

Risky Business: A Toolbox for Managing Litigation Interests and Risks

CPR Annual Meeting
St. Petersburg, Florida
February 27, 2020

Experts for This Program

- **John Lande**, Isidor Loeb Prof. Emeritus, Univ. of Missouri
- **Heather Heavin**, Assoc. Dean & Assoc. Prof., Univ. of Saskatchewan
- **Michaela Keet**, Prof., Univ. of Saskatchewan
- **Duncan MacKay**, Deputy GC & COO, Eversource Energy
- **Conna Weiner**, Mediator, Arbitrator, Special Master
- **You**

Today's Agenda

- **Survey audience about your use of litigation interest and risk assessment (LIRA) techniques**
- **Simple LIRA framework**
- **Sophisticated tools**
- **Experienced practitioners' perspectives**
- **Audience discussion**

Stone Soup Process Today

- We will use Stone Soup research process to disseminate knowledge from this program
- Notetaker will take notes without names
- Summary will be published in *Alternatives*
- I will post summary on Indisputably blog – including this powerpoint
- If you don't want your statements to be included, let notetaker know
- Questions?

Audience Survey

- We will ask questions about your background and use of LIRA techniques.
- You will use clickers to answer questions.
- There should be clickers on everyone's table.
Does anyone need a clicker?
- Your responses will be anonymous and immediately displayed in aggregate.
- If a question isn't applicable, please skip it.

Audience Survey

- You will have 15 seconds to answer each question and you will see a countdown clock on the screen.
- To get the best information we can, it's important that you answer candidly.
- Any questions before we begin?

Informed Consent

You are being invited to participate in a research study that involves participating in an anonymous survey. Participation is voluntary. If you have questions about the research, please contact John Lande, lande@missouri.edu or 573-234-1745.

Who Are You?

Let's get a sense of who's in the audience.

Are you:

- 1. an inside counsel**
- 2. a lawyer in a law firm**
- 3. an executive in a law firm (even if you have a law degree)**
- 4. a private neutral**
- 5. other**

Inside Counsel

If you are an inside counsel, are you:

- 1. the general counsel**
- 2. other inside counsel**

Lawyers in Law Firms

If you are a lawyer in a law firm, are you:

- 1. a partner**
- 2. an associate**
- 3. other lawyer**

Private Neutrals

If you are a private neutral, are most of your cases:

- 1. mediations**
- 2. arbitrations**
- 3. about half of each**
- 4. other**

Procedures in Your Cases

- **We want to learn about the actual use of various procedures in your cases. Please answer these questions about the degree to which your company or firm has actually used these decision-making processes or tools.**
- **If you don't know or the question is not applicable, please skip the question.**

Systematic Assessment

When your company or law firm assesses litigation risk in your cases, how often is the process a systematic, formal assessment process:

- 1. in most of our cases**
- 2. in about half of our cases**
- 3. in a substantial proportion of cases, but less than half of our cases**
- 4. in almost none of our cases**

Early Case Assessment

- **The next question is about how often your company or law firm uses early case assessments (ECA).**
- **For this purpose, an ECA involves basic factual investigation, legal analysis, estimation of likely court outcome, and estimation of the costs of going all the way to trial.**

Frequency of ECA

In the cases that your company or law firm litigates, which best describes its use of ECAs?

- 1. we routinely use ECAs in most types of cases**
- 2. we routinely use ECAs in certain categories of cases (e.g., amount at stake, subject matter, reputational interest)**
- 3. we often use ECAs, on a case-by-case basis**
- 4. we rarely use ECAs**

Valuing Intangible Costs

When you do ECAs, how often do you assign a monetary value to intangible costs such as harm to internal operations, damage to reputation or relationships, diversion of time from business activities, loss of opportunities, etc.?

We routinely assign monetary values:

- 1. in most of our ECAs**
- 2. in about half of our ECAs**
- 3. in a substantial proportion of ECAs, but less than half of our ECAs**
- 4. in almost none of our ECAs**

Formal Decision Trees

In what proportion of your cases do you use formal decision trees?

- 1. in most of our cases**
- 2. in about half of our cases**
- 3. in a substantial proportion of ECAs, but less than half of our cases**
- 4. in almost none of our cases**

Technological Tools

In what proportion of your cases do you use other technological tools such as databases of comparable cases or statistical models (e.g., Monte Carlo simulations)?

