

## **DISPUTE RESOLUTION: TWO TREES IN THE FOREST YOU CAN'T IGNORE**

It is said of those who miss the big picture that they can't see the forest for the trees. This is especially true of many litigants who choose trial over settlement. Of course, some cases just have to go to trial. However, studies have shown that parties to a civil dispute who fail to settle their cases prior to trial often make mistakes in establishing the settlement value of their cases and as a result do worse at trial than they could have done in settlement negotiations. According to a recent study, plaintiffs, more often than defendants, make valuation errors in unsuccessful negotiations, evidenced by the fact that a high percentage of them receive somewhat less at trial than they could have received in settlement. When defendants get it wrong, on the other hand, they do it in spectacular fashion, with verdicts coming in much higher than they could have settled their cases for. In short, plaintiffs are wrong more often but when defendants are wrong, they pay a very high price. With so much at stake in properly setting the value of a case, litigants can not afford to ignore two trees in the forest of dispute resolution: the tree known as decision tree analysis and the tree of *Time, Risk, Energy, and Emotion*. This article will highlight the importance of fully examining both of these "trees" prior to mediation.

### **Decision Tree Analysis**

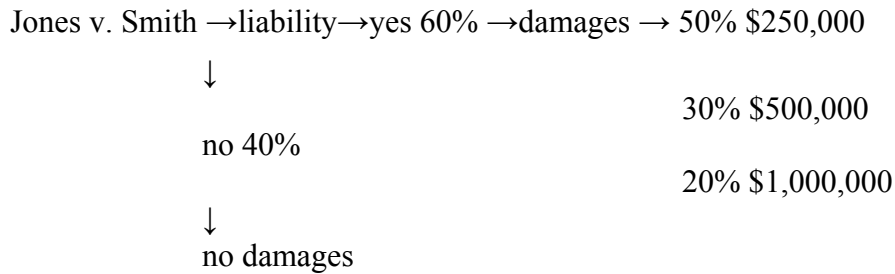
Prior to mediation, you should prepare a negotiating strategy based on the settlement value of your case. If you represent the plaintiff, you must establish the lowest settlement amount that would be acceptable to your client. If you represent the defendant, you must determine the highest amount your client is willing to pay to settle the case. Whatever side you are on, this bottom line settlement number approximates your best and final offer that you would make during mediation. In their seminal book, *Getting to Yes*, Fisher and Ury call this number your BATNA-the best alternative to a negotiated agreement. In other words, your client would rather go to trial than accept an amount lower than the bottom number in your settlement range if you represent the plaintiff, or if you represent the defendant, your client would prefer going to trial rather than pay more than the highest number in your settlement range. In order to establish your BATNA, you must consider the point at which the risks of trial outweigh the concessions your client must make to reach a resolution of the dispute. Decision tree analysis is a great tool to help you help your client understand the settlement value of his case.

In decision tree analysis, you establish the key events of the litigation through trial. You then estimate the probability for success of the key events and the dollar values of the potential final outcomes. A decision tree visually depicts this process in as much detail as may be desired. A more complex decision tree may include the chances of success of potentially dispositive motions, such as summary judgment, or the impact of rulings on certain key evidence. On the other hand, a basic decision tree may only depict liability and damage issues.

When evaluating liability and damages, you start with the basic question: what is the chance of prevailing on the issue of liability? If liability can be established, what is the amount that will be awarded for damages? The outcome will provide a range for settlement purposes.

Suppose you believe there is a 60% chance liability will be established and if established, the low, medium, and high ranges of damages are as follows: 50% chance the damage award will be

\$250,000; 30% chance it will be \$500,000; and a 20% chance it will be \$1,000,000. A decision tree based on these assumptions would look like this:



Next you would factor in the 60% possibility of liability to determine the range of values and the average expected value:

Low Range	Medium Range	High Range
(.60 x .50 x 250,000)	(.60 x .30 x 500,000)	(.60 x .20 x 1,000,000)
\$75,000	\$90,000	\$120,000

Average damage award = \$285,000 (75,000+90,000+120,000)

This decision tree would enable you to advise your client that the average value of the case is in the range of \$285,000, assuming a 60% chance of liability, but if liability is actually established the value of the case could range from \$250,000 to \$1,000,000.

You will also want to advise your client of the total average cost of litigation, which would include the average damage award and the estimated attorneys fees and costs. Assuming fees and costs of \$100,000 for each side, the total average cost of the litigation for the defendant would be \$385,000 (average damage award + estimated attorney fees and costs); for the plaintiff, the average value of the case would be reduced to reflect the net amount the client would actually receive, \$185,000 (average damage award – estimated fees and costs). Risk analysis is not complete, however, without factoring in the possibility of having to pay the other side’s attorney fees and costs that may be awarded to the prevailing party under statutory law, California Code of Civil Procedure section 998 or Federal Rule of Civil Procedure 68, for example.

Of course, decision tree analysis is only as good as the assumptions upon which it is based. The results, however, can provide your clients with valuable information about the potential trial outcomes and the cost of litigation when preparing for mediation.

### **Time, Risk, Energy, and Emotion**

Your analysis of the settlement value of your case is not complete until you have fully explored with your client the tree of *Time, Risk, Energy* and *Emotion*. Your decision tree analysis has helped your client analyze the monetary risks and established the monetary value of the case, but what of the intangible risks of trial on your client’s time, energy, and emotion? While litigators

generally have a sound understanding of the implications of trial that go beyond winning and losing, most clients do not have the same appreciation of the affects a trial will have on their lives. Thus the monetary value of the case must be augmented by the intangible elements of litigation in order to arrive at the true settlement value for your client.

Decision tree analysis can also be used to evaluate some of the non-monetary aspects of the case. Litigation time commitments, for example, can be anticipated: time for depositions, time for preparation, time for trial, time away from work. But what affect those time commitments will have on your client's life, including work and family, can not be measured. A client may be eager for his day in court when suit is filed, but most clients do not fully appreciate the impact the litigation will have on their lives. They may not have experienced the anxiety of being deposed by a determined litigator. They probably can not anticipate the toll of being cross-examined in front of a jury. But you understand these things! You have been through it before. Unless you review both the monetary and non-monetary aspects of the case, your client will not be able to make an informed decision about resolving the dispute. Until these concepts are factored into your negotiation strategy, you have not fully considered the true settlement value of the case from your client's perspective.

Your client may want to resolve a case for practical reasons for an amount that is less than its monetary value if he understands the non-monetary implications of litigation. For example, an 80 year old plaintiff may prefer to take less in settlement rather than sit through a contentious trial and then hope to outlive the appellate process. Or perhaps the president of your corporate client chooses to discount the settlement value of its case in order to fund a capital project that requires an immediate infusion of cash. In both examples, your client has benefited from your explanation that the case may not be over even after a trial; that the opposing side could lock it up for years by filing an appeal. These examples point to the fact that each case has unique facts and extenuating associated risks, and that each client has different needs that must be considered when preparing for mediation.

Evaluating risk through decision tree analysis coupled with a consideration of the non-monetary aspects of time, risk, energy, and emotion will enable you to fully prepare your client for mediation. You will know your BATNA. You will understand your risk versus concession points. By preparing for mediation in this way, your client will know the real value of his case and you will have fulfilled your role as a trusted counselor of law.

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