ARIZONA
ADR
FORUM

SUMMER 2019

CONTENTS

It is with mixed feelings that I step aside and let another ADR Section member take over the newsletter.

First, I want to thank the Section leadership for entrusting the newsletter to me. Second, there is no newsletter without the authors. Thanks to all who contributed.

And finally a big shout out to Michael Peel from the State Bar who was my "personal" graphic artist.

Be Well.
Thom

STATE BAR OF ARIZONA

EDITOR | THOM COPE

We welcome comments about this newsletter and invite you to suggest topics or submit an article for consideration. Email the Editor, Thom Cope at tcope@mcrazlaw.com

PHOTO BY BY LUKE GROUSE ON IMGFLIP.COM.

ROBERT F. COPPLE has a national reputation for providing successful solutions to prevent, manage, and resolve complex disputes. He is a trained alternative dispute resolution neutral and has been involved in hundreds of arbitrations and mediations covering a broad range of issues. He also consults with major corporations, government agencies, and public interest groups regarding complex negotiations, litigation strategy planning, crisis management, and data security and management.

Robert Copple's career encompasses 20 years of high level law firm practice and Fortune 50 corporate legal management, as well as national level professional and academic projects.

He practiced with the law firms of Sherman & Howard and Parcel, Mauro, Hultin & Spaanstra in Denver and Lewis and Roca in Phoenix.

BY ROBERT F. COPPLE, JD, P.HD., CIPP

Why the Cannabis Industry Should Embrace Private Law and Alternative Dispute Resolution

Perhaps more so than any other type of enterprise, the cannabis industry has much to gain from embracing Alternative Dispute Resolution (ADR) as a primary tool to resolve legal claims and disputes. As the cannabis industry moves from the dark into the light, it has entered a tumultuous and patchwork regulatory environment of highly varying federal, state and local laws. Because cannabis is still listed by the Federal Drug Enforcement Agency (DEA) as an illegal Schedule I drug, there are serious questions, among others, whether:

- Federal and state courts will enforce cannabis related contracts.
- Federally regulated banks will do business with the industry.
- Federal intellectual property protections are available.

Even as more states are legalizing cannabis, uncertainty grows at the federal level. In an effort to partially reconcile the conflict between federal law and the state legalization, the U.S. Department of Justice in 2013 issued the "Cole Memo," which generally states that DOJ will not enforce federal drug law against cannabis businesses that are operating legally under state law. But with a change of administration, that "truce" is now being questioned by a new U.S. Attorney General who believes that cannabis is a gateway drug helping to fuel the opioid epidemic.

Given the chaotic state of the law, as well as highly divergent public opinion, reliance on traditional public institutions, such as the courts, can be very risky. The better option is for the industry to enter the world of private law and ADR.

Like any commercial enterprise, the cannabis industry can benefit from the general advantages provided by mediation and arbitration, including:

- Lower cost than a trial to the court.
- Shorter time to resolution.
- Avoiding litigation disruption to the business.
- Control of the evidence and issues to be considered.
- Selection of the mediator or arbitrator.
- Choice of time and place for the ADR proceeding.

In addition, because of the checkerboard of regulations, there are certain ADR advantages that can be particularly important to the industry:

- Avoidance of negative public perception and public decision makers.
- Confidentiality.
- Private law and ADR agreements.
- Broader range of settlement options and remedies.
- Preservation of business relationships.

Avoiding Negative Public Perception and Public Decision Makers

Even though we can do our best to be objective, our judgments are still value laden; influenced by our lives, experiences, education and cultures. The same is true of judges. Who would you rather have resolve your cannabis business dispute, the state judge who was a career criminal prosecutor and cut his teeth during the War on Drugs or a trusted, discrete and efficient mediator/arbitrator hand selected to help make your dispute go away? Further, by its nature, litigation creates a public record that can later be used by third parties or in an agency action.

Much the same can be said about public agency decision makers. Many are political appointments and some, with a strategic bias, are looking to make a name for themselves in government, politics and the professions. Another disadvantage of going the agency route is that presentation of the complaint or dispute may reveal some fact or issue that raises unwanted agency scrutiny. In addition, as with litigation, agency decision making creates a public record that is available to the competition and future opposing parties. So, unless agency reporting or intervention is required as a matter of law, go to ADR first.

Finally, there is the general public and the jury. When you submit your dispute to a jury, you have just taken on 12 new uncertainties about whom you have little knowledge and even less control. The last person you want on your jury is the "Church Lady," as depicted by Dana Carvey on *Saturday Night Live*.

Why the Cannabis Industry Should Embrace Private Law and Alternative Dispute Resolution

Confidentiality

There are a number of reasons the cannabis business may want to cloak the ADR proceeding in confidentiality, including:

1. Staying clear of unnecessary regulatory oversight.
2. Protecting important financial data.
3. Avoiding related third party disputes and lawsuits.
4. Preserving the public image of the business.

ADR confidentiality can be protected in a variety of ways. In my experience, confidentiality is best achieved by using the available legal tools to create multiple layers of protection.

First, a number of states, including Arizona and Colorado, have statutes that, with some exceptions, declare mediation communications and materials used during the mediation to be privileged and confidential. These rules should apply both to the primary parties in the dispute and to third parties who may gain access to the communications. As a result, discussions occurring during the mediation process should not be admissible for impeachment purposes at a subsequent trial or regulatory proceeding.