- 1. in most of our cases**
- 2. in about half of our cases**
- 3. in a substantial proportion of ECAs, but less than half of our cases**
- 4. in almost none of our cases**

Internal Database

Does your company or firm maintain an internal database of dispute characteristics, process used, and/or the outcomes?

- 1. yes**
- 2. no**

Pre-Suit Mediation

In what proportion of your cases do you mediate before an arbitration or lawsuit is filed?

- 1. in most of our cases**
- 2. in about half of our cases**
- 3. in a substantial proportion of ECAs, but less than half of our cases**
- 4. in almost none of our cases**

Litigation Interest and Risk Assessment

A Methodological Approach
to Early Case Assessment
in Litigation and Settlement

Smith vs. Jones

- 5 yrs ago, Mary entered a construction zone as a member of the public, and suffered head injury when hit by a rock in a construction blast.
- 5 years into litigation, discovery of documents is complete, and expert medical and engineering reports have been shared.
- Claim is for **\$1.5 million**.
- Defendant has just made a without prejudice offer of **\$250,000**.
- Assume **you are Mary**. On what basis would you decide whether to accept?

Getting it wrong?

- Randall Kiser, *Beyond Right and Wrong*:
 - 61% plaintiffs, 24% defendants rejected settlement offers to do worse at trial
 - Plaintiff error: \$43,100, Defendant error: \$1,140,000

Understanding Decision-making

- *Patterns of Behaviour*

- Anchoring
- Framing and Loss Aversion

- *Cognitive Biases and Heuristics*

- Overconfidence/Self-serving/Confirmation Bias
- Acceptability Heuristic

What language do you use...?

Very likely

Quite unlikely

Some possibility

Very good possibility

Reasonably likely

Fighting chance

Almost a sure thing

REMOTE POSSIBILITY

Mary Smith

Your lawyer has told you that there are three issues in the claim:

1. Proving Standard of Care

- Industry standard – how many and what type of blast mats were required?
- *“This could go either way.”*

2. Contributory negligence

- There were signs, warning public not to enter, but some question as to placement and visibility of signs

3. Damages

- Most of claim is for future loss of income. You have a pre-existing back injury, and have had difficulty committing to prescribed treatment. = **Causation of loss (pre-existing injury and mitigation)**

Step 1: Understand and Calculate Risks on Liability

Break each cause of action into its elements.

Assign probability: consider law and evidence (proof).

Assess overall probability of success: COMPOUND

Go through the same process with respect to DEFENSES.

Step 2: Project Damages/Remedy

Break it down into heads/types of damage.

Assign a most likely outcome (considering probability) for quantum on each. Consider law and evidence (proof).

Add up #2 for each head of damage.

Step 3: Assess – multiply steps 1 and 2

Liability projection x Damage projection = Risk-Adjusted Outcome

Mary Smith

Step 1: Liability and Defenses

- Standard of care 50%
- Contributory negligence 40% chance of 25%

Step 2: Projected Damages

- Damages
 - Past (pecuniary and non) – 80% of \$500,000 (some evidentiary problems)
 - Future (loss of income) – 40% of \$1,000,000 (60% chance she will be found to be a crumbling-skull plaintiff, rather than thin-skull plaintiff)

$$\$400,000 + \$400,000 = \$800,000$$

Mary Smith

Step 3:

- $\$800,000 \times 50\% = \$400,000$ less Contributory negligence ($40\% \times 25\% = 10\%$ reduction)

Weighted
Average for CN

- OR, use a decision tree ...
- $40\% \times .75 (\$300,000) = \$120,000$
- $60\% \times 1.0 (\$400,000) = \$240,000$

Projected
Outcome

- $\$360,000$

Mary Smith

- **Step 4: Process Costs**
- Consider the Direct (Legal) Costs of Litigation
- Consider and evaluate the Impacts of the Litigation on Mary

Aspects of the litigation process that cause stress...

- Adversarial nature of the Process
- Delay
 - Postponements, adjournments
- Intensity
 - Moments of 'too much, too fast'
 - Accelerated processes

Aspects of the litigation process that cause stress...

