students—even with little or no litigation experience—were able to develop and use risk assessment effectively in the negotiation. But not all were able to accomplish that. The discussion below centers on the work and reflections of four teams of negotiators, who gave permissions for their work to be shared as part of this project. The experiences of these students are set against the general experiences of their peers, to illustrate

31 Doug deVries, supra note 30.
33 Palmer, supra note 25.
the contents of the ‘good’ risk assessments. These experiences also demonstrate how strong risk assessments were used to ground the negotiator with a clear BATNA, help identify the bargaining zone, reduce adversarial posturing, and even build trust. The analysis below therefore focuses on two particular simulations, from which we can draw conclusions about the strengths, challenges, and impact of risk assessment tools used to support negotiation.

A. The Case of Mary Smith

In the scenario, “Mary Smith,” the plaintiff, is pursuing a damages claim against Jones Construction Company. Five years ago she was injured by a flying rock in a construction blast.\(^{34}\) In the hypothetical, discovery of documents has just been completed, and expert reports have been shared. The claim—for a stated value of $1.5 million—presents a scenario more complex than students normally see in a role-play. Divided into teams of two and representing either the Plaintiff or the Defendant, students were required to review court documents: pleadings; a brief of law; client communication; and summaries of evidence including witness statements, doctors’ reports and engineers’ reports. They submitted preparation plans, conducted a one-hour negotiation with the other side (video-recorded), reviewed the video file, debriefed with teammates, and submitted a written reflective analysis of the experience.

There are a multitude of issues that may arise in Mary Smith’s claim. Was there a breach of the standard of care on the part of the Defendant? This will turn on whether the construction company took proper precautions to avoid flying rocks. The type and number of blast mats, and industry practice, is relevant. Was there contributory negligence on the part of the Plaintiff? Mary was a member of the public, entering the worksite to visit her boyfriend, who was one of the employees. The placement and visibility of warning signs will be relevant here. What is an appropriate assessment of damage, given uncertainties around causation and proof? Did the damages flow directly from the accident, or from other causes (her depression, or other pre-existing injuries or condi-

\(^{34}\) We have been using this scenario in our Negotiation class. The original documents for the scenario can be attributed to Vivian Hilder, a law professor (at the time) with the University of Manitoba. The scenario has been developed considerably through its use at the University of Saskatchewan. For further information, contact the Author.
ations)? Did she fail to mitigate by not fully following the advice of health professionals (also a contributory negligence issue)? Is there enough evidence to support some parts of the claim (such as the claim of permanent disability and future loss of employment)?

The students are given latitude to prepare for their negotiations on their own—to identify their own BATNAs, reservation values, and bargaining strategies. Their document package includes a memorandum of law, as well as summaries of client interviews, which identify general characteristics, concerns, and goals of their clients. For example, Mary has a young son and hopes to regain financial security. John hopes to sell his business and retire very soon. The way students manage the file is a rich opportunity for learning—for them, and for their instructor—on what produces agreements in the process, and how well each side is able to meet client interests.

It might help to fast-forward, for a moment, to the end of the exercise in a best-case scenario. A reasonable interpretation of the client instructions and likely outcomes at litigation would set the bargaining zone between $450,000 and $700,000. An outcome in that range could be justified, on the information given, by both Defendant and Plaintiff. Anything less for the Plaintiff would mean that her counsel ‘left too much on the table’ and compromised her long-term interests; anything more for the Defendant would leave him unable to meet his future goals. Taking combined litigation risks into account, an outcome in that range meets both sets of client interests and should also fall within reasonable risk assessments focused on litigation outcomes. Some students are also able to create value through an integrative approach, but the distributive outcomes of the negotiation should, on a successfully negotiated file, fall within that range.