Second, the parties can bind each other and the mediator/arbitrator by agreement. Such an agreement would clearly apply to the parties. Where no privilege exists, third parties would, at least, have to penetrate the agreement by a subpoena in order to gain access to the information; giving the parties an opportunity to make their case for confidentiality.

Third, Rule 408 of the Federal Rules of Evidence and its state equivalents would, in most situations, prevent the parties in mediation from using those discussions in a subsequent trial. It may not, however, bar third party use.

Fourth, in arbitration, the parties can select a form of award that promotes confidentiality. Instead of a "reasoned award" that lays out the findings of fact and conclusions of law supporting the decision, the parties can require a "standard award," which is only a thumbs up or down without any backup for the decision. Although not bullet proof protection, this method makes it more difficult for third parties to use the award to their advantage.

Private Law and ADR Agreements

By their very nature, contracts, partnership agreements and corporate formation documents are examples of private law by which the parties decide what rules will govern their business relationships. Likewise, ADR agreements are a form of private law.

One of the beauties of ADR is that the parties have extensive power to create the process to fit their needs. It can be as complex as a full trial to the court or as simple as a coin toss. A "sabers at dawn" clause, as much as I like the example, is probably illegal and unenforceable. But otherwise, the potential scope and design is as broad as the business imagination.

It is best to establish ADR private law at the beginning of the business relationship before a dispute arises. Agreement to use ADR can be achieved later, although, once tempers flare, consensus will be more difficult. So, it behooves the parties early in their contracting to agree how to handle future disputes and include an ADR clause setting out that understanding.

The parties are free to draft their own private ADR clause or adopt form ADR agreements available from many of the ADR providers. Both the American Arbitration Association and the CPR Institute for Conflict Prevention & Resolution have draft clauses available, which can be modified to meet the needs of the parties.

That ADR agreement can include an extensive range of ADR requirements. Among those most important to the cannabis industry are:

Confidentiality.

As discussed above, confidentiality can be a major concern. Therefore, it is best to think it through upfront and document the agreed upon process in contract form.

Choice of Law.

In addition to the form and procedure of the ADR process, the parties may also choose the law that will be applied to the dispute. As a result, the parties can decide to designate the law of a cannabis friendly state for the benefits of contract interpretation, potential illegality and enforcement of the award.

Time is of the Essence.

It goes without saying that the cannabis industry is rapidly growing and evolving with shifting ownership and investment. A prolonged and expensive dispute process can be detrimental to that growth by using up scarce corporate resources and discouraging investors. Therefore, it is within the parties' best interests to quickly and efficiently resolve disputes. To that end, the ADR clause can include requirements to accelerate the process. For example, the agreement could provide that any dispute had to be mediated within 30 days of notice. If mediation is unsuccessful, the dispute would have to go to a full arbitration hearing within 60 days, after which, the arbitrator would be required to make an award within 10 days. In addition, to prevent business disruption, the agreement can require that the parties maintain the status quo of the supply chain until the required ADR process is completed.

Receivership.

Because of the speed with which it has developed, the cannabis industry suffers from more than its fair share of partnership disputes. In cases of serious strife, management of the business can become dysfunctional and put the assets at risk. As a creation of private law, the ADR clause could include language setting forth the criteria for when the appointment of a receiver would be appropriate. If need be, this agreement could be enforced by a court while the parties worked out their differences in ADR. There is a growing population of professional receivers with expertise in cannabis operations.

Settlement Options and Remedies

In a court of law, the cannabis business's range of remedies generally will be limited to monetary damages and, maybe, injunctive relief. In ADR, however, bargaining and barter can reign and save the day. In fact, as the parties approach their dispute, whether they like it or not, the potential for future business, such as a steep discount on product and supplies or preferential distributorships, should be high on the ADR agenda. As a neutral and an advocate, I have been involved in a number of barter settlements that proved to be very successful. Ask me about bulk activated charcoal, semiconductor chips or the vintage 1964 Mustang convertible.

Preservation of Business Relationships

Despite the rapid growth of the U.S. cannabis industry and projections that it will be worth gazillions of dollars in 10 years, it is still a somewhat small and exclusive club. There are a couple of reasons for this. Because of the conflict between federal and state law, there is only very limited interstate commerce in cannabis. As a result, in any state that has, to some extent, legalized cannabis, all or most operations, including growing, processing and distribution, have to occur within the boundaries of that state. This legal fact, by itself, limits the number of potential partners. Further, most state regulatory schemes constrain the number of growers, processors and distributors, again narrowing the field.

As a result, the cannabis business cannot afford to burn bridges without considering the consequences. ADR, along with a calm and thoughtful strategy, can go a long way to resolving the dispute while preserving these important relationships.

In the End

I want to note I am aware of one cannabis ADR agreement which provided that, should a dispute arise, the parties would meet in a conference room, light up and talk until they had resolved the dispute. To me, that seems very civil and simple, and within the spirit of ADR.

My interest in U.S. cannabis law has to do with the fact that it is the Wild West of American jurisprudence with many questions unresolved and a healthy dose of federalism and states' rights. At this point in the evolution, we are all learning. So, please, tell me where I am wrong. Share your thoughts and experiences. We will learn together.

