Introduction

Forswearing Ambiguity of Purpose or Method

A client asks of his lawyer: What's it all worth? How much do I have to worry about a verdict so high that it will bankrupt my company? What type of investment in this litigation makes sense? What can we count on and what is uncertain about the way this case could unfold in the court system? How sure are you of your predictions? How many different ways could this turn out? What could happen to make the case jump the track? How and when will I be able to influence what happens in the litigation? How could the possible twists, turns, and demands of this litigation affect my business, my income, my professional options, my personal circumstances, or my family?

Less often articulated is the important question: How does the choice to file this lawsuit or continue to defend it compare to other ways that time, money, talent, and energy could be spent?

This text is an unabashed and full-throated argument for lawyers to use decision tree analysis when considering such questions and their responses and when discussing them with clients.

It's fair for a reader to ask: Why is it worth my time to learn how to do basic decision tree analysis (in the first half this book) and then plow through the challenges of more nuanced applications (in the second half)? Why should I? What would be lost if I were to put the book back on a shelf, or to close the e-book?

While there are certainly other legitimate ways to "slow think" or systematically analyze a legal decision problem, I would argue that a decision tree's visual map-like presentation as well as its mathematical calculations can prove invaluable for lawyers and clients.

On the mathematical side, once a client comes to understand that legal outcomes are uncertain, that client may understandably want to know: "What would a betting man do?" What's a logical way to think through risk and value?" A client's decision about settling or investing resources may rest upon an assessment of: "When all is said and done, what are the overall chances that this or that will happen to me or my business? A decision tree's computational capabilities, using the lawyer's considered numerical estimates, offer a way to answer those questions.

In my view, however, the holy grail of decision tree analysis is not only or even most often found in a decision tree's mathematical yield-the cumulative valuation whose logic and method are explained in this text. Instead, a decision tree's power is found in clearer and just plain better client communication and thus a better lawyer-client relationship. And it fosters a lawyer's more rigorously derived and thus more justifiably confident legal strategy.

Even in a relatively simple case, building its decision tree structure—in graphic form, on paper or on screen—helps make future abstractions of risk and possible outcomes real, and it shows them in

sequential and logical order. Needless to say, building a decision tree is all the more helpful in a more complex case. The tree structure is the case map. It enables the client to see where the lawyer's discussion of motions, issues, liability theories, and damages ranges fit on that map, on the various paths to an outcome. A tour guide may describe a winding and treacherous road ahead, but the prospective rider will consider the journey more carefully if he sees it mapped on the terrain. Of course, it's helpful that a client can also show the map—the decision tree graphic of the case—to other important players, whether fellow executives or a concerned spouse.

As discussed further in Chapter 13, for the lawyer aspiring to a "fully informed client," each juncture or turn along the tree's branch paths is a natural invitation for client questions and discussion. As lawyers, many of us tend to talk quickly through complicated law and process; we wave with a broad stroke through legal theories or damages ranges. We may assume a client's familiarity with legal concepts and procedure, or that the client absorbed and remembered previous explanations. At minimum, building a decision tree for a client's case and discussing why it looks the way it does also forces us to slow down. The process facilitates slowing down to explain each risk and possibility and to wait for confirmation of client understanding before moving on to the next segment of the tree. Often, the exercise also helps the client create emotional distance from the case and the idea of settlement.

Yes, similar calculations can be done with a spreadsheet and other decision-making approaches can be useful. However, in my view, the full blown graphic decision tree is a singularly worthwhile exercise when the client's decision rests on understanding, acknowledging, and coming to terms with foreseeable risks and possible outcomes, tangible and intangible, as the case unfolds.

For a lawyer, very simple cases don't require a tree. We get that overall settlement value suffers in the face of a real threat of dismissal on an early dispositive motion, or a potentially valid motion to eliminate a fraud claim. However, for more complex cases, the process of building a tree enforces the discipline of considering more nuanced questions: Is summary judgment really just all or nothing in this case? Might different potential rulings on the motion impact evidentiary issues down the line? With a limited budget for discovery or experts, where should we invest dollars to maximize our client's chances of success or, at least, to maximize settlement value? What is the relationship between linked risks and outcomes?

There is simply no substitute for seeing the more complex and nuanced map of interplay between procedural questions, legal issues, and possible outcomes. Sometimes, mapping the case by building a tree facilitates a less-than-obvious decision such as where to file, when choice of law questions are complex and state laws and judicial or jury temperaments vary. The tree gives the lawyer a sense of the whole picture, of the ways different issues fit together in a complicated case. As litigation unfolds—an expert report proves disappointing, a fact witness is unassailable on deposition—adjustments to the tree's probabilities or sketched paths may be warranted. And seeing where the fortunate or unfortunate development fits helps us to avoid over-weighting or under-weighting its significance.

In sum, lawyers and clients benefit from rigorous, clear, and honest ways of reaching understanding, prediction, conclusions, and advice. And claims to analytical rigor require deliberate consideration of factual and procedural uncertainties and their probabilities, strategic choices and their impact, and a full range of potential outcomes and their likelihoods. A client should be able to see the case's possible pathways as they may be mapped in his lawyer's mind. There's great benefit to the lawyer's analysis be-

ing transparent and accessible for discussion with both the client and attorney colleagues working on the matter.

Skeptics of the method sometimes argue against the value of decision analysis in legal practice because it is built only upon imperfect numerical estimates of probabilities and damages. Yet, as will be discussed further, the more ubiquitous prose analysis has no greater claim of accuracy or perfection. Moreover, as illustrated in Chapter Ten, lawyers who foreswear formal decision tree analysis still inevitably estimate probabilities and outcomes when recommending settlement numbers or ranges to their clients, just subconsciously and not methodically. The words of Professor Howard Raiffa are wise and on point. In a post-retirement, reflective piece, "Decision Analysis: A Personal Account of How it Got Started and Evolved," Professor Raiffa wrote:

> *I'm reminded here of the complaint that it seems wrong to build a logical edifice on such imperfect input data, to which Jimmy Savage responded, "Better to construct a building on shifting sands than on a void." Here, the 'void' being no use of judgment inputs.* [1]

Arguments for incorporating decision analysis into legal practice are pointless unless the reader knows what it is and how to apply it. The method's fundamental premises, inviolable rules, gray areas, real limitations, and meaning must be understood. Truth be told, I hope that once lawyers fully understand decision analysis and how to use it, further argument will be unnecessary.

To that end, this text seeks to fully explain the method's logic and application for both simple and more complex legal cases, identify common mistakes and misuses, and provide "best practice" advice for basic and more subtle technical choices. It is also unambiguously aimed at more effective client communication through the use of decision trees. Why? Because, when done well, the method enables a lawyer to move intelligently from prose to a visual map of case analysis and predicted consequences, and facilitates that lawyer's discussion with a more fully informed client.

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[1] Raiffa, Howard, "Decision Analysis: A Personal Account of How I Got Started and Evolved," Operations Research 50, no. 1: 10 (2002).