



▶ **Litigation Risk Analysis, Inc., Uses TreeAge Pro to Shed Light on Litigation Risks**

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Marc B. Victor, Esq.
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Profile

Marc B. Victor, founder of Litigation Risk Analysis, Inc., is credited with introducing decision tree analysis to the legal profession.

Victor, who holds both an MBA and a law degree from Stanford, first learned to use decision trees in a business school course in the ‘70s. During a subsequent summer, while working for a high-tech firm that was suing IBM for monopoly, he was asked to help the legal team arrive at a reasonable settlement figure. What amount should the firm be advised to settle for, and how could the company feel confident that the figure represented a good deal? Using his legal training and knowledge of decision analysis, Victor helped the firm and its outside counsel develop a decision tree – a novel approach that provided a rigorous quantitative assessment of the lawsuit’s value.

A few years later, Victor founded Litigation Risk Analysis, Inc. Since 1981, the company has conducted similar analyses on over 500 major cases and has trained over ten thousand lawyers to use the decision process now trademarked as Litigation Risk Analysis™.

Challenge

Lawyers have traditionally evaluated the risks of litigation strictly intuitively – relying on experience and gut feeling, but only a few rudimentary calculations – to arrive at recommendations that can affect the disposition of tens or hundreds of millions of dollars.

To make litigation decisions with greater confidence and authority, lawyers need both a reliable decision analysis methodology and an easy to use software package that enables them to model the uncertainties and complexities affecting their lawsuits, quantify their best guesses, calculate and analyze case value, and persuasively communicate the results to their clients.

Solution

Victor's Litigation Risk Analysis offers a rigorous method for analyzing the risks of pursuing alternative legal strategies. Using TreeAge Pro (formerly called "DATA") software to map litigation issues on decision trees and quantify their values, Litigation Risk Analysis, Inc. – now among TreeAge Software's Strategic Alliance Partners – transforms a haphazard process into a rigorous methodology that has tremendous benefits for both lawyers and their clients.

The first step is to identify the issues that will affect a lawsuit's final outcome – those that determine whether the defendant will be held liable and, if so, the dollar amount that the court will award the plaintiff and order the defendant to pay. A lawyer can begin by charting the pertinent causes of action and their elements and defenses using TreeAge Pro's "influence (dependency) diagram" tool to capture the key uncertainties and their interrelationships.

The next step is to convert the diagram into a decision tree showing all of the possible litigation scenarios and their consequences, and to assign probabilities to each uncertainty. Victor and his clients create their decision trees using TreeAge Pro software. "I'm not aware of any other software package that is being used widely or even moderately in the legal community," Victor said.

TreeAge Pro includes all of the features that are really important to lawyers and other decision makers, and is very easy to use, Victor said. "TreeAge Pro does everything I've ever wanted decision tree software to do, and is so user-friendly you almost don't need training," he said.

Law firms that offer Litigation Risk Analysis find that it is a great way to differentiate their services from other firms', Victor said. "They are glad to be in the forefront of law firms that offer this cutting edge capability."

"It is the kind of analysis that clients like to see," Victor added. Business clients – often trained in quantitative methods – typically feel more confident when they can see the fruits of a rigorous and logical process displayed on a decision tree.

In one case, a lawyer from a large corporation flew to England to present recommendations to the firm's UK division based on a Litigation Risk Analysis, Victor said. In the course of the presentation, the client noticed that the lawyer was frequently looking down at a printout, and finally asked him what he was looking at. After spending 15 minutes reviewing the lawyer's decision tree printout, the client accepted his recommendation on the spot, speeding a decision process that might otherwise have taken hours or more. "He read the decision tree, saw the backup lists of reasons explaining where the probabilities came from, and said, 'I agree. I understand. We don't need to sit here any longer,'" Victor said.

TreeAge Pro users can leverage a rich set of display features. Two basic but important graphical tools for lawyers are probability wheels and bar charts. Probability wheels provide a visual way of assessing uncertainties. Bar charts make it clear that the end result of a risk analysis is not a single dollar value, but is in fact a range. “Lawyers take a lot of comfort in that,” Victor said. “Having the software do calculations instantaneously and generate a bar chart of the potential awards and their relative likelihoods – and knowing there won’t be any calculation errors – is very useful.”

Clients – particularly those who aren’t comfortable playing the averages – also want to see the award range. On the other hand, a decision maker who can afford to play the averages may be more interested in the “expected value,” i.e., the average of what’s shown in the bar chart, which is also calculated by the software.

Even more important is that clients want to see not only the decision tree and the end numerical results, but how someone got there. “Just to put probabilities on a decision tree risks garbage in, garbage out,” Victor said. Using the “node comment” feature in TreeAge Pro, users can include what Victor calls “lists of reasons” at each uncertainty node. The feature helps them track the thought processes that determine the probabilities they assign to the various results, opening up a text-editing window where they can record their thinking on the evidence and arguments that will be presented by the plaintiff and defendant. “So if a client three months from now wants to know how we ended up assessing the probability of losing that issue at 75/25, you’ve got a record right there. We can point to the node, open it up and say ‘Here’s what we thought the other side would argue, and what we would argue.’ It’s a very useful feature,” Victor said.