Robert F. Copple © 2017

Mediating the Arabic Way

By Jason Houston

The U.S. Department of Justice outlines cultural considerations that must be accorded Arab and Muslim Americans in legal environments. For those of us who practice mediation, broadening cultural knowledge can prove to be immensely effective in resolving cases.

As mediation becomes more accepted among ethnic communities, there are even more issues to address. Gaining cultural knowledge and applying it effectively cannot be overstated. Few people are born with intuitive sensitivity to cultural differences, but even a minimal awareness can always be helpful in settling disputes.

In the case of the Arab culture, being cognizant of a few facts could mean a successful conclusion to a mediation, rather than deeply offending someone and having the mediation disintegrate. In Arabic culture Arabs give deep respect to people in positions of authority. What does this mean to the mediator?

In a hypothetical case, Mr. Hafiz has a problem with a merchant, Mrs. Jones, who refuses to accept the return of merchandise. In the Arabic culture, returning merchandise is viewed negatively. Mr. Hafiz may be embarrassed to accept a deal in which the merchant – as a gesture of goodwill – has agreed to take back the merchandise.

As the mediator, it would be wise to re-clarify the issues, as well as to confirm this is what both parties really want. The mediator may reassure Mr. Hafiz that Mrs. Jones is making the offer because both of them came to mediation. Mr. Hafiz, at that point, may understand it is indeed acceptable to settle, despite a loss to the other party.

Physical considerations have to be made as well. For instance, when Mr. Hafiz comes into the conference room, he may continue standing until the mediator asks him to sit down. This is done out of his culture's

respect to the person in authority.

Another physical consideration is seating arrangements. Most Arabs are unnerved when someone crosses a leg over their knee with their shoe pointing directly at another. Arabic culture teaches that it is an insult to point your foot directly at someone. Seating arrangements made parallel avoid the possibility that someone with a crossed leg might inadvertently create an insult.

Graciousness as a mediator can be very effective, since Arabic culture heavily emphasizes the importance of honoring a guest and making sure they are comfortable. In their home, this means serving excessive amounts of food until the host is sure everyone is satisfied. Commonly, as a gesture of respect to their guest, a host and his sons will not start eating before the guest does. In the legal world, this translates into the mediator's responsibility of ensuring everyone is fully satisfied, not necessarily through food, but through graciousness, respect and patience.

Mr. Houston is a family law mediator and civil arbitrator. He serves on California State Bar's Mandatory Fee Arbitration Panel, and is a new member to the ADR Section of the State Bar of Arizona. His leisure pursuits include gourmet cooking, singing and song-writing, collecting old cars and writing political satire.

Ethics of Mediation

SECRETS AND LIES

By Jason Houston

What do you do when confronted by a scenario in which you suspect either your clients or their attorneys are lying? It's a tough call when the concept of attorney-client privilege collides with the transparency of mediation.

A lie in mediation can impede the progress of negotiation and create impasse, while a secret is an excellent tool for the mediator.

Every mediation begins with an assurance by the mediator that confidentiality of communication is guaranteed. These private communications typically consist of undiscovered facts, including negotiating posture, case valuation and limits on client authority.

For example, a defendant's desire to end litigation charging him with sexual harassment "as early as possible" in order to avoid facts which may be become known to his wife in a pending marital action is something the mediator would not voluntarily reveal, yet a critical bit of information to aid in the understanding of the parties' interests in the outcome of the litigation. This is a prime example of an undiscovered fact that affects the outcome of the mediation, but should not be revealed by the mediator. It's a secret, but not a lie.

A physician's urgent desire to settle a case below Medical Board reporting limits to avoid investigation, even if it means paying some portion of a settlement under the table, is another example. Knowledge of other claims against the physician would never be revealed. To the mediator, they are simply secrets.

A lawyer's lack of faith in his client and his intent to sub out if the case doesn't settle, is another instance of a secret communication which the mediator may become aware of, but keeps confidential. This kind of communication is a typical secret mediators can accept as a confidential tool for negotiating.

