
EVEN MORE INTANGIBLE NON-MONETARY AND STILL IMPORTANT CONSEQUENCES

Even a committed and creative estimator must concede that some very real consequences cannot be measured in dollars. Money isn't everything! Fortunately, human beings are not narrow rational economic actors, solely motivated by desire to maximize financial gain. A healthy range of intangibles, of values measured in emotional satisfaction, relationships, pride, personal and professional narrative, comfort—all things that matter greatly to us—drive our decisions and are impacted by them. When a decision and chance (node) leads to opportunities, risks, losses, and gains, their intangible consequences may be no less important. Indeed, these may be much more important.

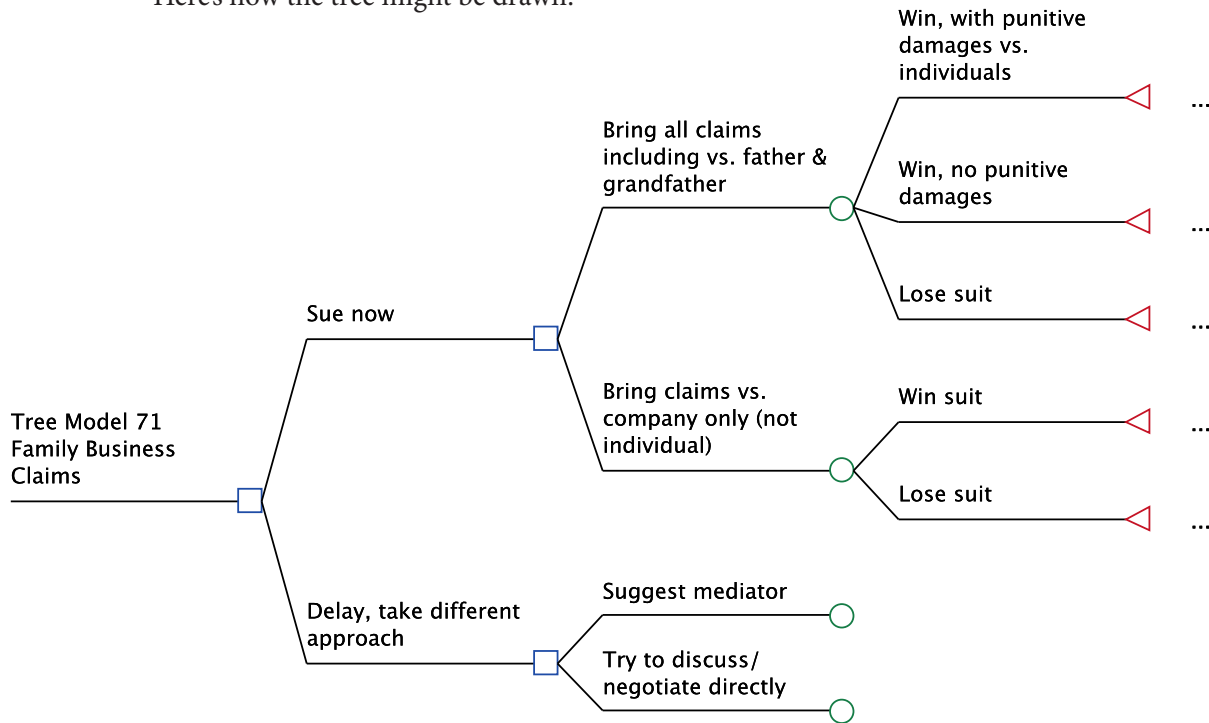
For the tree-builder, there are at least four ways to work with true intangibles.

- 1) The first is to ignore them when building the tree. The lawyer-as-counselor would still raise the question of intangible but real human consequences of a client decision: *How will the other employees feel? What will the community reaction be? What will be the professional or family impact?* The tree-builder lawyer would explain that the decision tree simply maps the path of the litigation and calculates a dollar EMV and various possible monetary outcomes. The decision tree informs consideration of what the litigation might mean for the client, his colleagues, family, patients, customer, etc., but it only measures risk and monetary outcomes—not the other important but terribly consequential non-financial impacts.
- 2) A second way to work with intangibles is to use the outcomes end of the tree to prompt questions about these non-monetary but important consequences. Though monetary value cannot be assigned, the lawyer tree-builder makes careful notation by writing these consequences to the far right of the tree, wherever they would occur.

