The anatomy of risk

Helping your client evaluate swimming with the sharks

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Every lawyer knows the combination of skills to be deployed on behalf of a client. The basic "package" involves technical matters that an attorney must master in order to succeed: Substantive and procedural rules must be learned; evidence must be discovered, organized and presented; a case theme developed; persuasive advocacy crafted; and much, much more. A universe of intangibles looms in every case, and the words are familiar to every one of us who has represented a client: *perspective*, *tenacity*, *perseverance*. And of course the most intangible of intangibles, *believability*.

But one skill has always defied a concise description, and it is the analysis, and appreciation, of risk. It is one thing to understand the substantive rules of liability, but quite another to assess—and express—your client's chances of winning and the consequences of losing.

Even in cases where you understand the risk at hand, how in the world do you communicate the gravity of risk so the client appreciates it in real time, on real terms? To be sure, there are mechanical resources available. We have all read about (and some of us have used) computer programs to analyze the odds in a given case.

But what about talking to the client about risk? There is no software for that. It must be done eyeball to eyeball, and with great sensitivity and care.

In most injury cases, the client employs counsel on a contingent fee arrangement. No victory, no fee. From a client perspective, does that mean no risk? Of course not, for attorney's fees are only a fraction of the picture. Moreover, the very lawsuit that seeks compensation from an alleged wrong doer is itself but a part—albeit a major part—of the story. However the lawsuit resolves, the client still faces life diminished by his injury.

Cause for pause

I have handled many cases and arbitrated and mediated many more. In all of my travels across the landscape of litigation, I have come upon several risk models that can effectively focus a client's attention and at least require some pause in the contemplation of case strategy. A "cause for pause" is especially appropriate when a significant settlement offer is on the table.

Of course, the operative word is *significant*. In a case worth $20,000, a $15,000 offer is significant, as is a $750,000 offer in a million dollar case. For a moment, let's put numbers aside and just talk about risk—for it is risk that we evaluate just as much as money.

Imagine a swimming pool. Make it a large pool with a gold brick located at the bottom of the deep end. There are nine people already swimming, trying to get to that gold brick. You are about to become the tenth person to jump into the water and make the effort. But wait a second. There's a shark in the pool, and he's going to eat one of the swimmers. We know that. It is a given. We just don't know who the victim will be.

Do you still want to jump in there and go for the gold?

Shark-infested waters

If you're not sure, let's play with the example a bit. Suppose we know the shark will eat only one person, then die. Want to jump in? It's only a 10 percent risk—but the result is fatal if you're wrong.

You can vary the numbers. Increase the risk to five out of 10, which is 50 percent. Getting kind of scary, isn't it? The next time a client asks you to evaluate his chances, think of the swimming pool. It's an excellent tool to make the point.

Each of us can recall telling a client that no case is perfect; that no matter how confident you are, things happen when cases are tried—unexpected things—and results are unpredictable. The best case in the world can turn sour with just a few bad bounces. Every trial lawyer knows that the real evaluation of a case can't be made until the jury is empaneled and evidence has been presented.

Weighing liability and damages

Given these unknowns, we face risk every day, with every case, particularly when we attempt to resolve them before trial. To be sure, there are innumerable subtleties in the swimming pool analogy. For example, a case may involve huge damages, but very questionable liability. Or the opposite can be true; a case may be a virtual "lock" on liability, but very "iffy" on damages. And, as is the reality in most cases, *both* liability and damages may be uncertain.

That is why the evaluation of risk is so critical, and why it is vital for clients to appreciate these realities. The shark- infested swimming pool is a very effective tool, for it brings home the possibility of both success and disaster in the same breath. At the end of the day, it is perfectly acceptable for a client to take a risk, but only if the risk is fully explained and appreciated by the client.

Sitting down with a client to evaluate risk should not wait until a settlement offer is on the table. It should happen

during the first lawyer-client conference and continue throughout the case. Why? Because risk is always present, and it changes as the case evolves.

The next time you think you've got a pretty good case, think about the swimming pool. Think you've got a 70 percent shot? That's fine, but remember: the shark is going to eat three people. How do you know you (or your client) won't be one of them?

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