

EFFECTIVE RISK ASSESSMENT - TOWARDS INFORMED CONSENT

Presented to Continuing Legal Education Seminar

Lawyer as Problem Solver

May 26, 2006

Patricia Lane LL.B; C. Med.

EFFECTIVE RISK ASSESSMENT -- TOWARDS INFORMED CONSENT

I. Introduction

“Lawyer as problem solver” includes assisting our clients to do effective risk management in understanding choices and options. If we are to be really helpful, leaving our clients satisfied that their needs were met, and that their engagement with us, and the legal systems in which we operate represented value for money spent, we have to find ways to communicate information about both probable and possible impacts of the various options that exist.

Studies indicate that satisfaction rates with litigation system are low. Approximately 12% of those who end their negotiations in court say they are satisfied, or somewhat satisfied, by the end of the process. Put another way, 25% of those who win their cases are happy about their experiences. Naturally the 50% who lost are unhappy and the remaining 25% represent winners who were dissatisfied even though they “won”. The vast majority of our clients routinely complain that win, lose or draw, they did not get what they expected. They were unprepared for the consequences. One way of understanding this is to conclude that a large part of this dissatisfaction stems from ineffective risk management. Clients entered into a process that delivered different and more disappointing outcomes than they imagined.

In the medical world, there is a risk in all medical procedures. As a result, a requirement has emerged that practioners ensure their patients give informed consent before they can be taken to have agreed to undergo a procedure or take a drug. The low satisfaction rate surveys of our clients tell us that to the extent that they consented, their consent was uninformed.

II. What are the elements of informed consent?

There are compelling reasons to develop standards for risk assessment in legal practice that are as rigorous as those in use in medical circles. One of the most helpful definitions I found of informed consent comes from the medical school at the University of Washington:

“The most important goal of informed consent is that the patient have an opportunity to be an informed participant in his health care decisions. It is generally accepted that complete informed consent includes a discussion of the following elements:

- the nature of the decision/procedure
- reasonable alternatives to the proposed intervention
- the relevant risks, benefits, and uncertainties related to each alternative
- assessment of patient understanding
- the acceptance of the intervention by the patient

“In order for the patient's consent to be valid, he must be considered competent to make the decision at hand and his consent must be voluntary. It is easy for coercive situations to arise in medicine. Patients often feel powerless and vulnerable. To encourage voluntariness, the physician can make clear to the patient that he is participating in a decision, not merely signing a form. With this understanding, the informed consent process should be seen as an invitation to him to participate in his health care decisions. The physician is also generally obligated to provide a recommendation and share her reasoning process with the patient. Comprehension on the part of the patient is equally as important as the information provided. Consequently, the discussion should be carried on in layperson's terms and the patient's understanding should be assessed along the way.”

The emphasis on patient involvement is noteworthy. Client participation is commonly cited as a central reason for high satisfaction rates in such forms of negotiation as mediation. In stark contrast with the litigation system, satisfaction rates for mediation are routinely high – between 65-85% or higher, and always regardless of outcome. When interviewed about the reasons, clients almost always comment on the sense of control they felt in the process and on the importance to them of their own participation. Mediation offers more client participation in solution creation, and therefore in predicting outcomes and other forms of risk management, than does the usual trial process.

My practice is now restricted to mediation and so most of the stories in this paper are from that milieu. Since only a very small part of my practice occurs without lawyers involved, I will talk about my experience of lawyers as problem solvers in this forum. I believe that, since mediation is assisted negotiation, there are many lessons to be applied from that forum into all kinds of negotiation. The focus of this paper is to ask “What can we do to increase the degree to which our clients assess risk effectively in all forms of negotiation, including the litigation option, and so have more understanding of outcomes and greater satisfaction?” In other words, what can we do to promote more informed consent?

III. What is effective risk assessment and management?

- *Risk assessment and management* is the legal equivalent to informed consent. It means assessing all likely, and less likely but still possible, impacts, and deciding on the path most likely to achieve the desired result with the fewest number of unanticipated and therefore unplanned for, consequences.
- “*Effective*” means that it works. That is, a client makes a conscious decision to choose one option over another, based on the best available information about the impact of the various options.
- “*Conscious decision*” means not only that the information which is important and relevant has been provided to the client but that the information has been used by the client to make the decision.