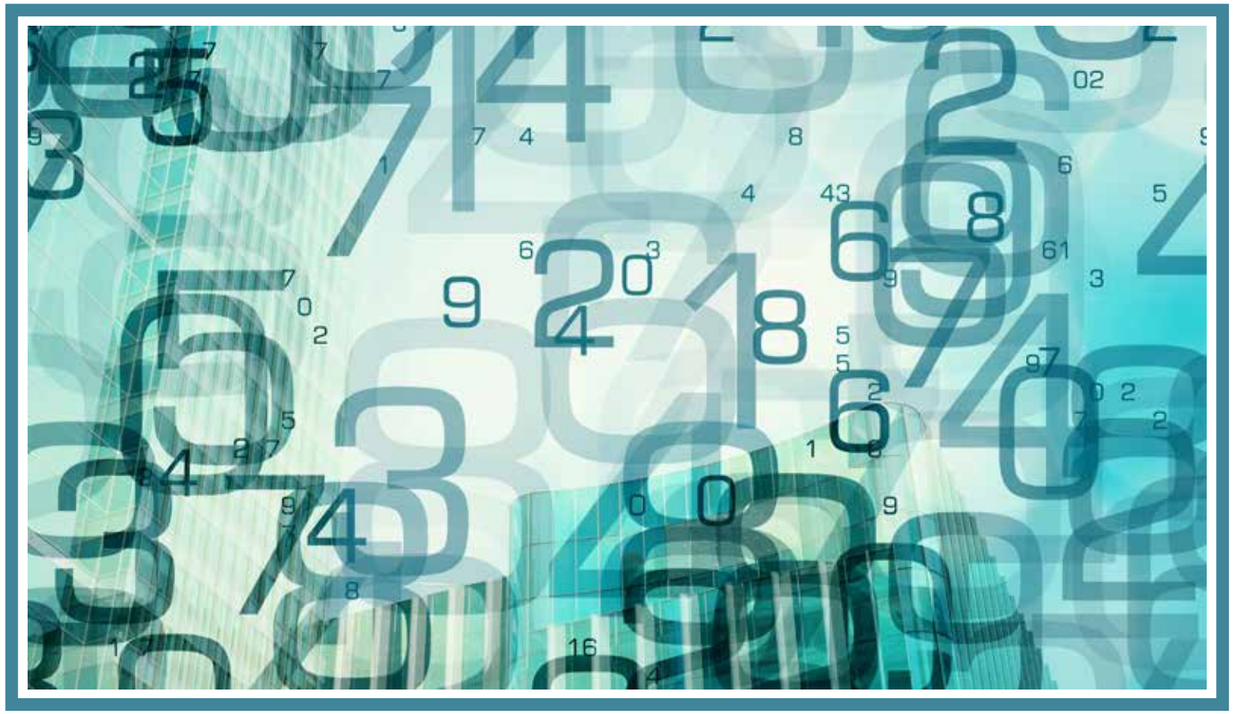
Secrets are not only expected, but respected in a very different way than lies. A mediator is expected to maintain secrets, but if questioned should not lie to protect their secrecy. For example, if asked if there are any prior accidents, he should refuse to reveal any information. If the mediator answers, "none that I know of", he is participating in a lie. Nonetheless, this type of secret is useful to the mediator.

If pushed, most mediators will admit they tolerate, even expect some bluffing in the negotiation phase of a mediation. Indeed, many mediators admit to employing this means of cajoling the parties into agreement themselves. "I'm confident that if you raise your offer by $10,000, he'll come down under six figures." The problems come when a factual misstatement is made or the settlement posture is misrepresented.

The typical bluff comes in the posturing that goes along with the negotiation. In many mediations, you reach a point where one side or the other declares, "We're leaving if they won't take/give $X. They're wasting our time". Most mediators recognize this as a bluff.

Contrast that with: Defendant informs the mediator that in medical records, Plaintiff was found to have a pre-existing condition in her back, which appears to be the same injury in the case at issue, implying a pre-existing condition. There was no actual diagnosis of a pre-existing condition in the same area of the Plaintiff's back in any record Defendant has been able to obtain.

There are gray areas where a lie may not be a lie and where a secret, if taken too far, may turn into a lie. Always tread lightly and use caution. Remember that no two cases are ever alike. Employing lies usually derails mediation rather than promotes settlement. Remember the fortune cookie that says, "Better to remain silent and be thought a fool than to speak falsely and remove all doubt."



BY__ Robert F. Copple, JD, P.HD., CIPP

How to Use Decision Trees in Negotiation and Mediation:

THE POWER OF NUMBERS

I am very pleasantly surprised how well my original LinkedIn Decision Tree article was received. It just goes to show the depth of geekiness in the LinkedIn community. Good form!

In my first article, "How to Handicap a Lawsuit: Decision Trees and Probability Analysis," I described decision tree logic and process, and how to use these tools for strategy development and case valuation. In this article, I discuss how decision trees can also be used as tools of persuasion in negotiation and mediation.

The examples that follow are derived from my own experience with decision trees as a mediator, negotiator and advocate. Just so we can jump right into the discussion, I am not going to repeat here the logic and process of building a decision tree. That is all set out in my first article above. So, if you haven't already, I suggest you take a few minutes to look at that article. It's a quick read.

The Power of Numbers

As I have said many times before, preparation is key to successful negotiations and mediations. Using decision trees as part of that preparation contributes significant advantages:

- Providing a disciplined platform for you and your team to understand your case, including what is important and what is not.
- Allowing you to evaluate various potential settlement positions.
- Documenting your thinking in a permanent visual form – a road map – that provides a quick reference as you work within the negotiation.
- Will likely result in you being the most prepared and knowledgeable negotiator in the room.

But, in addition to these values, decision trees give you the Power of Numbers. We live in a quantified society where numeric standards and measurements carry weight. Whether it is the SAT, LSAT or MCAT, numbers often influence our perceptions of skill, ability and preparedness. At the very least, by presenting a decision tree to a mediator or opponent, you are making a strong statement that you have thought deeply about the case. We have all walked into mediations and negotiations where the other side has done little hard thinking. No matter, "Fortune Favors the Prepared Mind" – Dr. Louis Pasteur.

On several occasions, I have used decision trees to "anchor" a mediator to my position, thus turning his focus towards moving the other side. With a sophisticated (or maybe even unsophisticated) mediator, it is amazing how well this technique can work. The scenario goes like this:

Mediator walks into the private session and begins.