Perhaps not surprisingly, most students are not able to reach a deal within the scope of this assignment. It is a complex file, without real access to their client to explore nuances; and they only have an hour to complete the negotiation. However, the objective of the exercise is to encourage students to explore what works at the negotiation table outside of the typical one-dimensional role-play, in what ought to feel more like the ‘gritty’ setting of a real litigation file. Overall, the addition of a risk assessment module in the preparation for this assignment had an encouraging result. The way students approached risk assessment mattered to both the pro-
cess and the outcome. Observations are offered below, focusing on
the negotiations of “Group 1” and “Group 2.”

A word, first, on the less successful examples. Having ob-
served forty students conduct twenty different negotiations since
introducing the risk assessment module, I can make the following
anecdotal observations. Students who prepared no risk assessment
at all tended to be much more positional, and presented inflated
demands inside the negotiation. For example, the Plaintiffs might
anchor the negotiation at the full claim amount of $1.5 million.
They tended to be less compromising, and more adversarial in their
behavior. Anecdotally, those groups that had not done a risk anal-
ysis were more apt to start with a presentation on liability and then
let the discussion descend into arguments about the evidence and
interpretations of law—arguments designed to persuade rather
than explore, similar to the arguments that would be offered at
trial. More often than not, these negotiations produced no deal.

Other students did attempt to construct a risk analysis, but did
so weakly. From the Plaintiff side, the analysis typically over-em-
phasized the risk, attached risk to too many factors, and magnified
individual risk factors. Compounded, these errors produced pro-
jected litigation outcomes at levels far lower than justified. For ex-
ample, such risk assessments projected likely outcomes as low as
$50,000. Teams tended to convey weak negotiating positions, and,
while many reached a deal, the teams compromised far too much,
and later regretted their negotiation positions. It has been noted
that a careful risk assessment can have a dampening impact on the
litigator, decreasing confidence in the file: “there are some very
intelligent lawyers out there who could never litigate because they
get so hung up on the risks.” This might suggest that doing no
risk analysis at all is less damaging for the client than doing a weak
one, which loses ‘the forest for the trees.’

The rest of this discussion focuses on the example of the well-
constructed and well-used risk assessments, and the work of eight

35 Group 1 and Group 2 were each comprised of four students, participating in two different
offerings of the Negotiation class: one in March, 2015, and one in November, 2015, both taught
by Professor Keet. Those eight students are now graduates of the College, and each has provided
permission (in accordance with an approved research ethics application) to refer to their materi-
als. Any quotes from their assignment material are referred to as belonging to Student 1, Student
2, etc.

36 Interview with Lawyer #1, supra note 14.
students in particular. The successful features of these two examples demonstrate normal tensions, which are embedded in the risk analysis exercise, and reveal glimpses of the multiple ways a risk analysis can be constructed. The examples are helpful in that they show how tensions were resolved in the context of a hypothetical file and what gains were achieved in the negotiation process.

1. The Contents of a Well-Prepared Risk Assessment

Boils Liability Down to the Key Risks: the first step in any litigation risk assessment is to list the elements of the claim and assess the evidence available to prove each element, including defenses. This requires an in-depth theory of the case, a solid understanding of how the claim is constructed, and the fortitude to make projections even in the face of incomplete information on each point. Since risks are aggregated in a risk assessment process, de minimis risks should not be factored in: the risk analysis should reveal and then focus on the key risks and their implications.

In the case study of Mary Smith, Group 2’s liability assessment demonstrated that they understood this objective. Their document was created in the form of a chart, listing “law,” “evidence,” and “probability” for each of six key elements and/or defenses: duty of care, standard of care, causation, remoteness, volenti, and contributory negligence. How these are worked through showed a good understanding of the relationships among these factors. First, the assessment avoided ‘knee-jerk reductions.’ For example, the chance of successfully getting over the duty of care element is listed at 100%. On the facts of this case, this is the right approach: duty of care ought to be established. In contrast, students who completed poor risk assessments were more apt to add a general risk reduction, reducing this factor to 90% even in the absence of a legal or factual dilemma in the duty assessment. This might be viewed as the ‘nothing is guaranteed’ perspective on assessing risk. Because it was a case with numerous elements, those students ended up with artificially inflated conclusions about risk.