- “*Important and relevant*” means that all the client’s interests have been considered. These include economic, social, personal, emotional, mental and physical health, and those of the community to which the client feels accountable.

To help our clients feel satisfied with the way we assist them to solve their problems, it is crucial that lawyers understand:

- *The legal uncertainties.* This seems obvious. What is perhaps less obvious is that our ability to consider, weigh, and communicate, uncertainty, is affected by a myriad of human tendencies which exist in all of us and in our clients which can blot out the utility of the legal research we so carefully carry out. Later in the paper I will explore some of the most common.
- *The broadest possible spectrum of consequences* to the client of each avenue of uncertainty. If we are to be really helpful we have to abandon the idea that we are only there to give legal advice and accept that our clients lives, loves, communities of influence, pasts and futures all matter. In this way we help clients assess and manage the broadest spectrum of risk. It means ending our profession’s often-stated reluctance to converse with our clients about anything other than legal or financial risk. I will spend some time on barriers we erect to assisting our clients to manage the full spectrum of risks they face.
- *How best to communicate* risks and risk management strategy. In my experience, this last point is so poorly understood that it deserves to be expanded upon first.

IV. Communication as a risk

When we communicate, we hope our message will in fact be received and used in the way we intend.

Most often we have our clients in our offices and, hopefully after listening to them, we talk to them. We deliver verbal advice. Even if we set up choice points early in the process with a carefully-penned opinion letter, during the heat of the subsequent negotiations our engagement is primarily verbal. This is a problem. Oral messages can be easily misunderstood and convey the opposite meaning. Only a small percentage of effective communication is oral. Estimates range from between –10% to 25%.

Some of our society’s most effective communicators are advertisers and we have much to learn from them. Advertisers understand the importance of:

- image and presentation. To compete with the other messages with which we all deal on a daily basis, attention must be paid to image and presentation. An example is the gradual increase of visual images in CLE presentations! Another fine example is the use of pictures of admired individuals used by the CBA in their recent advertising campaign promoting our profession.

- use of plain and engaging written communication. Our profession's slow but steady approach to plain language and readable sentences testify to the effectiveness of this.
- opportunity to digest and reflect and the value of receiving the message in a number of different media, spoken, written and graphic.
- context. The same message received at one moment will mean something different received in another.
- audience participation in message creation. Messages will be much more easily understood and translated into a person's decision-making if they participate in creating the message, for example, answering quizzes, writing things down, or drawing pictures/diagrams. Some of the best commercial ads ask questions or leave the answer to the audience's imagination or creativity. The campaign of United Colors of Benetton is one good example.

If we restrict our engagement as problem solver to the spoken word, given in one context (our office), at one time (the client meeting) and in one voice (ours as the expert), it is highly unlikely that the message sent will be received and used in the way we intended.

V. Barriers to Developing More Effective Risk Management Strategies

So why don't we change the way we engage more readily? Well, I do see changes.

I see a few lawyers using spread sheets and charts, for example.

In family law the use of the printed charts generated by the DivorceMate software have gained easy acceptance as a more visual way to explain the after-tax effects of various support choices.

Corporate lawyers asked into a boardroom are likely to use PowerPoint to accompany an opinion letter.

And of course a well-written opinion letter is an alternative or an aid to effective communication.

Once they are in mediation, lawyers are often good at assisting clients to solve their own problems in a participatory way. But it remains the case that most advice is still rendered in the standard "lawyer as expert" "I speak, you listen" way. My question is really: "Why are we slow to engage our clients in doing the kind of in-depth risk analysis that will allow them to understand the real and likely impacts of using the litigation system in an attempt to persuade someone else to change their behaviour?" What will be the impacts on their lives of filing the writ? How will their children be affected by the endless requests for production of documents that will inevitably necessitate longer hours at the office? What will their customers and suppliers' responses be to the knowledge that, in their relatively small community (and in this

global village all communities are small), they are suing? It is this kind of advice too many lawyers are slow to get into.

What are the barriers to presenting effective forms of advice? What factors are in play that mean the most often-used form of risk analysis we present to our clients is the least likely to be effective in helping them actually assess risk? What stops us from using written/visual/participatory/repeated/multi-media risk analyses?