- Meetings with lawyers, other professionals
 - Interviews
- Examinations/depositions
- Testifying

Identify and Value Costs:

- Individual:**
- financial goals and stability
 - career, education, 'productive work'
 - relationships, family, community
 - health and wellness
 - previous litigation experience
- Organizational:**
- opportunity costs
 - reputational/brand costs
 - psychological health of organization

Mary Smith

- Step 4: Process costs
- Time/delay and present value of the money (opportunity costs)
- Psychological and health impact of being involved in the conflict
- Direct legal costs

\$360,000 – process costs = Overall Risk-Adjusted value of the case

Sophisticated Tools

- **Systematic Approaches to identifying and weighing risks**
- **Other professional disciplines (Business, Engineering etc.) predicting in the future**
- **Checklists: helpful for indentifying, tracking and managing tasks, but lack methodologies for estimating the quantitative probabilities of various contingencies/options**

Decision Analysis – Decision Trees

- Three stage process:
 1. Identify all significant uncertainties in the legal case that may affect the finding of liability or damages
 2. Determine all the reasons for a favourable and unfavourable finding for each uncertainty
 3. Estimate the probability of each outcome for each identified uncertainty

TreeAge Software, Inc.

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Mediation Strategies: A Lawyer's

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Legal Analysts

Create and analyze a model to quantitatively analyze a case so you can best advise your clients before proceeding to trial. Attorneys and clients need to assess all scenarios with respect to verdicts and damages in order to plan for settlement negotiations and trial strategy.



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Model the Case

Create a model to mirror the flow of a case from settlement to points to be made at trial to damage estimates, including all possible outcomes. This process helps the client and legal team consider all the legal points that could lead to winning or losing the case.

Analyze the Model

Quantitative analysis of the case, considering all possible scenarios and damage awards, provides an overall expected value for the case. Graphically study the range of scenarios to consider the overall risk of proceeding





2:08 PM
2/10/2020

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LITIGATION RISK ANALYSIS™

Overview Training Consulting Full Software Software Models

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Countermeasure Legal

Simulate, Predict, Execute

Generate better strategies and more accurate predictions so that you can win better litigation results.

Data Analytics

- using data from legal sources (databases) to provided detailed statistical information about past events such as courtroom outcomes and/or settlements
- Popular products on the market in the U.S. and other large legal markets

Litigation Analytics - WestLaw Edge

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legal.thomsonreuters.com/en/products/westlaw/edge/litigation-analytics

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LexisNexis (Lexis Advance and Lex Machina)

The screenshot shows a web browser window with the LexisNexis website. The browser's address bar shows the URL lexisnexis.com/en-us/products/lexis-analytics.page. The website's navigation bar includes links for PRODUCTS, SOLUTIONS FOR YOU, SUPPORT, and STORE, along with a red button for PRODUCT SIGN-IN. The main content area features the heading "Experience leading legal analytics" and a paragraph stating that LexisNexis is the leader in legal analytics. Below this, three product cards are displayed: Lexis Advance, Context, and Lex Machina, each with a brief description of its capabilities. The Lexis Advance card mentions applying artificial intelligence and machine-learning technology. The Context card mentions presenting the best case using influential language from case law. The Lex Machina card mentions anticipating behaviors and outcomes to craft winning strategies. The website is viewed on a Windows 10 desktop, with the taskbar showing various application icons and the system clock indicating 2:31 PM on 2/10/2020.

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lexisnexis.com/en-us/products/lexis-analytics.page

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Experience leading legal analytics

LexisNexis® is the leader in legal analytics. Through rigorous processes, relentlessly improved data and leading-edge technology, we help legal professionals gain meaningful insights, craft winning strategies, improve client service and minimize risk.

Lexis Advance®

Apply artificial intelligence, machine-learning and visualization technology to the abundance of data you've come to rely on.

Context

Present your best case using influential language from case law with Context, new from the integration of Ravel™ Law and Lexis Advance® technologies.

Lex Machina®

Anticipate behaviors and outcomes to craft winning strategies with quantitative data on case timing, resolutions and damages.

TOP

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Bloomberg Law – Litigation Intelligence Centre

The screenshot shows a web browser window with the URL `help.bloomberglaw.com/docs/blh-030-litigation-intelligence-center.html`. The page is titled "Litigation Intelligence Center" and is part of the "Product Help & Walkthrough" section. A left sidebar lists navigation options: Home, Getting Started, What's New, What's New Archive, Search & Browse, Specialized Searches, and Litigation Intelligence Center (which is highlighted). Under "Litigation Intelligence Center", there are links to Litigation Analytics, Company Analytics, Law Firm Analytics, Judge Analytics, Attorney Analytics, BCITE, Copy with Citation, and Points of Law. The main content area features a "Search Court Opinions" section with a description: "Find relevant cases by keyword and use Bloomberg Law's BCITE to check the status of a case. For more search options, use our [Court Opinions Advanced Search](#)." Below this is a search interface with a text input field labeled "Enter keywords", a "NARROW BY STATE" dropdown menu showing "Ex: Delaware", and a green "Search" button. The browser's address bar and tabs are visible at the top, and the Windows taskbar is at the bottom.