Overall, Group 2’s assessment focused in on the two areas which are true liability risks in the Mary Smith hypothetical: standard of care and contributory negligence. Their document summarized the law and evidence, on both sides, and projected a 50% chance of proving standard of care. That assessment could be

37 Many—indeed, the majority—of students did great work on this project. The examples of these two negotiations have been chosen simply for clarity on the takeaways. Examples on the contents of a well-prepared risk assessment are all drawn from the work of Group 2.
slightly higher on the facts of the case, but 50% is on the low end of a reasonable range. Contributory negligence was then dealt with as described below.

Captures a Different Impact for Apportionment Issues: apportionment of liability—and contributory negligence in particular—is a tricky issue. Apportionment requires some thought about how a win or a loss on that point would impact the projections, underlining the importance of understanding the relationship among elements in a claim. Duty, standard (or breach), and causation (factual and legal) are all preliminary elements in a tort claim. If one is not proven, then the claim will fail. Any uncertainty attached to each of these elements must be compounded, then, as explained above. Contributory negligence is a different consideration—raising issues of apportionment, once liability is established. That posed conceptual problems for some students.

Some students assumed the chance of a contributory negligence finding at 50%, but added it as a risk to be compounded in with the other liability elements. The impact of this addition inflates the overall risk and leads to unnecessarily low numbers on that side. Contributory negligence is actually a partial defense, and not part of the initial liability equation. Its proper treatment inside a risk assessment is as a two-step assessment or a separate branch of a decision tree. First, what is the chance that she will be considered to have contributed to the initial accident? Then, if she has contributed, by what amount will the overall claim be reduced? The average student’s instinct in this case, that there is a 50% chance she will be considered contributorily negligent, is reasonable. However, the range of responsibility that will be assigned to her is low—lower than 50%. And, the chance of her getting a 10% reduction is much higher than the chance she will get a 50% reduction. The proper contributory negligence calculation multiplies the chance of a finding by the degree apportioned to the plaintiff; and a sophisticated approach leaves some room for the different directions this could go.

Group 2 handled the contributory negligence issue best. After a reasonable projection was calculated on liability and damages, they presented a table of contributory negligence scenarios, representing apportionment to the plaintiff of anywhere from 10% to 50%. This introduced the right sequence for the analysis, but missed the nuance that a weighted average calculation might have. Consider the example of a projected damage assessment of $100,000, with a 50% chance of proving breach of the standard of
care. The value assigned to a projected trial outcome, taking risks into account, is then $50,000. Assume, again, a 75% chance that she will be found contributorily negligent and that her claim was most likely to be reduced (in that event) by 25%. This would leave a 25% chance that she would not be found contributorily negligent at all.

A weighted average projection would then look like this:

75% chance of her receiving a 25% reduction:
\[
.75 \times .75 \text{ (her share of proceeds) } \times $50,000 = $28,125
\]

PLUS a 25% chance of her receiving no reduction:
\[
.25 \times $50,000 = $12,500
\]

Weight average assessment of what she is likely to get after contributory negligence is taken into account:
\[
$28,125 + $12,500 = $40,625
\]

On a $100,000 damage assessment, then, the risk projection would be $40,625, taking these two factors into account (50% chance of proving standard of care, and 75% chance of a 25% apportionment of fault). Very few students mastered the translation of contributory negligence into the risk assessment calculation, which reinforces how important it is for lawyers to understand the principles behind the liability issues.

The other way that students confused the relationship among elements was by double-counting some factors. This showed up in the risk assessments when addressing remoteness issues and mitigation. Remoteness is an element that is considered preliminary to the assessment of liability: the result of the negligence act or omission must not be too remote from the act itself. Many students, however, reduced this between 50% and 80% because they felt the injuries may have been caused by other things (pre-existing causes, for example). This can be a remoteness issue—but, remoteness on damages is a different consideration than remoteness on liability and the placement of risk in their analyses was wrong. They had improperly ‘located’ the risk, conceptually, and were then more apt to count the risk a second time on the damages side of the equation.