- A. Habit. The more we do one thing the more likely we are to keep doing it.
- B. No training. The less likely we are to anticipate that we need to change the way we do things, the less likely we are to train others (students, juniors, associates) to do it differently.
- C. Expense. Talk is cheap(er); other media are more costly. We are all under pressure to keep costs down.
- D. Boredom (with the idea of repetitive client training). So much of risk analysis becomes routine and we don't like being bored. We often assume that, if we know it, it must be obvious to others, especially if it's not labeled "legal" knowledge.
- E. Reluctance to disillusion. It's unpleasant for us to have to disillusion people that justice, truth, rationality and finality are not usually part of the litigation process. People repeat activities that are pleasant and avoid the unpleasant ones. We also don't like being the bearers of bad news or depriving people of their myths.
- F. Perception of scare-mongering. If every time we got into a car we were forced to demonstrate our knowledge of all the risks of driving a car, we might never drive again! There is a school of thought, even in medicine, that since many of the potential risks of taking medication are so unlikely, most of those risks are not helpful to mention. The doctrine of informed consent is hammered into doctors for a reason: Many are resistant to providing for it!
- G. Loss of certainty, which may drive clients away. Just as a patient may in the end refuse the treatment or prescription, the client may refuse to take the trial. That's a direct hit on our pocketbooks.
- H. Knowledge of risks may harm emotionally unstable clients. When people come to see us, they are unhappy and often emotionally unstable. How do we help them to manage risk when they appear unable to handle uncertainty of any kind?
- I. Is it worth it? A rational risk analysis isn't going to stop an irrational fight so why bother? Wars seem to break out regardless of the imperatives against them.
- J. Avoiding creation of dangerous documents. What if the risk analysis fell into the other party's hands or saw the light of public scrutiny?

- K. Crisis management may trump reasonable long-term planning. The need to stop the perceived danger may trump the wisdom of refraining from escalating the situation, especially in the clients' minds. Restraining orders are a great example. Sometimes we get worn out counseling caution.
- L. Relying on the mediator to do it for us. Many people come to me having done no risk analysis. I often get called by counsel "giving me a heads up" that this client is "difficult" and I will be expected to tell them things that the lawyer does not wish to. Sometimes this is a good strategy and an excellent use of a mediator. Sometimes it's poor client management. It depends on the situation.
- M. Avoiding premature advice. Lawyers often wait to give advice until it's too late. They want to avoid premature decision-making, believing that the uncertainties need to be narrowed before the client can make intelligent decisions. Yet judgment calls are what we are often paid for.
- N. Fear of inaccuracy. It is risky to give advice and sometimes we would prefer not to.
- O. Preference for standardized lists. However convenient, these are not useful as if they are personalized. If we do use them we should use them in the form of standardized questions drawing the client into providing the data themselves.
- P. Wishing to avoid "denigrating" the court system in writing: Sometimes what we have to say may seem disrespectful to the judicial system.
- Q. Aversion to discussing emotional, personal, mental or physical health issues with clients. ("I'm a lawyer, not a counselor.") But while we may refrain from offering psychological advice, we must allow this discussion to happen in our presence as part of risk analysis, even if we venture no opinion about it.
- R. The "Doberman Effect." "If I consider the risks I can't do my job for you as your advocate." "Head down – charge!" Thankfully, this is rare, but it does appear in my practice from time to time.
- S. The client wants the "expert", the "wise counselor" to make the decision. Dependency feels delightful. We get to feel wise and strong. But it's risky!

The increasing interest of our profession in alternative means of communication and indeed, in conferences like this one, are encouraging. I want to turn now to other obstacles to effective risk analysis. I am indebted to Dr. John Wade from Bond University in Australia for much of the organization of the material that follows. Every instance occurs with some frequency in my practice. Put simply, this is because effective risk management must overcome normal risky human behaviour.