Let's take a look at this second way of working with intangibles by considering a client who seeks to take legal action against his family-owned company with multiple locations. The suit would necessarily include allegations of misconduct against various relatives in the company's leadership position. Your client owns shares in the company. No doubt, it would be worth asking about the litigation's impact on Thanksgiving dinners, on aging family matriarchs or patriarchs, or relationships between his children and their cousins, and other extended family members. How often do they interact? This thought experiment might lead the client to set aside or delay filing his claim. Or it may limit those named as defendants. Perhaps there will be value in foregoing an allegation that his father was complicit, or that his grandfather engineered a conspiracy. Does a direct claim against the father or grandfather really strengthen the case so much as to be worth how he would feel about it? To me, this entire discussion would suggest

the wisdom of enormous efforts to reach a peaceful agreement within the family. The very act of filing suit may have such a poisonous impact as to render this impossible. That is another intangible value that may be worthy of weight and consideration.

Here's how the tree might be drawn.



The considerations listed in bold face below are examples of what might be written to the right of the tree's terminal nodes on a yellow pad, a large flip chart or white board, or more likely, multiple charts, boards, or other enlargements. Client reflection and discussion might generate the text written under each category, such as the text which follows.

Net \$ Impact/Outcome if suit is won with punitive damages

Recover your % share of company's lost income due to misconduct – \$?

Recover punitive damages, likely multiple of lost income

[After est. 2 years' time]

-Pay \$50,000 in attorneys' fees & costs

-lose share of parents'/grandparents' estates - wills change?

Net \$ Impact/Outcome if suit is won, no claims involving punitive damages

Recover your % share of company's lost income due to misconduct – \$? [After est. 2 years' time]

-Pay \$50,000 in attorneys' fees & costs

-lose share of parents'/grandparents estate, wills change?

Net \$ Impact/Outcome if suit is lost

- \$0 Recovered

-Pay \$50,000 in attorneys' fees & costs

-lose share of parents'/grandparents' estate - wills change?

Intangible Impacts of Filing Suit [any strategy, any outcome]

Family relationships break down further, including relationships with parent and grandparents

-no more family gatherings: holidays, weddings, graduations

-fractured/no interactions between your children & cousins

-discomfort at town/school events, any common friends

-town/neighbors/friends may take sides; social backlash

Intangible Impacts of Filing Claims against Father and/or Grandfather

-If file suit naming father and/or grandfather personally, asserting conspiracy claims, relationship break irreconcilable.

-If file suit without those claims, is the relationship break less likely to be irreconcilable?

Consequences of delaying, either negotiating, retaining a mediator

Control your own fate, not imposed

Save attorneys fees (though mediator may cost)

Process may preserve/mend relationship

At the end of each branch path, client and lawyer are invited to pause and consider: what would the monetary and emotional costs be if the case unfolds along this path? The thought exercise will make what is abstract and in the hypothetical future seem more real.

In our non-compete case from last chapter, similar questions would be asked: "What would it cost me if a judge were to grant the injunction so that I couldn't work in my industry for 18

months? Could we still cover the mortgage and the kids' activities? Is it worth incurring the lawyer's litigation costs? How will I feel if I make no change?" The client might predict that it's worth the risk of a brief injunction because his most valuable clients will return after that period. He might consider or pursue "Plan B"—a temporary employment interlude outside of the industry, or selling only non-competitive products at the new company—and estimate his earning capacity during the interlude. Even if the dollar estimates are far from certain, it's worthwhile to write them at the terminal nodes on the right side. And rolling back the tree with those numbers to learn both the EMV and the likelihood of the various possible outcomes may prove significant for the client's decision.

- 3) A third way is to make roughly estimated monetary adjustments to account for non-monetary consequences.¹ These can be broad or more specific.²

Thinking broadly, the decision-analyst could ask the client to consider what it would be worth to him, his family, or his organization not to go through this entire process. A way to frame the question is to ask: *Disregarding lawyer's fees and all of that, what if there were two ways to get to a final result. The first way, you and your employees [or you and your family] go through the litigation process, the depositions, documents, hearings and, say eighteen months from now, there's a trial, you and others testify, and then the jury says X—whatever they say. The second way, I could wave a wand and we'll just be faced with X—whatever it is. In other words, you can skip the entire process. What value would there be in NOT having to go through it all? How much would that be worth?*

Then, let's assume your decision tree begins with a decision node that has two branches, settle or litigate. If the "settle" branch ends with the other side's current offer (or the amount you think they would be willing to pay), the client's dollar valuation of NOT going through it could be added to the settlement payoff. Or, it could be subtracted from the end of the litigation payoffs (or added as a negative, for the defense side).