Similarly, students who discounted at the liability stage for contributory negligence, but cited the failure to get proper medical treatment as the reason, usually ended up double-counting risk. At the initial liability stage, contributory negligence assesses the Plaintiff’s responsibility for the accident itself, not what happens after. A risk assessment that clouds those things at the liability stage may
have also included a mitigation factor at the damages stage, inflating the risk and lowering the numbers.

In sum, a clear understanding of liability factors, which does not cloud issues around apportionment of liability, is important for an effective risk analysis.

_Addresses Heads of Damage with Their Separate Risks and Uses Weighted Average Calculations to Add Specificity:_ one benefit of a risk analysis is the rigor it introduces to the lawyer’s preparation. While some points of uncertainty can be assessed with a single probability assessment, other uncertainties call for a more detailed or nuanced calculation, with probability broken down into several stages or considerations. A weighted average calculation accomplishes this, and can be extremely useful at certain points in the analysis.

Group 2 defendants used this approach at exactly the right point in the damages assessment. First, they assessed the likelihood of proving each head of damage separately, which allows distinct risks to be taken into account. For example, loss of earning capacity in the hypothetical is much more difficult to prove than pain and suffering. For loss of future earning capacity, they used a range with a weighted average, which suited the head of damage extremely well:

- 10% chance she’d be seen as 100% disabled in the future (10% x $882,020.25)
- 20% chance she’d be seen as 75% disabled (20% x $661,514)
- 40% chance she’d be seen as 40% disabled (40% x $352,807)
- 20% chance she’d be seen as 25% disabled (20% x $220,505)
- 10% chance she’d be seen as not disabled at all (10% x 0)

Their weighted average projection came out at $405,728.63.

The plaintiffs in Group 2 applied a more straightforward approach to the projection of damages. They added up the full amount claimed on each head of damage (less the loss of future income), and reduced the whole amount by a factor for mitigation. Then, they created a table with three scenarios for future loss of income (a decision tree of sorts), with amounts representing an ability to work full-time, part-time, and not at all. Those values, under the three scenarios, were added to the remaining damage projection to create a range of outcomes. This is a reasonable and easier way to handle the projection on damages, but does not capture as many nuances as the approach used by their counterparts.
Fully Explores and Quantifies Client Goals and Litigation ‘Costs’: here as well, one of the student groups anticipated and valued their client’s interests in a way that most others failed to do. Group 2’s assessment of the Defendant’s risks included two separate tables with the headings “interests and goals in pursuing litigation” and “indirect costs in pursuing litigation” (time, stress, opportunity cost). Each heading had values assigned to them. A third table assessed “direct costs in litigation.” Some of the items factored in included: “time spent by the client in litigation” at $5,000; “stress due to litigation risk” at $5,000; and most importantly, on the facts of the case, the “opportunity cost of losing the chance to sell the business.” These students assessed the loss of opportunity at $137,700, which represented the difference between the existing offer to purchase and the book value of the business. To those indirect costs, they added the projected $50,000 in actual litigation costs. While they had to hypothesize in assessing the value of intangible factors, the exercise of doing so was impactful: their ‘process cost’ deduction amounted to almost $200,000. Most other students noted client interests in their preparation plans, but did not go through the process of naming and valuing those interests in the risk assessment itself.