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Litigation Intelligence Center

Search Court Opinions

Find relevant cases by keyword and use Bloomberg Law's **BCITE** to check the status of a case. For more search options, use our [Court Opinions Advanced Search](#).

Search Court Opinions

Find relevant cases by keyword and use **Bloomberg Law's BCite** to check the status of a case. For more search options, use our [Court Opinions Advanced Search](#).

NARROW BY STATE

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WIN RATE: 48%	WIN RATE: 72%	WIN RATE: 87%	WIN RATE: 32%	WIN RATE: 60%
HOURLY RATE: \$350	HOURLY RATE: \$275	HOURLY RATE: \$250	HOURLY RATE: \$400	HOURLY RATE: \$380
AVE. CASE LENGTH: 460 HOURS	AVE. CASE LENGTH: 360 HOURS	AVE. CASE LENGTH: 360 HOURS	AVE. CASE LENGTH: 360 HOURS	AVE. CASE LENGTH: 360 HOURS

2:35 PM
2/10/2020

Loom Analytics

The screenshot shows a web browser window with the Loom Analytics website. The browser's address bar shows 'loomanalytics.com'. The website has a navigation bar with links to STRUCTURA, COURT ANALYTICS, ABOUT US, BLOG, CONTACT, and a highlighted HOME button. The main content area features two product sections. The first section, 'Structura', includes a red network diagram icon and a paragraph describing it as a web-based analytics and data management platform. The second section, 'Court Analytics', includes a red icon of a classical building and a paragraph describing it as a data analytics platform for Canadian case law. The Windows taskbar at the bottom shows the time as 2:37 PM on 2/10/2020.


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Loom Analytics

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Structura

Structura is a web-based analytics and data management platform that provides an intuitive, customisable environment that consolidates and makes usable *all of a company's data*. With easy-to-use statistical modelling capabilities, any data available to Structura can be plugged into a predictive model, allowing users to mitigate risk and anticipate outcomes without a data science team.



Court Analytics

Court Analytics is Loom's data analytics platform for Canadian case law. Our legal team carefully reads through case law, then classifies and encodes it, allowing users to look up case data by specific desired parameters such as parties, decision practice areas, the judge or master presiding over the decision, and more.

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TX State Travis Matpractice \$ 1,800,000

Amount \$ 2,700,000
Date 04/22/2013
Time 2pm 48
Revert Update Offer

Date	Time	Amount
4/22/2013	11:36 AM	\$500,000
4/22/2013	12:12 PM	\$3,800,000
4/22/2013	12:43 PM	\$600,000
4/22/2013	12:58 PM	\$3,700,000
4/22/2013	1:09 PM	\$700,000
4/22/2013	1:27 PM	\$3,500,000
4/22/2013	1:44 PM	\$1,000,000
4/22/2013	2:07 PM	\$3,100,000
4/22/2013	2:26 PM	\$1,200,000
4/22/2013	2:58 PM	\$1,250,000
4/22/2013	3:09 PM	\$1,250,000

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Model-based Analytics

- Using mathematical algorithms to generate future predictions
- -Monte Carlo simulations
- - Bayesian Analysis

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	Year 1	Year 2	Year 3	Year 4	Year 5
Cost/Package	\$5.00	\$5.00	\$5.00	\$5.00	\$5.00
# Sold	10,000	10,000	10,000	10,000	10,000
Gross Revenues	\$50,000.00	\$50,000.00	\$50,000.00	\$50,000.00	\$50,000.00
Cost of Revenues	\$5,000.00	\$5,000.00	\$5,000.00	\$5,000.00	\$5,000.00
Gross Income	\$45,000.00	\$45,000.00	\$45,000.00	\$45,000.00	\$45,000.00
Operating Costs	\$10,000.00	\$10,000.00	\$10,000.00	\$10,000.00	\$10,000.00
Net Income before Taxes	\$35,000.00	\$35,000.00	\$35,000.00	\$35,000.00	\$35,000.00
Taxes	\$7,000.00	\$7,000.00	\$7,000.00	\$7,000.00	\$7,000.00
Initial Investment	\$100,000.00				
Net Income	\$28,000.00	\$28,000.00	\$28,000.00	\$28,000.00	\$28,000.00