"I know those guys are too high, but don't you think you should go up with your number? Have you thought about this risk or that? And what about attorney fees if you go to trial?"

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You give the mediator your decision tree, which addresses all of the issues he raised.

He studies it for 5-10 minutes and then says,

"Ok, give me the information I need to beat up these guys."

He leaves the room to talk to the other side and comes back three hours later with a settlement number at or close to your case valuation.

Honestly, I've seen it happen. It's the Power of Numbers.

The Moot Decision Tree to Make a Point

I have to emphasize that I refuse to falsely play with the percentages and outcomes in a decision tree in order to bamboozle a mediator or opposing negotiator. The tree is not a brief and to game it is, IMHO, a lie and unethical. And, I'm not suggesting that, as a matter of course, you should always reveal your finished tree. After all, it is clearly an example of attorney work product. If you are going to present it, you better be convinced that the tree favors your position because, at the very least, your valuation will become the floor or ceiling of the negotiation. It's a call you have to make considering the specific case and your case strategy.

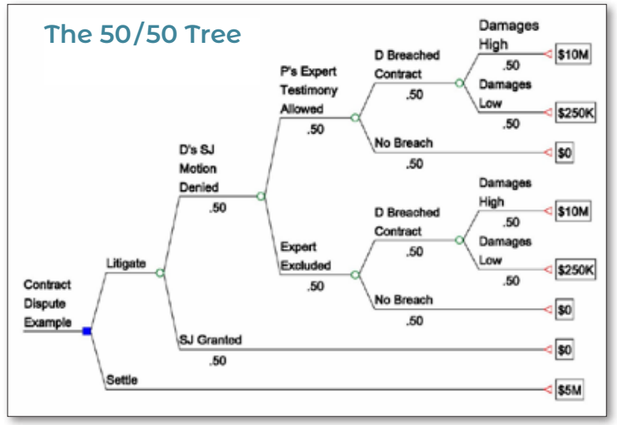
But if, for whatever reason, you don't want to give your tree to your opponents, you can still make a point with a Moot Tree. By Moot, I mean a tree that is admittedly mocked up as an example of potential outcomes to get the other side to reconsider their position. The following are examples of using Moot Trees in settlement negotiations.

The 50/50 Decision Tree

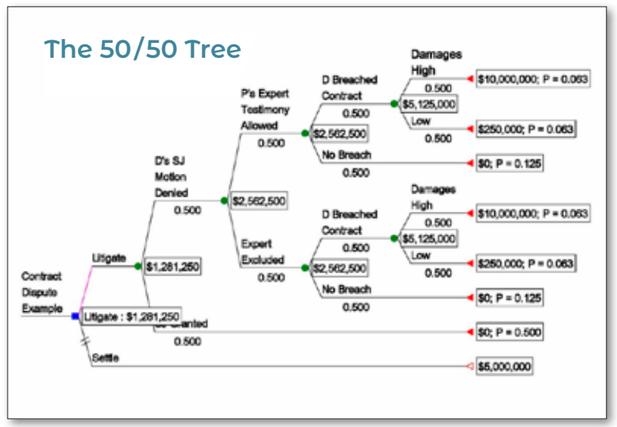
I have used the 50/50 Decision Tree to bring some reality to disputes where the Plaintiff has an unrealistic expectation of success at trial. For this example, let's use the very simple contract dispute tree below, which includes:

- A Summary judgment issue that could resolve the entire case in favor of the Defendant.
- An expert evidentiary issue.
- The ultimate breach issue.
- Two levels of potential damages based on different damage theories – $10 million and $250,000.
- The Plaintiff's generous settlement offer of $5 million.

We begin the negotiations by explaining that, just to keep it neutral, we are assigning a 50% probability of winning and losing to each individual issue. That sounds fair, right?



Now, remember the multi-variable equations discussed in the first article and how a string of probabilities is calculated. When we run the numbers, the Plaintiff sees that assigning a 50% probability to each issue does not mean a 50% chance of being awarded $10 million. Instead the probability of winning $10 million is .50 × .50 × .50 × .50 = .06 or 6%. And, since that same equation appears in two outcomes, the total probability of winning $10 million is about 12%, with a total case value of about $1.28 million.



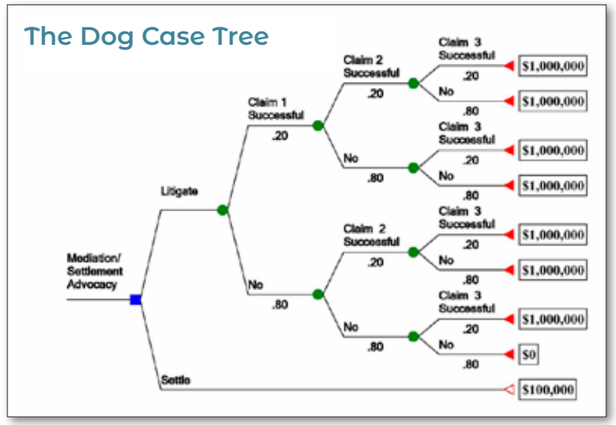
Yes, I will admit that there is some statistical gamesmanship here. Even so, this use of decision tree tools may well cause the Plaintiff to do a double take and reconsider its settlement position.