Leaves Room for Adaptation: a thorough evaluation of different perspectives and process options might warrant the creation of more than one risk assessment. For example, Group 2’s document on behalf of the Defendant repeats the analysis a second time, viewed from the opponent’s perspective, and then identifies a projected bargaining zone. At times, it is conceivable that different process paths ought to be examined as well. One lawyer who regularly uses risk assessment tools has described his role this way, “Part of our function in the process was not just an external risk analysis with respect to the litigation, but also a risk analysis with respect to the settlement. If we do this, what could happen in the future?” He elaborates:

From a risk analysis perspective, there were two sides of the tree: the litigation side and the settlement side. If we settle it like this, then there are all these risks and contingencies on the settlement side. On the flip side, if we agree to that, what are the risks of this, and this, and this? How does that impact the outcomes? That was really delving into the business of the client. They’re much better at doing that, but we pushed them to

38 Interview with Lawyer #4, conducted by the Author, in person, on January 16, 2013.
undertake that process, and this guided the scope of the range for a settlement structure.\textsuperscript{39}

Finally, a risk assessment is not likely to be a one-time exercise on most litigation files. Because the assessment is based on information and projections that may shift over time, it is best considered an ongoing obligation—a more fluid process rather than a static opinion.\textsuperscript{40} When preparing for negotiation, the lawyer ought to expect that information may emerge in the conversation that could impact her assessment of liability, damages and remedies, or overall outcomes. Law students on both sides of the file in Group 2 recognized this possibility, by adding a table or an Excel spreadsheet to show a range of outcomes above and below the projected risk, with the variables that would affect where it would fall. For example, the Defendants had assessed liability at 35\%, but they produced a table which listed the value of the case as anywhere from 5\% to 100\% chance of success on liability. They also ran the same assessments for two main calculations of damages: first, their projection of the most realistic outcome on damages; and then again for the maximum damages claimed. The ‘alternate outcome’ tables help the negotiator be more nimble and responsive during the negotiation process.

2. The Benefits Inside Negotiation

Students who completed strong (well-reasoned) risk assessments were better able to make progress in a presumptively adversarial setting. A good risk assessment grounded the team with confidence, allowing those students to rely on the strength of their side rather than powerful or manipulative dynamics such as bluffing, and also prevented them from drifting towards a ‘bad deal.’ The most advanced teams were able to use their well-reasoned risk assessments strategically in the negotiation itself, with interesting results. They were surprisingly able to shift an adversarial discussion toward a more collaborative one. They did not get drawn into positional discussions about the law and evidence, but were able to have matter-of-fact transparent conversations about their views on where this might go at trial. When the other side matched this,

\textsuperscript{39} Id.

\textsuperscript{40} Susan Blake says that the key stages at which a risk assessment might be carried out include: once the basic position of the other side is known (in the pre-pleadings phase); following receipt of the pleadings; following disclosure; before taking any significant procedural step, including but not limited to reviewing the case before trial. Susan Blake, supra note 27.
they could make progress extremely quickly, framed with courteous and professional dialogue.

The students wrote the following reflections as they analyzed their negotiations after-the-fact (with some quotes coming from written dialogue among the group).

Student #3: [Rather] than hashing out the arguments, it just made it clear where we all stood and the uncertainty that both our sides were facing, which gave further incentive to negotiate.

Student #2: Your presentation of a structured risk analysis and your explanation of it made me feel like you had taken care to think about the issues thoroughly and realistically, and I was less nervous about your settlement figure being unreasonable. It made me much more willing to accept the numbers proposed as reasonable and not just arbitrary. It helped the negotiation flow much more smoothly since we didn’t have to spend time inquiring how you arrived at those numbers.

Student #4: [I] found the approach of contrasting our two legal positions a very useful way in quickly getting through the information and acknowledging that there are potential strengths and weaknesses on both sides of the argument. This allowed us to move forward fairly quickly on this legal issue. It allowed us to talk about the liability issues in an objective way so we didn’t become mired in our legal positions at this stage.

Student #1: The comparison of our risk analysis documents was a good way to perform a somewhat objective analysis. Putting both numbers on the table really encouraged us to work towards a goal. Knowing that you took the time to compile a risk analysis prior to attending the negotiation with reasonable numbers made me feel like both parties were on the same page and that the zone of agreement was within reach for both parties.

