

## Choosing Door Number 2: Helping Clients Decide to Allow Their Case to Go to Trial

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J. Simón Cantarero — LifeVantage Corporation  
Trystan B. Smith — Trystan Smith & Associates  
Arthur Wing — President, Wing Enterprises

Moderator: John R. Lund — Parsons Behle & Latimer

In deciding to try a case, the client and the lawyer both benefit from a candid and thorough evaluation of the case. An honest assessment of both the likely outcomes of trial and the costs of trial should help you try the cases that should be tried and do so with the confidence and support of your client.

- **Applicable Rules of Professional Conduct**
  - Rule 1.4 – “Reasonable communication” so the client can “effectively participate.”
  - Rule 2.1 – “Candid advice.”
    - Comment: “Straightforward advice expressing the lawyer's honest assessment.”
  - Rule 2.3 - Evaluation for use by third persons.
  
- **Case Assessment for Trial Purposes – The Basic Steps**
  - 1. Damages – Start here to define what is at stake?
    - If just money, what is the range of reasonable likely outcomes?
      - At this stage, assume liability.
      - On the plaintiff’s “reasonable best day” what is the most that would be awarded in each category of damages claimed?
      - On the defendant’s “reasonable best day” what is the least that would be awarded?
      - Within that broader range, discuss what is most probable, maybe a tighter range?
    - Is something other than money at stake? Reputation, precedential impact, future rights?
      - If so, try to articulate the significance of that issue in monetary terms.
  - 2. Liability – What are the odds?
    - If the case were tried ten times, how many times would the jury find the defendant liable?
    - Assuming liability was found, how many times would the jury then also find causation?
    - In a simple case, this defines the risk a defendant client is facing.
      - Range of Probable Damages X Risk of Losing.
    - Additional factors, like fault of others, affirmative defenses and key evidentiary rulings should also be considered.
    - And the odds of such outcomes need to be provided and incorporated into the decision making.
  - 3. Witnesses and Exhibits, Strategy and Preparations
    - The Case Evaluation should also provide a thorough summary of the expected testimony from key witnesses and an explanation of key exhibits.

- And it should lay out the expected strategy for the trial, key themes, expected answers to the opposition's case and so on.
  - 4. Settlement Prospects
    - Deciding to go to trial, choosing Door Number 2, means not settling the case.
    - So, the trial evaluation needs to clearly remind the client of the history of settlement negotiations as well as your best judgment as to what further compromise it would take to resolve the case without a trial.
  - 5. Expected Trial Costs
    - In most cases, the fees and expenses of a trial will not be recovered from anyone.
    - View these as the client's investment in the trial.
    - And estimate them honestly and completely.
    - Including the impact on the client's life and business.
- **Deciding to Go to Trial from the Client's Perspective**
  - Confidence in counsel, in their preparation and in their case.
  - Consider all stakeholders, decision makers within the client's team.
    - Everyone needs to be on board.
  - Financial analysis
    - Requires clear statement of the range of likely outcomes.
    - Requires clear statement of the expected cost.
    - Requires level-headed comparison of that option to settlement option.
  - Business analysis
    - How will the trial results, positive or negative, either benefit the client or damage the client? Reputation, other similar claims, etc.
  - Principles
    - Have a clear-eyed discussion of what, if any, principles of right and wrong, might be addressed by the trial result.
- **Special Considerations from the Business Plaintiff's Perspective**
  - Companies who need to enforce their contracts, or protect their property, need a little different analysis than if they are the target of the lawsuit.
    - One main difference with that insurance may not cover the cost of litigation and any resulting damages.
    - Another is that there may be a fee provision in the governing contract entitling the "prevailing party" to recover the fees.
    - And the prospect of actually recovering on a judgment must also be assessed.