Effective risk analysis must overcome the following human tendencies:

- A. **Wrong Baseline Trap:** comparing what is on the table with what we want, or consider to be “fair”). A huge part of effective risk analysis is getting people to make comparisons to what is doable or achievable in other processes (BATNA, WATNA, etc.). In my opinion, “**What are you going to do if you don’t get a deal?**” is the single most important question in preparing for a negotiation. Yet very frequently clients appear in my office with “go to court” as their only option, without any understanding of whether this is a good alternative or a poor one. Sometimes they have never even been asked the question at all.
- B. **Anchoring Trap:** over-reliance on first thoughts. Just as first impressions are important to our long-term views of people, first thoughts and reactions about our conflicts are hard to dislodge when we assess risk later even if we have more information. If our first idea is that we are victims, for example, we will have a hard time believing that we made a contribution to the situation, let alone that our adversary is owed an apology. Stories can be a powerful tool in the work of changing minds. So can reality, in the form of an experience in discovery, or perhaps a lawyer’s bill. It’s axiomatic that every case begins as a matter of **principle** and only changes once the legal bills begin to affect one’s view of one’s **principal**.
- C. **Status Quo Trap:** keeping on keeping on. We’ve started so we might as well finish. Inertia is a powerful force. Changing direction requires effort.
- D. **Sunk Cost Trap:** protecting earlier choices. This tendency adds drag to the idea of changing direction.
- E. **Search for Confirming Evidence Trap:** seeing what you want to see and neglecting relevant information. This is such a common phenomenon it is almost not worth illustrating. But the fact that it is so common makes it imperative that I do so. Cognitive dissonance is a dangerous thing. If we receive information which is at odds with our values or world-view or previously-reached conclusions, we have a tendency to ignore or dismiss it -- if we receive it at all. I see lawyers and clients alike doing this all the time in my office, when presented with new evidence in a case about which they have a clear view. For instance,
- One client could not understand why she could not persuade her brother that she had been the victim of abuse at her father’s hands and that he had, too. She originally filed her WVA claim to gain a forum where her brother would agree with her version of reality or, from her perspective, since she was sure she would be believed as she was telling the truth, be forced to do so by a judge. In mediation, a psychologist to whom I referred her, her lawyer and I, were successful in helping her see that her emotional state was such that she could hold her own truth while allowing her brother to hold his, as two separate and dissonant truths. However, her brother, who was an alcoholic, could not. He could hold only the one truth -- that his relationship with his father was perfect, so hers

must have been, too. In mediation we worked hard to ensure that, although her brother did not agree that his experience was the same as hers, he really listened to her story and accepted that it was true for her. She believed that he believed she was telling the truth. Rather than continue her search for confirming evidence she was able to settle her WVA action in keeping with her stated principle “that it was not about the money”, understanding that she could, in fact, live with that dissonance.

- In her recent book *A Mind of its Own – How Your Brain Distorts and Deceives*, (Icon) Cordelia Fine tells of a study in the US in which people already declared either for or against the death penalty were asked to evaluate two research papers. One showed that the death penalty was an effective deterrent against crime; the other that it was not. One research design compared crime rates in the same US states before and after the introduction of capital punishment. The other compared crime rates across neighbouring states with and without the death penalty. Surprise, surprise: which research strategy people found the most scientifically valid depended mainly on whether the study supported their views.

F. **Framing Trap:** triggering a premature answer with the wrong question. Even in straight price negotiations such as personal-injury mediations, people, both counsel and clients, strive for meaning. The meaning for lawyers is different than for clients. We need to know that the settlement we advise is meaningful in terms of what risk the client runs in taking it in front of a judge or jury.

Clients often need vastly different kinds of meaning. They might “need” to be right. They might “need” the other to be wrong. They might see money as a ticket to some way out of the economic mess they attribute to the incident (accident, expropriation, divorce, firing). They might “need” the other side to suffer economic consequences. They might need to appease a spouse who has one of the above aspirations. Lawyers can help their clients find other ways to meet these needs. Too often I meet counsel who amplify their clients’ needs in these categories to increase the chances that the lawyer will get his or her needs met.

- A wise counsel helped a woman to see that, even though the money the other party had on the table was not what either the lawyer or her client had hoped for, it was at least in the low end of the range of litigation risk and did represent significant movement. The client was afraid, not of the shortfall, but rather that, if she accepted, she would spend the rest of her life wishing she had been stronger. The lawyer helped her see how skillful she had been in getting the movement to occur and to assess how she would feel about herself if she allowed the case to go into litigation, taking up a lot of her life and distracting her from other important things. The woman was able to reframe her experience from being a weak opponent, to being a skillful negotiator -- a label which carries with it the ability to close a deal.