Student #6: I could not help but smile as the Plaintiff lawyers outlined the estimates they had prepared, as they were so closely aligned with the numbers we had generated in our risk assessment. Thorough preparation and reasonable expectations from both sides led us to have similar estimates.

Student #8: To me, this was the moment when each side breathed a sigh of relief because our numbers were similar enough that we could fine-tune without having to discuss big issues for the entirety of the negotiation.
Student #7: This was a pivotal moment for us. Did our numbers match up? This really goes to show the impact that risk analysis can have!

As the students' own reflections confirm, a strong risk assessment grounds negotiators in a clear BATNA, assists with identifying the bargaining zone, reduces adversarial posturing, and even helps build trust.

3. Techniques to Manage the Risk Assessment Discussion

The two student groups I have singled out were able to use the risk assessment exercise to their advantage, to support rather than derail a problem-solving process—and yet make room for the sometimes tricky conversation about what is likely to happen at trial. The techniques they used to accomplish that are worth noting.

*Embedding in an Interest-Based Approach:* as Group 1 ventured into a discussion of law and evidence, they immediately acknowledged the risk assessments each side had prepared. The language they used to introduce this was non-adversarial: “we believe x about the evidence; we’re not trying to challenge you on this, but we see it a bit differently; it is good for us to both see where we feel the strengths and weaknesses are in our case.” Indeed, Wade, who has written about how to handle a risk assessment during negotiation, suggests phrases that are designed to be exploratory and to encourage dialogue: “Can you suggest some risk we have omitted if we do not reach a settlement today? ... If we are wrong, we would be glad for you to give us more information so that we can make a better decision.”

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The students tended to use the risk assessment not to gain power in the negotiation, but to identify points of difference in how they each saw the law and evidence. Once they narrowed down points of difference, they traded views on what might unfold at trial. Because the points of difference were not jarring, the groups were able to move ahead fairly quickly. As stated by one student partway through the negotiation:

I still think our numbers are pretty close on our risk assessments overall. It sounds like we both understand the law in the same way, and that we have both done a similar risk calculation. We

41 Wade, supra note 13, at 7–8.
both know, going to trial, what we’re looking at—which has helped us to move towards what we’re here to negotiate today.\textsuperscript{42}

Couched in terms of risk assessments, approached reasonably by each side, the discussion about the law “helped to decrease any tension that might be starting to build.”\textsuperscript{43} These students were all relatively open about their clients’ goals, and it is impossible to know which came first—the interest-based approach, or the open and exploratory tone of the discussion about risks. As one student noted, after the fact:

[Y]our numbers seemed very reasonable and we knew when you started explaining that we would be able to make an agreement. I think, however, this only worked because of the integrative framework we were both using. Because we were trying to be cooperative, we tried to be very reasonable with your numbers, which left very little wiggle room. If the other party had been very positional and had started with a number very far from ours, it would have been harder, because we had very little wiggle room in our numbers... We would have either been stubborn and inflexible, or we would have had to inflate our numbers to try and compete.\textsuperscript{44}

\textit{Presenting with Transparency}: the Defendants in Group 1 were open about where they saw the risk, but also where they could concede that points would not be in issue.\textsuperscript{45} Neither side seemed to assume that their assessments would line up perfectly, nor expressed concern about that. For example, while the Defendant lawyers had assigned a probability of proving standard of care to be 50%, the Plaintiff’s side assessed that at 70%. One side discounted for remoteness and the other side did not. Assessments on contributory negligence also differed. The Defendants anticipated a 30% chance she would be found to have contributed, with an apportionment of 30% responsibility to her. The Plaintiff anticipated a 95% chance she would not be found contributorily negligent, and if she was found liable, it would only be at the level of 10%. In Group 2, each side had also taken different steps in constructing their risk assessment. The Plaintiff’s risk assessment had a much higher liability prediction (82% as opposed to 35%), but

\textsuperscript{42} Student #4.