TreeAge Pro’s analytical features, including sensitivity analysis, are also critical for legal decision analysis applications. One-way sensitivity analyses (as well as tornado diagrams) show how the case value would change if any one probability assessment or damage assumption were varied. Such analyses show whether the different opinions of two attorneys on a particular issue are sufficient to affect the decision to accept or reject the opponent’s latest settlement offer/demand. They also identify where additional legal and financial resources should be devoted in preparing for trial – i.e., for which issues a small change in the probability of success has the biggest impact on case value. Two-way sensitivity analysis is invaluable for helping lawyers arrive at economically sound “high-low” settlement proposals that protect both plaintiffs and defendants against their worst-case scenarios. (Under a high-low agreement, the parties still go to trial but with an agreement that caps the award at both ends. If the plaintiff loses completely or wins less than the low amount specified, the plaintiff will still get that amount. But if a jury comes back with more than the high amount specified in the agreement, the defendant’s obligation will be limited to that figure.) Victor can’t imagine exploring this type of settlement arrangement without the benefit of a decision tree and a two-way sensitivity analysis.

Over the years Victor has helped lawyers value pending or threatened lawsuits involving breach of contract, products liability, personal injury, medical malpractice, insurance coverage, toxic torts, environmental cleanup, employment discrimination, intellectual property, antitrust, securities fraud and other matters. In addition, Victor’s company has offered seminars and training in Litigation Risk Analysis – and use of the TreeAge Pro decision analysis software – for law firms such as Pillsbury Winthrop, Shook Hardy & Bacon, Wheeler Trigg & Kennedy, and Weightmans Solicitors, for insurance companies such as Zurich and CNA, and for legal departments at major corporations including ConocoPhillips, ChevronTexaco and Portland General Electric.

ConocoPhillips’s corporate litigation department, a team of about 40 lawyers and litigation assistants, uses Victor’s Litigation Risk Analysis for cases relating to every aspect of the global company’s

operation – from upstream production, to refining, to gasoline retail. Adopting the methodology has helped ConocoPhillips manage its litigation costs, said Tim Brown, senior counsel in the department.

“It tells us which issues are most important to focus on during the discovery phase, and where we should focus our expenses to most fully develop the case and maximize the probabilities of success,” Brown said. And using a method based on quantitative analysis – rather than relying solely on attorneys’ gut feelings and experience – makes the decision process more transparent and thus increases the team’s ability to communicate with its internal business clients, he said.

Victor continues to train the litigation department’s new hires in the use of both the Litigation Risk Analysis methodology and TreeAge Pro software. “But most of my time is not teaching concepts to lawyers or doing software training,” Victor said. “More often, I get hired to sit down with the lawyers responsible for a large case and to work through and develop the risk analysis with them. I work on maybe 20 large lawsuits a year. If they settle, which most of them do, they settle for either tens or hundreds of millions of dollars. In the last year, two cases settled at over a billion,” he said.

Risk analysis can also be an important tool in mediation. “I have been training mediators for at least 10 years, and have found Litigation Risk Analysis to be a valuable tool in getting parties to settle,” Victor said. So has the American College of Civil Trial Mediators, which presented Victor with its 2003 Education Award of Excellence.

Recently Victor was jointly retained by Microsoft and lead counsel for plaintiffs in the California antitrust class actions filed against Microsoft. His job was to help their mediator “make sure the mediation was firmly grounded upon a rigorous and objective analysis of the legal and evidentiary merits.” “The rigorous analytical process that was used ... is precisely what Judge Posner of the United States Court of Appeals for the Seventh Circuit and retired United States District Judge Infante of the Northern District of California (as well as many other judges) have prescribed for use in the settlement of class actions. (See *Reynolds v. Beneficial Finance Co.*, 2002 WL 655931 (7th Cir. April 23, 2002); ABTL Report, Fall 2002, Vol. 12, No. 1, Judicial Approval of Class Action Settlements by Hon. Edward Infante, Ret.)” The settlement agreement obligates Microsoft to provide the plaintiff class up to \$1.1 billion in vouchers.

Victor has written a simple manual called "Getting Started with TreeAge Pro" for Litigators to help lawyers get comfortable with the TreeAge software quickly. “Not a day goes by that I don’t use the software,” he said. “But I couldn’t recommend it if I couldn’t be comfortable with the way my clients would be treated by TreeAge Software. In 15 years, there hasn’t been a negative comment from anybody. It’s always been ‘I got the answer. They were very helpful. We’re all straightened out.’ In terms of customer support, which is critical because my reputation in part is also at stake, TreeAge is just A+. And they are exceptionally nice people.”

For more on Litigation Risk Analysis, visit the company’s web site at www.litigationrisk.com.