

Full Article: TAKING THE GUESSWORK OUT OF CASE ASSESSMENT

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By Gardner Courson and Deborah Ausburn

It's a delicate topic. But today, more than ever, it merits serious discussion. And that is this: the peril of attorney overconfidence in assessing the legal and economic merits of a complex case.

It's a tricky issue, because the best attorneys exude confidence – to their clients, to a jury, to a judge. Confidence is a *good* thing. Who among us would want to be represented by a lawyer racked with self-doubt?

Lawyers, by nature, are zealous advocates for their clients. They play to win – they expect to win. The inherent conflict this presents can almost be understood in Greek terms: some of the things that makes a lawyer great – supreme confidence and fierce client loyalty – can also be serious flaws when it comes to the cold objective analysis required for case assessment.

Case in point

A recent study (Goodman-Delahunty, J., *et al.*, "Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes," 16 *Psychology, Public Policy, and Law* 133 2010) interviewed almost 500 lawyers, asking them to predict the outcome of some of their pending cases, and then compared their predictions to the actual results.

Fully 44% experienced worse outcomes than they predicted. In other words "far more lawyers were susceptible to the overconfidence bias than to the underconfidence bias."

Experienced attorneys were no more accurate than their novice counterparts.⁶ Indeed, the study's authors noted, "Many of the most overconfident lawyers will be the senior partners who may not typically obtain third-party review or feedback in the course of their practice."

In short, what's an asset in the courtroom can be a double-edged sword at the beginning of a case's lifecycle – the critical case assessment phase. It's at this key juncture where an attorney makes decisions whose repercussions ripple up and down a law firm, and throughout the entire life of the matter: should I take this case? Is it worth my time? What are my chances of prevailing? Will my arguments fly with a jury?

The stakes could hardly be higher

Take the wrong case and invaluable firm resources are squandered. Or take the right case but build an argument that won't fly with a jury. The result is the same: less than optimal settlements, outright losing, and an underserved the client.

Bottom line: Attorneys tend to be overconfident about their chances of success, and that overconfidence can seriously skew their evaluation of a case.

Now add this to the mix: the stakes today are higher than ever. Clients expect firms to run lean, mean and still win. Many corporate clients demand fixed fees for service. The pressures to take the right cases, and build the best arguments around them have never been higher.

An exciting new breed of litigation weapons that takes the guesswork out of assessment

The ability to realistically evaluate a case – then efficiently litigate it – has given rise to a new breed of products and tools. What they have in common is that they take the guesswork out of assessment, and free attorneys do what they do best – advocate, strategize, litigate, win. More important, they ensure that all that intelligence and intellectual capital is focused on the right cases, the right evidence, the right jury.

Let's look at three of the more interesting examples where data processes and expert analyses can help attorneys pick the right cases, removing gut feelings or client loyalty from the equation.

- Preview™™ Data Driven Litigation Assessment™™
- ACT Litigation Services
- LookingGlass Online Jury Research

**Preview™ Data-Driven Litigation Assessment
Early Triage for Complex Cases**

Perhaps the most fundamental factor in successful case assessment is obtaining an objective third-party opinion of a case's legal and economic merits. Programs such as California's Early Neutral Evaluation, for example, have resulted in a marked decrease in unrealistic expectations for participating attorneys.

Preview™ builds on the concept of expert 3rd party assistance. This business intelligence tool uses objective data and experienced attorneys to analyze the dynamics, risks, costs and most likely outcome of a lawsuit within a few months after notice of the suit.

The heart of the successful Preview™ model is its decision-tree analysis. Seasoned attorneys work with law firm and in-house counsel to quantify the determinative legal and factual issues, and place each of them into an “if-then” hierarchy.

The Preview™ and litigation teams then assign a realistic probability of winning and losing to each issue. Combining all of those probabilities with the range of possible jury verdicts enables the attorneys and the client to determine a value for the case.

The attorneys and clients also can use the decision-tree analysis to develop a master discovery plan. If, for example, changing the probabilities on a given issue does not significantly change the later calculations, then the litigation team

could determine that the issue does not warrant extensive discovery.

Conversely, the analysis may reveal that an issue has much greater importance than the attorneys realized earlier.

ACT Litigation Services:

Highly Targeted Data Mining Finds Key Evidence Fast

Most cases will come down to relatively few key witnesses and documents. The earlier that attorneys can find and identify that evidence, the earlier they can realistically assess the case. Effective litigation assessment requires that the trial team identify key witnesses and documents as soon as possible – something current discovery methods cannot deliver. Far from it – discovery can often take years or months to play out.

Through an interactive and iterative process, attorneys design targeted data mining searches that help determine which company personnel are likely to have key information, and which documents are likely to become critical. The attorneys then can interview those personnel and review the identified documents. Because the process is independent of discovery demands, it can be done much more quickly and efficiently than the later process required for certification of discovery responses.

Again, such a tool helps attorneys more realistically evaluate their chances of success or failure far earlier in the case's lifecycle – before time, resources and talent are invested.

LookingGlass, Online Jury Research.

After the discovery experts and attorneys identify key documents and personnel, on-line jury research can provide data about how a jury will view them. For complex, high profile and high-stakes cases, jury research has become an accepted part of the case preparation process. Although jury research remains a powerful tool in evaluating cases and in developing trial strategy, it can require a great deal of time and money to accomplish. *Online* jury research provides objective results quickly, securely and at less cost.

Online research allows larger sample sizes at substantial cost savings. Jurors, recruited from the venue, answer questionnaires, view presentations, and even deliberate. Because the cost of recruitment and compensation are so low, it is possible to conduct the research using large groups of jurors in the pertinent venue.

When jurors log on to the site, they answer a questionnaire that has been designed by the client or a jury consultant. They view videotaped presentations of the case and arguments that are prepared by the client. While viewing the videotapes, they use their computers to rate the presentations and the arguments in terms of persuasiveness. Following the presentations, they respond to questionnaires that measure their reactions to the presentations, whom they would find in favor of and why, and the damages, if any, that they would award.

Attorneys can use online research to: 1) test their case strengths and weaknesses; 2) find out which arguments work and which do not, through the real-time ratings of the video presentations; 3) see what evidence matters and what does not with open and closed-ended questions; and 4) determine the characteristics of the best and worst jurors for the case.

Law firms and corporate counsel are using into the benefits of data-driven products and tools to give them a genuine competitive advantage: taking the right cases, finding and leveraging the best evidence and witnesses, and seating the most sympathetic jury.

Debbie Ausburn is a member of Taylor English's Litigation and Dispute Resolution practice group. With two successful U.S. Supreme Court cases and dozens of jury trials under her belt, Ms. Ausburn brings an unusual depth of experience to the firm. [Full Bio](#)

Gardner Courson is a member of Taylor English's Litigation and Dispute Resolution group. Prior to joining Taylor English, Mr. Courson was the Managing Director, of both Litigation and Compliance practice groups at FSB Legal Counsel in Atlanta. Widely acknowledged as an expert in alternative fees for legal disputes and for applying process technology to streamline both individual and class action litigation, Mr. Courson has written and spoken frequently on these topics. [Full Bio](#)