The How to Turn a Dog Case into a Winner Tree

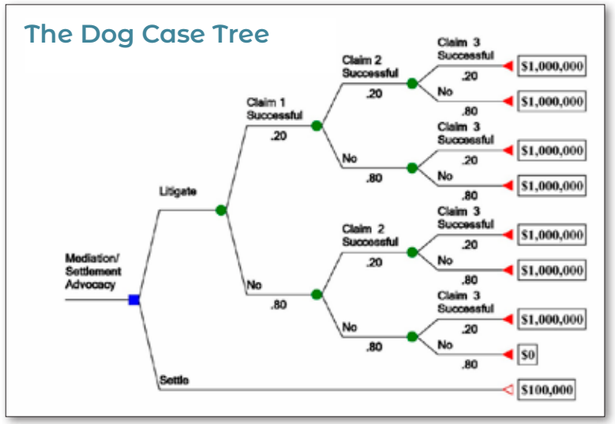
Often, the best strategy for negotiation is changing your opponent's perspective about its probabilities of success. A Moot Tree can be a valuable tool to achieve this transformation.

Here is a version of a decision tree I created on the fly during a settlement negotiation regarding environmental liability. We had demanded that our codefendant (or PRP, to put it in CERCLA parlance) make an additional contribution to the cleanup of a Superfund site. In support, we had three admittedly weak claims, each of which could lead to the same $1 million award. That is, the claims were not cumulative.

At first, the other side scoffed at even considering settlement given the weakness of our claims. To which I replied, "Come on, give me a 20% probability of success on each claim. Just about anything in litigation is worth at least 20%." They agreed. Scoff Scoff.



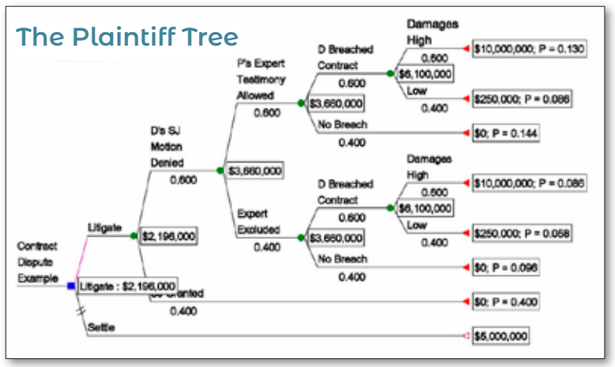
When I ran the probability numbers, our opponents looked on in disbelief. How could those weak claims result in a case value of $488,000? I replied, "The answer is simple. I only have to win one claim, but you have to win all three." Their perspective had been changed and they wrote a check that day.



The Mediation Reevaluation Tree

As a mediator, I have used decision trees to get the parties to reevaluate their positions and narrow the spread. This technique works best when the important issues are relatively straight forward and accepted by both parties. In such cases, I walked into the mediation with a basic tree already sketched out. I then work with each of the parties privately to assign probabilities, which essentially locks them into their individual value calculations. The result is two separate trees – a Plaintiff Tree and a Defendant Tree. Then I run the numbers and compare.

For this example, I am using our basic contract tree discussed above. I have tried to keep it simple and still allow for the effects of bias between the parties' positions. To that end, in the Plaintiff Tree, I have assigned a 60% probability of success to each issue favoring the Plaintiff and 60% to each favorable issue in the Defendant's tree. Here are the two trees.



How to Use Decision Trees in Negotiation and Mediation:

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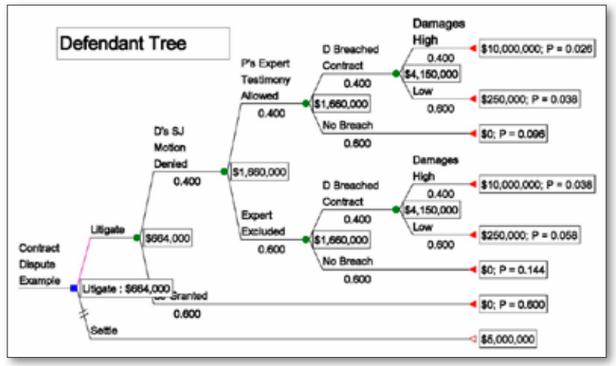

And we compare the results:

- Plaintiff's Maximum Award = $10,000,000
- Plaintiff's Settlement Offer = $5,000,000
- Plaintiff's Expected Value = $2,196,000
- Defendant's Expected Value = $664,000
- Expected Value Delta = $1,532,000

Now we have something to work with and to drive further discussions.

Application of decision tree tools can be very creative and modified to allow for a number of different types of analyses. Other examples include:

- Regulatory disputes and strategies.
- Valuing liabilities acquired in M&A.
- Evaluating the strength of multiple patent portfolios to assert in patent licensing programs.
- Developing Y2K legal process maps.

I'm not kidding. I did a bunch of Y2K trees! That must be the reason the disaster was averted.

MEDIATION FROM A MEDIATOR'S PERSPECTIVE

By Jerome Allan Landau

JEROME ALLAN LANDAU has served business entities, individual clients and governments as a professional Attorney, Mediator, and Arbitrator since 1972. Jerome is a certified Member of the National Academy of Distinguished Neutrals (NADN), is certified by the International Mediation Institute (IMI) in the Hague, and the Mediation and Arbitration Neutral Rosters of the American Arbitration Association (AAA), Construction Dispute Resolution Services (CDRS), and other dispute resolution panels.