\textsuperscript{43} Student #3.

\textsuperscript{44} Id.

\textsuperscript{45} They accepted duty of care, assessed breach/standard of care at 50%, and accepted that causation was likely to be established.
they took more variables into account in terms of contributory negligence and mitigation.

In neither negotiation did it impede progress that the same factors were taken into account in different ways. In each group, negotiators were willing to disclose what numbers they had assigned on those points, and that helped signal a range to which the negotiation was moving. Because the overall, cumulative, assessments on each side were not radically different, and did not convey positionality and bluffing, the comparisons had positive impacts. The students' reflections confirmed this. Several students mentioned "defused" or "stabilized" emotions helped them to "focus on the problems, rather than any personal conflicts." Two students noted the positive impact on trust:

Student #4: The level of trust established made it possible for us to exchange numbers in an honest way. I don't know what we would have reached as a settlement without knowing that we had both been prepared and were both willing to share the numbers honestly.

Student #6: When we found out that the other side had similar estimates it went a long way in terms of strengthening the trust. Suddenly, the confidence and trust that we held in our own research and numbers was projected upon the opposing side. This building of trust allowed us to be open and collaborative, and helped to facilitate an agreement.

Some lawyers we interviewed also spoke about their experiences, sharing risk assessments with opposing counsel during a negotiation process, or condensed versions of those documents. Because they had spent so much time on their risk analysis, understanding, and forecasting the impact of changing variables:

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46 Interviews were conducted by the author, in person, on January 30, 2013 and on December 20, 2014 (files with Author). Lawyers stated that they may also share a risk assessment confidentially with a mediator or a settlement conferencing judge to test the assessment. Another lawyer spoke of going through the risk assessment in caucus with the mediator, simply to "bring the client along with" him. The practice of one study participant is to share "a print out which represented an aspect of the work which had been produced by the risk analysis," or "a summary output," which condensing the factors and their impact. In another example, a risk assessment had been prepared with input from two retired judges, who had given their input without knowing which side had retained them. Once completed, the risk assessment was then given to the negotiating party on the other side, with the request that it be forwarded to the Board of Directors (on the expectation that the opposing lawyer had a responsibility to so forward the document). "The case settled." Here, the neutral input into the risk assessment likely had persuasive impact. Interview with Risk Assessment Consultant #2, conducted by the Author, via telephone, on November 7, 2012.
the benefit of that was that, when we engaged the other side in
the specifics of the risk analysis, and they mentioned a number
(a risk factor) to us, I knew what it was going to do to the out-
puts. All of the iterations we had run gave us a reasonable sense
of what the impact would be.47

In the end, he felt this served them extremely well: "having seen
where it went, it put us at a tremendous advantage. If I was settle-
ment counsel on the other side, I would have felt completely dis-
armed by the fact that they are doing this, and we're not. And I
don't have control over it." Although less extensive, the advanced
preparation done by Group 2—with charts representing different
scenarios, brought into the negotiation—helped in a similar way.48

Fitting Risk Assessment into the Structure of Negotiation: students
in Groups 1 and 2 took care to bring up their risk assessments after
they had engaged in discussion about interests and objectives, and
had the opportunity to set a non-defensive tone. After setting an
agenda for the discussion, one student in Group 2 introduced the
discussion this way:

We recognize it would be in neither interest to go to litigation.
There is a risk that either could lose at litigation. I don't know if
you've gone through a thorough risk assessment, but we have
put together some numbers. I think it would be useful to com-
pare those numbers, see if we can come to some agreement as to
where the risks lie and what range of numbers we're each look-
ing at."49