A note of caution: focusing on distaste for the process can be problematic, particularly when working with a defense client who already feels "extorted" by the process and its costs. There may be understandable resistance to your suggestion to focus on the unattractiveness of litigation as a reason to pay more.³

It may be perceived as fairer to focus on a particular real but intangible impact of a litigation decision. For example, imagine that your client owns a business that is a member of a closely-knit trade association. He has a potential breach of contract claim against another business in

¹ For a clear and careful presentation of a way to evaluate non-monetary consequences, see: Hammond, John S.; Keeney, Ralph L.; and Raiffa, Howard, *Smart Choices: A Practical Guide to Making Better Decisions* (2000).

² Professors Heavin and Keet reference the importance of assessing impact on the client and note that it is often missing from risk analysis tools. See Heavin, Heather and Keet, Michael "Litigation Risk Analysis: Using Rigorous Projections to Encourage and Inform Settlement," *Journal of Arbitration and Mediation* (forthcoming): 8.

³ While I have asked clients to estimate the value of "not going through it," I appreciate their resistance to that being used against them, in a way, by subtracting it from or adding it to negative payoffs. With all due respect for measurability bias and inclusive payoff numbers, this is one where it seems better just to record the number on the margin—as a plus for settlement or a negative for litigation. It's recorded on the page and becomes part of the discussion.

the organization. He believes the other business shorted the quality and quantity of goods delivered on the contract. This was very costly to your client who had to find quality replacements on a rush basis to fulfill his contract with a major customer. There have been some “friendly” discussions about the problem, but the other business owner has offered a “pittance” in settlement.

In addition to mapping the legal claims, probabilities, and hard costs, you may wish to discuss any subtle impact on other trade association members’ willingness to do business with him in the future. Can the client put a price on that—or on his desire to avoid it? Perhaps it cuts the other way, perhaps filing suit has the additional positive value of communicating a warning against shorting the quantity or quality of an order. This answer will likely depend on the offending trade member’s reputation within the association. Indeed, your client may wish to communicate proactively with other members to preempt negative rumors and backlash. Whatever your discussion yields, it may be possible for your client to put a positive or negative dollar value on the impact of his decision to take legal action. If so, that may be included at the appropriate outcome node. Or, as in the example above, it could at least be written on the tree page.

Technically, it is also possible to assign a dollar value to purely emotional or relationship-based consequences of a decision. I hereby admit that this option makes me uncomfortable, but I offer it for those less uncomfortable with translating the value of emotional or personal relationship values to dollars.⁴ After all, our legal system routinely asks juries to assign dollars to emotional distress, loss of consortium, and alienation of affection.

- 4) A fourth way to work with intangibles—utility analysis—involves assigning utility values to both financial and intangible factors, including attitudes toward risk must be referenced here. For some clients, and some highly consequential legal problems, it may be well worth the time and effort. It should also be noted that the initial steps in a utility analysis—assigning points, weights and preferences to different intangible factors—can be of great assistance to a client thinking through a difficult decision. Its value does not only derive from the capacity to plug utility values into a decision tree.

However, because I suspect only the smallest minority of lawyers or clients would ever take the time to do a full utility analysis, this text does not currently include a section on how to do one. (That may someday appear on the riskandrigor.com website on topics related to this book, currently in the planning stages.) It is admittedly technical and somewhat time consuming. A description of this method can be found in a number of the reference sources included in this text’s bibliography.⁵

⁴ See the option of converting both money and intangibles to utility values, discussed briefly below this section.

⁵ A less technical explanation can be found in Hammond, Keeney, and Raiffa, Howard, *Smart Choices* (2002): 131-153. For more in-depth discussion of utility analysis among the references contained in this book’s bibliography, the reader may consult the original Raiffa, Howard, *Decision Analysis: Introductory Lectures on Choices under Uncertainty* (1968); or Clemen, Robert T. *Making Hard Decisions* (1996): 465-489.