Jerome is a co-Founder and Chair of the international Advanced Commercial Meditation Institute and has presented numerous Mediator training programs, including two as an Invited Presenter at the United Nations.

the mediation process is no longer a form of "alternative" dispute resolution; it has become the primary art for resolving disputes.

Counsel and client should come to the mediation actually seeking to settle the case rather than merely seeking "additional discovery".

The longer parties litigate, the more money spent – forcing parties to seek higher settlements to recoup counsel fees and expenses or, conversely, to offer lower amounts in settlement.

A large majority of mediated cases are settled in the mediation, or as a result of the "seeds" that have been planted. Only a very small percentage of all civil cases actually go forward to a jury trial.

The Art of Mediation finds an experienced Mediator both creating a comfortable supportive environment for the parties to exchange ideas, and concurrently taking the parties out of their respective comfort zones. The experienced Mediator/Artist creates realistic and justifiable doubt in a party's belief about its likelihood of success and increases a party's sense of risk if they do not settle.

Counsel's representation of a client in the mediation process can also be an Art, with counsel recognizing and "flowing" with the movement of the mediation process. Below are some keys from my "Mediator's" perspective counsel can use to enhance the likelihood of more efficient and effective service.

1 Selecting the right Mediator for the dispute.

A] Determining the "most appropriate" Mediator for a given dispute is not always an obvious decision. Strongly consider whether the Mediator should have sub stantive expertise or is a good experienced Mediator needed

B] Consider off letting the opposing party select the Mediator provided you have made some initial decisions to insure the proposed Mediator is qualified and Neutral.

C] Suggest that the other side to propose 3 Mediators that have those qualifications and in whom that counsel has confidence. Suggest that they be a Neutral certified by one of the recognized providers such as the American Arbitration Association, the International Mediation Institute, or the National Academy of Distinguished Neutrals.

D] Evaluating a prospective Mediator: check the website; ask colleagues about the Mediator (his style, preferences, etc.); might there be a "conflict of interest" (e.g. Mediator at one time worked with the firm representing a party); does the Mediator have "subject matter" knowledge; can the Mediator be trusted with confidential information; will the Mediator give good "third party' feedback; ask the Mediator whether he will want a brief, an informal letter, pleadings; use caucuses; ask for opening statements; prefer the client also talks.

2 Be prepared: this is not a "dress rehearsal" for the trial.

A] Be thoroughly prepared to have a substantive discussion regarding the facts and legal issues regarding their case or the opposition's case.

B] Understand the strengths and weaknesses of your case, the other side's case and educate the Arbitrator. Be honest; the type of Mediator you want will see through exaggeration and deception.

C] Every case has problems; if not, the parties would not be in mediation. Generally sharing your downside analysis with the Mediator does enable the mediator to serve more effectively.

3 Pre-mediation memo and pre-mediation conference with the Mediator.

A] Experienced Mediators will obtain much of this information from the parties through a pre-mediation memo and pre-mediation conference. Your pre-mediation memo should not merely sending the Mediator a copy of the pleadings, although you should provide the Mediator with the important pleadings.

B] Your memo should include your own confidential assessment of the case and your opinion as to how you believe it can be resolved. Advise the Mediator of issues that may impact the mediation such as party antagonism, client control issues, third party influencers, other conflicts/issues.

4 Preparing your client and managing expectations.

A] Spend significant time with your client; fully explain the mediation process – that it is a process for compromise – not winning; and that your role as counsel is to facilitate settlement, not to attack as you might in a trial or deposition.

B] Manage client expectations before arriving at the mediation, especially if your pleadings or early talks convinced the client of a level of success that is impractical.

C] Ask the Mediator to do this if you cannot.

D] Learn your client's true "wants" and "needs".

E] You and your client must "learn" from the other side: listen, hear and learn the other side's arguments (which make sense and which do not.); where do they appear to lack confidence; what would a Judge or jury "hear" at a trial?

F] Settlement is about compromise – not justice. Compromise is not "giving in" – it is strategizing for the client's future. This is the client's chance at deciding its own fate – not just handing its company's life over to a judge or jury or arbitrator.

5 Evaluating the other party.

What is driving them? Who is the decision maker?

A] Claims in mediation are aspirational – settlement offers are real.

B] What do they need to settle; Are there non – money issues the other party is concerned about? Do they need to structure a settlement in a certain manner? Do they have disclosure issues? What is a realistic settlement? We understand "positional" bargaining – but negotiations should start from a realistic position that you can explain – be serious in your offers and expect the same from the other side.

C] Tools: Decision Analysis (know yours and theirs);
- BATNA: (Best Alternative for a Negotiated Agreement);
- ZOPA (ZONE OF POSSIBLE AGREEMENT);
- ANCHORS (At what amount to start the negotiation.)

D] Using the Mediator: The Mediator can assist counsel in many areas:

- Gaining insights to the other parties' positions.
- Client control issues.
- Reality testing: The more information you share with the Mediator the more effective the Mediator can be in using reality testing with your client, and with the other side.
- Separate meetings between Mediator and counsel can be agreed to by counsel; let your client understand the benefits.