Using their most favorable projection generated through the
risk assessment, they effectively anchored the negotiation in a neu-
tral and persuasive way. As they began explaining their approach
to the assessment of liability, they were clear about their projection
of 82% on the elements of liability, subject to a concession on con-
tributory negligence. They then worked through their damages
calculation "if everything goes our way on damages." Using that
damages assessment as a starting point, they multiplied it by the
82% liability value, and then added reductions for contributory
negligence (and mitigation), ending up at $435,000. That starting

47 Interview with lawyers, see text, supra note 46.
48 TreeAge and other software may create efficiencies on this front: "Towards the end of the
negotiation, we were actually getting their numbers and injecting them into our own program.
On the last day of negotiations, we could see that we had authority that overlapped with what
their numbers indicated they were willing to accept." Interview with Lawyer. See id.
49 Student #8.
point eventually led the group to a framework of an agreement, with a positive tone flowing into the next scheduled meeting.

Group 1 also discovered congruence in how both sides had approached the risk assessment and affirmed early on that there should be a bargaining zone. After some early comparisons of their risk assessments on liability and damages, they returned to a discussion of client interests, engaged in brainstorming to capture more creative terms of an agreement, and tentatively agreed on two ideas. They agreed in principle on the idea of income replacement being paid over time (with regular medical reporting), and a short-term employment relationship between the Defendant and the Plaintiff. They reached a deal in the bargaining zone, at roughly $700,000, structured with $500,000 cash and another $10,000 per year to the age of sixty-five (after twenty years, another $200,000), contingent on proof that she continues to be unable to work full-time.

To support the risk assessment conversations, both groups used visual aids. Consistent with the approach described by some lawyers above, one student in Group 1 created a document specifically to use in the negotiation. In the following comment, the student observed that the other side did something similar “in the moment:”

I specifically separated them onto two sheets so we could show one without showing the other, and I think you did something similar by folding yours. It was a good way to test the waters without making ourselves extremely vulnerable, and also helped indicate that there was, in fact, a likely zone of agreement.50

While these two groups used documents constructively, use of flipcharts during discussions over law and evidence were not necessarily helpful. Students not prepared for risk assessment conversations—simply listing elements of liability and issues of evidence, negotiating concessions point-by-point—ran into trouble. Discussions became adversarial and positional, occupying most of the time allocated for negotiation.

50 Student #3.
IV. Conclusion

Studies show that experience as a lawyer does not necessarily improve predictive judgment and decision-making skills. Under-standing and applying a simple risk analysis framework, on the other hand, can strengthen a lawyer's assessment of the case and enhance her negotiation strategy as well as her communication with the client. Risk assessment forces a lawyer to consider the relationship between multiple factors in a case and to connect intuitive and logical thinking methods. Applying the analysis helps secure a justifiable bargaining zone for the negotiation and prepares negotiators for less adversarial dialogue within the shadow of the law.

However, to benefit from risk assessment analysis, the lawyer and negotiator must fully understand the underlying principles; the stages and principles of the process are more important than the exact nature and technicality of any tool being used. Diversity of approach are successfully accommodated within the risk assessment exercise; different approaches did not impede the negotiation processes of the two groups of students, as long as the team could explain why they viewed an issue a certain way. When commitment to transparency is matched on both sides, comparisons of approach increased the respect brought to the engagement across the table, without minimizing negotiators ability to identify their bargaining zones.

Over many years of teaching the Smith vs. Jones simulation, I have noted a marked improvement in the integrity of the preparation and intentionality in students' negotiations, after they were taught the risk assessment module. This is promising and reinforces the need for education about risk analysis methods. Exposing law students and lawyers to literature, ideas, and tools will support professional growth in this area. If more accurate predictions of risk enable better communication, advice-giving by the lawyer to the client, and better deliberate management of the negotiation process than client interests—and lawyers' professional obligations—are better served.

51 Kiser, Beyond Right and Wrong, supra note 1, at 298–99.
52 In the study described above, students who did not understand why they were taking a step were also the ones who ended up out of range in their risk assessments, and whose intuition failed to catch 'odd' projections.