- G. **Overconfidence Trap:** being too sure of yourself and slanting probabilities and estimates. Self-interest and self-perception mean that very few clients or their counsel are truly objective. Churchill said, “Where you stand depends on where you sit.” The Harvard Law School’s Program on Negotiation has research documenting that lawyers do this a lot. One message I send (also borrowed from Dr. Wade’s work) is, “Litigation happens because experts disagree.” Sometimes my message is actually aimed more at the lawyers in a warning to them about the unlikelihood that, at least in a community like Victoria, their opposing counsel is going to argue a completely fanciful case.
- H. **Recallability Trap:** focusing on dramatic events. We tend to retell events in our lives that have dramatic interest. In doing so we forget the other events that were just as, if not more, important to our current state. A client will dwell on the time he hurt his leg but forget the number of drinks he had in advance of his fall.
- I. **Outguessing Randomness Trap:** seeing patterns where none exist. In personal injury cases, plaintiffs who suffer what they perceive as rude or harsh treatment at the hands of their initial adjustor often take considerable convincing that the entire insurer’s organization is not out to get them later in the process long after the first adjustor has left the scene. Similarly, sometimes defence personnel are too quick to imagine patterns of malfeasance that seem obvious to them but which are not substantiated by the medical information or other observed behavior. Good counsel will add a degree of objectivity and ask questions which might lead to a break in those patterns.
- J. **Reactive Devaluation Trap:** ridiculing or dismissing good suggestions because of their source. This is a well-known phenomenon in mediation and one which makes the use of a third party potentially very helpful. Early in the land claims treaty negotiation process government personnel would suggest the use of principled negotiation, to have it rejected as an attempt at deceit by the aboriginal table. Ironically, a number of years later, after trusted advisors began advising First Nations to use the “non-adversarial four-staged process of interest based negotiations,” government negotiators refused to consider it for the same reason!

Cordelia Fine points out that evidence that fits with our beliefs is quickly waved through our mental and emotional “border control,” while counter evidence must submit to close interrogation and even then will probably be rejected. And perhaps most dangerous of all, the act of rejection will often be used to justify holding our beliefs even more strongly afterwards. “Well, if that is the best the other side can come up with, then I really must be right.” This phenomenon, known as belief polarization, helps to explain why attempting to disillusion people of their beliefs is so often futile.

The phenomenon of reactive devaluation has an opposite as well. That is the likelihood of accepting suggestions if they come from someone we like. People who have recently indulged in extensive contemplation of their best qualities are more receptive to arguments that challenge their strongly-held beliefs even about core value. Flattery plays very effectively on what Fine calls one of our brain’s core constitutive characteristics:

vanity. In mediations, I often risk the wrath of one party by paying compliments to the other. I try to be even-handed about it but they tend to notice less the compliments I give them and notice much more the ones I pay to the other. This is an age-old negotiating tactic -- we are more likely to accept influence from someone who makes us feel good about ourselves than we are from someone who asks us to change our minds about something we hold dear!