6 Develop a settlement approach before the mediation hearing.

A] Bring your client into the process discussing thoughts on how to settle the matter – what you believe you might have to "give up" to get there.

B] Share this with the Mediator so that the Mediator can help you implement it, or suggest an alternative approach.

C] Do not just communicate with only numbers (e.g. sending a message "you are too high" or "outlandish" – these are received by the other side as "attacks" and only serve to strengthen their resolve.

D] Formulate skillful proposals which send a clear message by transmitting a commentary along with your numbers giving opposition counsel something to "work-off of" in motivating a client towards settlement.

7 What is really going on at the Joint Session?

A] Unless there is a reason for not having them – such as the parties hate each other and it will inflame the situation – they are primarily useful to accomplish:

- Giving the parties the opportunity to tell their story – to apologize, state facts the other party does not know. Giving one party the opportunity to apologies where appropriate.
- Letting the other side understand a parties views of the facts and legal issues – which the other party often does not know (not to learn the facts or legal issues).

8 Reaching settlement

A] Getting the parties settlement offers within a range that it no longer makes any sense for either party to walk away and providing a face saving approach to closing the gap.

B] Mediator Proposals: used to close the gap since it takes the responsibility for coming up with a solution or caving out of the parties hands and places it on the Mediator.

C] Generally at a midpoint between offers and may have some other aspects that a party may need to agree to the settlement. Most experienced Mediators have pre-sold a proposal before they make it. If you have any thing specific you really need in a proposal let the Mediator know before the Mediator floats the proposal – no one likes to re-trade a deal.

9 Bring the Outline of a Settlement Agreement (in Word).

A] Mediator Rule One – if they settle don't let them leave until it is in writing and signed.

B] Having at least a basic outline with "thought-out" provisions when you go into the hearing, you are less likely to be sued for malpractice than when in the middle of the evening counsel "rushes to draft" a settlement agreement.

10 Impasse (always to be expected, never to be feared.)

A] Sometimes caused by numbers, sometimes by language.

B] Discuss with the Mediator how best to frame a counter-offer; how to make the process more "thoughtful" rather than "reactive" or "reflexive".

C] Rethink what else you can divulge to the Mediator, either in confidence or for the Mediator to reveal to the other side (perhaps upon the Mediator's discretion.)

D] Work with the Mediator to keep the process "in motion" – movement is the key.

With great respect to my colleagues, we must remember that we attorneys are sometimes not highly thought of – When your client appreciates that you have his/her best interests at heart, and that you are actually seeking to short-cut a potentially lengthy and costly litigation process – you become a great winner!

FROM THE CHAIR

STEVE KRAMER

DEAR COLLEAGUES

What makes a good neutral? Experience? Training? Intangibles, like the ability to earn the participants' confidence and trust? In addition to understanding the evidence and the law governing a dispute, a neutral must put aside ego and biases, and listen carefully. The neutral must be prepared for the unexpected, and not be swayed by first impressions. Dispute resolution is a process, not a task. My absolute worst mediation and arbitration experiences have involved mediators or arbitrators who did not understand my client's case, and who came in wedded to their own idea of how the case should settle or be resolved. My best experiences involved patient, thoughtful neutrals who made the parties feel heard.

Those experiences fueled my desire to become a mediator. I started by volunteering as a Judge Pro Tem and joining the ADR Section. Since then, I have spent over 100 hours in CLE's dedicated to mediation, arbitration and negotiation. Each presentation provided tools, approaches, ideas and philosophies that have helped me, as a neutral, do my job more effectively. I have spent over 1,000 hours working as a neutral, and every time, I apply knowledge and skills gained from working with and listening to members of our ADR Section.

Whether you serve as a neutral, work with neutrals to resolve your clients' disputes (or do both, as I do) the ADR section has a lot to offer you. In August, we will be posting our schedule of CLE events, which will include a State Bar-sponsored CLE on October 23. We are working with the Maricopa County Superior Court to improve the information provided to court-appointed arbitrators, and we are continuing to explore ways to increase knowledge and awareness of mediation and arbitration as fair, rational and cost-saving methods of resolving disputes. If you, our members, have any ideas for programs or outreach that you would like to share with us, please call or e-mail me.

Serving as the Section's 2019-20 Chair gives me the great privilege of working with an exceptionally talented Executive Counsel. We have enjoyed outstanding leadership under our 2018-19 Chair, Robb Itkin, and his predecessors. Our subcommittees have delivered excellent CLE programs, and we thank our members and committee chairs for their creative, diligent work.

Rick Mahrle, who chaired the President's Award-winning 2019 Bar Convention CLE Committee, will serve again for 2020. Bob Copple will continue to serve as our Budget Officer. Jeremy Goodman will step in as Secretary, and Michelle Feeney is now our ASU Liaison. We thank Mark Lassiter for his excellent work heading our 2018-19 CLE Committee. Our Chair-Elect, Alona Gottfried, will fill that role in 2019-20. If you have any ideas for CLE programs you would like to see, please feel free to share your ideas with Alona.

A special thanks goes out to Thom Cope, who has done a fantastic job as Editor of the *Arizona ADR Forum* for the past three years. Thom is stepping down from the Executive Counsel, and he leaves behind large shoes to fill.

We hope you enjoy reading this newsletter.

Thank You,

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