NPV: \$100,000.00

Forecast NPV

NPV Histogram

Frequency

Probability

NPV

2,000

Define Assumption Cell C3

Normal Distribution

Mean: 100,000.00

Std. Dev.: 10,000.00

80%

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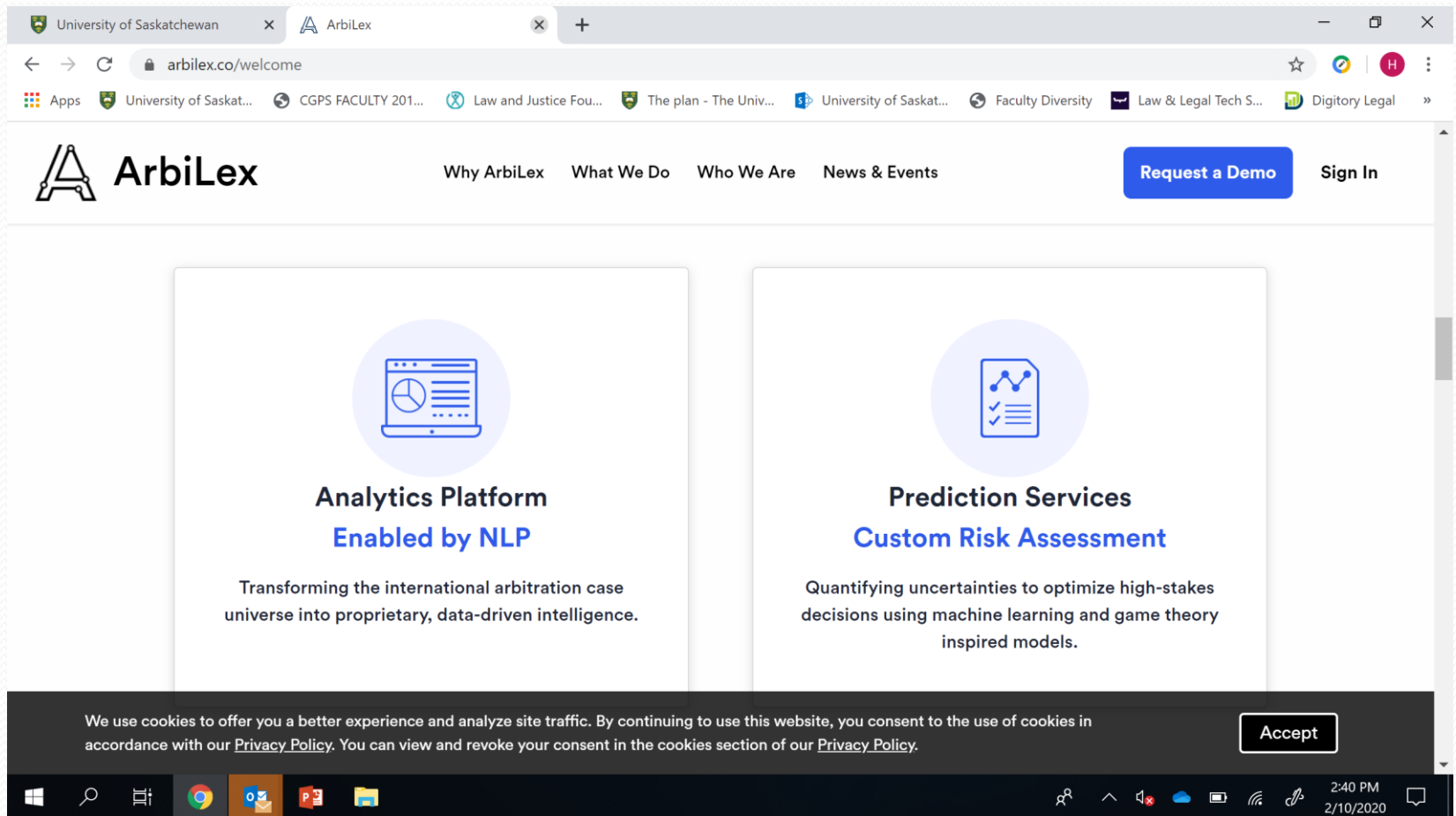
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Considerations for Using Tools

- Client communication and expectations
- Inclusion of other factors in to the analysis
 - Psychological and impact costs to clients
 - Business and Organizational costs
- Sufficient understanding of the data sets or the methodology that is being used by these products
 - Reliance on historic data?
 - Confidence in the modelling?

LIRA in practice...



Additional Resources