- K. **Winning in One Dimension Trap:** failing to assess risk to reputation or market risk. One question lawyers can helpfully ask is: “Winning and losing what?” I often meet lawyers who are aware that their client’s health cannot sustain a trial. That seems to be a relatively easy question to answer. Less easy are those cases where counsel believe they are right and do not seem able to do risk assessment on the possibility that they are wrong, even when there is a significant relationship or reputational risk to the client if they engage in litigation – win, lose or draw.
- I will always remember a senior manager in a large organization telling me, “We have not considered mediation because our lawyers tell us we will win and it would look bad for us to propose mediation at this point. It would look as if we were weak.” The case involved a relatively small amount of damages claimed by one client but with wide ramifications for other claimants, depending on the outcome. The people in management were unable to reframe their fear of losing face in proposing mediation to see the potential gain in their reputation as problem solvers with the many people potentially affected. Two years, hundreds of thousands of dollars, and endless hours of distraction later, the organization lost. The implications were enormous, in terms of having to pay out multiple sums to multiple stakeholders in the same position as the plaintiff. Now the only recourse is to appeal, for face-saving purposes if nothing else. What is doubly ironic is that, even if the organization had won, there would have been significant negative reputational consequences, since the desire to use company resources to “win” against smaller individual plaintiffs is increasingly regarded with dislike by the general public. How I wish that the lawyers representing the organization had asked management to engage in across-the-board risk management early in the game! Another course might well have been chosen. In these days of negative public perception of the use of “power over” by large entities, it is particularly worth a large organization’s while to always be the one with the last offer on the table rather than the one walking away, rejecting a solution proposed by the other party. Entering into litigation because “we will win” is no longer a good enough reason, if indeed it ever was. Today such a decision carries significant risk of accompanying losses in reputation and relationships, even if the predicted economic victory materializes.
- L. **Last Gap Trap:** drawing the line in the sand in the wrong place. There is always a last gap. Getting it closed requires the knowledge that it exists, and generating a renewed and realistic assessment of risk, not just of losing, but of not settling, and of winning as well.

- I had a multi-million-dollar transaction file settle a few weeks ago when one party asked the other at the last minute and late at night for “just a little more.” The dispute was over a family inheritance. The cousins had worked out terms and they were basically at agreement. But at the 11th hour the younger and acquiring brother asked for “one more painting.” The “little more” was not important in terms of money in the overall scheme of the settlement, but it represented the “helping hand” that the one wanted to experience from the other. The payor had been prepared by both his advisors for the last-gap phenomenon and was willing to see it in this light. Both his lawyer and his accountant were skilled and experienced negotiators and helped him to close the last gap without the all-too-tempting “quid pro quo”. As a result, the two will have a positive ongoing relationship, and their children will grow up knowing each other as friends and family as opposed to being enemies for life. Counsel can help with these last gaps by preparing clients for them, identifying them when they come, and then assisting clients to do meaningful risk assessment when often they are feeling too tired and impatient to want to do so.

VI. Designing for informed consent

How then to design effective ways of communicating risk and seeking truly informed consent?

To ensure that the client actually uses the information we provide them to inform their decision-making, it must:

- A. Be delivered in more than one medium – spoken, by more than one voice, visual component, repetition
- B. Be available in a form which uses the client’s ability to participate;
- C. Have a life outside the lawyer’s office (i.e. not context-specific);
- D. Be relevant to the client’s needs (economic, emotional, health, family, etc.); and
- E. Describe the range of risk accurately and allow the client to discuss meaning of ranges.

Informed consent requires:

- A. The capacity to consider, reflect, and decide;
- B. Appropriate knowledge of alternative options; and
- C. Appropriate knowledge of the legal, personal, financial and commercial risks attached to each option.

VII. Creating an instrument for effective risk management

Attached are examples of instruments I have developed which have been used to help overcome the barriers to effective risk management. While far from perfect, each instrument attempts to provide the client with most of the conditions and principles I've discussed, and each is intended to engage clients in conscious decision-making. Each has been used both before negotiations and during the heat of them to ensure that clients remain engaged in determining their own destinies and take responsibility for their own satisfaction levels.

These instruments are:

1. A quiz for clients assessing risk in settlement negotiations,
2. A table identifying economic, emotional and psychological risks of settlement vs. litigation, and
3. A spreadsheet with a quiz for assessing risk in negotiations.

Effective risk analysis is not always fun. It is almost always challenging but, done thoroughly, can put our clients' relationships with counsel and their comfort with the proceedings on a much firmer footing

Finally, in the interests of adding value to our clients' lives generally, let me add that developing one's skills as problem-solver creates benefits far beyond the lawyer-client relationship. It is something the client and counsel can "take away" and use as significantly useful transferable knowledge.

Notes:

In preparing these materials, I relied heavily on the following sources:

Wade, Dr. John. *Systematic Risk Analysis for Negotiators and Litigators: But You Never Told Me It Would Be Like This!* Bond Dispute Resolution News, Vol. 6, October 2000.

Picker, Bennet G. *How to Best Aid Negotiation by Breaking Down Barriers* published with the permission of CPR at <http://www.mediate.com/articles/picker.cfm>