About Risk, the Ever Present and Entirely Real Intangible

No doubt, decision tree analysis prompts the lawyer and client to thoughtfully consider and discuss risk. That is one of the method's primary values for client counseling and decision-making. As referenced in the "how to's" section, the distribution of possible outcomes in two cases (even with the same EMV) will suggest different decisions, depending on the client's aversion to or tolerance for risk. In simplest terms, one case's mathematical roll back to a \$100,000 EMV may flow from possible outcomes that range between \$125,000 and \$175,000. (This assumes a 66% (2/3) chance of a liability finding and no preliminary dispositive motions). Another case's EMV may flow from a 40% chance of liability, but damages that have a 50% chance of clustering right around \$375,000 and a 50% chance of clustering right around \$125,000. If you look at the distribution of outcomes he would have an overall 20% chance of a verdict (plus costs) of \$375,000, a 20% chance at \$125,000, and a 60% chance of \$0 dollars in liability.⁶

Different business clients will respond differently to these case scenarios. One client might note that, in the first case, he's probably going to lose so he might as well make a substantial offer. Or, if \$125,000—\$175,000 will not severely impact his business, he may decide it's worth rolling the dice. The same client might be greatly concerned about even a 20% chance of a \$375,000 verdict: that might put him into bankruptcy, lead to lay-offs, eliminate a credit line, or preclude a major investment to which he is largely committed. The client might also acknowledge his general discomfort with risk.

The plaintiff in either case may also be strongly impacted by the distribution of risk. Some plaintiffs will be uncomfortable with even a 1/3 risk of \$0 recovery (and still paying \$25,000 in fees and costs). Others would take the 2/3 bet for \$100,000, even with \$25,000 in fees. But they would not be pleased to buy a \$25,000 ticket with a 60% chance of \$0, a 20% chance of \$125,000 and a 20% chance of \$375,000. A plaintiff may be risk averse because he needs to recover a minimum amount to keep his business afloat or to pay off debts. Dollars over that are great, but not worth the risk of \$0.

The reader will not be surprised that those deep into decision analysis offer quantitative ways to account for risk aversion and risk tolerance. Their suggestions include deriving risk utilities by considering the difference in value between a certain dollar amount obtainable without risk, and the same dollar amount with risk.⁷ While beyond the scope of this text, it is possible to develop a general risk profile or curve for a particular client, and use it for that client's decision analysis.⁸

In my practice as a neutral mediator using decision tree analysis, I choose not to quantitatively account for risk in either of these ways for two reasons. The first is prescriptive; the other is practical. First, I prescribe against quantitative adjustment to reflect risk aversion (or preference) on the tree because, in my limited experience observing this practice, it rather ironically tends to lead us to double count risk. Here is how this can happen: assume a tree built for the plaintiff, in which payoff numbers

⁶ Note that, in an attempt to simplify, this example violates the requirement of including costs. Assume \$25,000 in attorneys' fees (and other costs). They would raise the EMV to \$125,000 in both cases, as the fees would be the same no matter what the outcome.

⁷ See Hammond, Keeney, and Raiffa, *Smart Choices* (2002), for a clear and simple discussion of utility analysis for outcomes that are intangible, a mix of quantifiable or tangible and intangible, and considering different levels of risk as an element of utility.

⁸ Once again, on the topic of deriving a client's risk profile, readers may consult the original Raiffa, Howard, *Decision Analysis: Introductory Lectures on Choices under Uncertainty* (1968), or Clemen, Robert T., *Making Hard Decisions* (1996): 465-489.

have already been reduced to adjust for their associated risk. Then the tree is rolled back to reflect and EMV and a range of outcomes. Still, the plaintiff tends to look at the tree, see those numbers, and then think, “but it’s risky,” and adjust down again. The strict decision analyst might respond by noting: “Yes, it is, and we’ve already counted that on the tree.” Somehow, that idea doesn’t feel real, but the actual risk still does. Hence, the impulse to discount for risk yet again.

The second reason I intentionally neglect the quantification of risk utilities or attitudes before rolling back the tree is practical. The client’s eyes, and perhaps mine, would no doubt glaze over. “What again are we exactly including in the pay-off numbers again? Oh yes, estimated damages awards, attorney’s fees, expert costs, monetized value of the employees time... and now what else?” That’s where I draw my line: short of quantifying and accounting for a client’s attitude toward risk *within* the tree and its mathematical analysis.⁹

Make no mistake: it is critically important for the client to think deeply about risk; how he understands it; how he will feel about it over time; how he would or would not be able to manage extreme but possible results; and what steps he could take to reduce risks or minimize their impact. Reckoning with risk is one of the benefits of using decision tree analysis with a client. However, my practice is not to inject it into the tree, but to step back from the tree and let the client consider the tree’s reflection of risks ahead. The goal is to strengthen the client’s ability to make a wise decision in light of the way he feels about these risks.

⁹ With some exceptions, in many circumstances I also draw it after including estimated costs and fees, but before some of the other intangible factors, and sometimes before other categories referenced in the earlier discussion of non-monetary consequences. It depends on client patience, the overall complexity of the tree to that point, and the desire to highlight some of these elements rather than fold them in.

