DWIGHT GOLANN

MEDIATING Legal Disputes

Effective Strategies for Neutrals and Advocates

ABA Section of Dispute Resolution

ABA Defending Liberty Pursuing Justice

4. Summary of Key Points

Lack of Information
- Promote an exchange of data
- Suggest reliance on representations, with a right to verification
- Take advantage of confidentiality
- Suggest a neutral analysis

Poor Analysis of the Litigation Alternative

a. Responses to Cognitive Forces That Distort Judgment
- Selective perception
  - Encourage the parties to speak
  - Use charts and other visual aids
  - Explicitly question gaps
  - If you repeat, use different words and tone
  - Ask disputants to summarize the other side's key points
- Over-optimism
  - Discuss case outcomes generally
  - Question the special characteristics of the case
- Overconfidence
  - Discuss best- and worst-case scenarios
  - Focus on the most likely outcome: a mediocre result
- Over-investment
  - Distance the "bettor" from his "horse"

b. General Suggestions
- Ask questions
- Lead an analysis
- Draw attention to the cost of litigating
- Challenge overly optimistic assumptions

Concerns about Precedent and Reputation
- Reframe terms to remove the issue
- Make sensitive terms confidential
- Recharacterize the issue so that the outcome appears unique
- Point out the risk of an adverse public result

Chapter 8

Merits Barriers: Evaluation and Decision Analysis

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A mediator's ultimate weapon for influencing divergent case assessments is to offer an evaluation. Evaluation is an important, risky, and controversial tactic that should be carefully considered, structured, and delivered.

To understand the difference between evaluation and other mediator interventions, consider this metaphor. If mediators were doctors, fostering an information exchange might be the equivalent of recommending exercise and diet. Helping lawyers and parties to rigorously analyze their own views on disputed issues would be like administering medicine with potentially uncomfortable side-effects.

Mediator evaluation would be akin to surgery. Just as surgery can range from an arthroscopic procedure to a major operation, evaluation can vary from small and low risk to comprehensive and potentially threatening. Most people would not choose a doctor whose first response to every illness was to bring out a scalpel. At the same time, few would feel comfortable with a physician who refused to perform surgery regardless of

need. The challenge for a mediator is to know when and how to perform evaluative "surgery" in the safest possible way.

What do we mean by *evaluation*? In this context it means forming and expressing one's views regarding a dispute. Evaluation can focus on a single issue ("It seems doubtful the statute of limitations defense will be successful") or the overall outcome ("The plaintiff is likely to win"). It can be expressed as a range ("I think damages could run between $125,000 and $175,000"), a numeric probability ("I would estimate a 40 percent chance of success"), or a precise number ("I predict a $500,000 award in this case in Randolph County"). An evaluation can be expressed with certainty ("I am fairly sure the plaintiff will win. . ."') or left vague ("I have some doubts about how a jury might react to. . .")

The idea that parties and lawyers evaluate their own cases is not controversial. However, we have seen that a party's numbers may be seriously distorted or may be driven by emotional needs, the symbolism of dollar amounts, or what they want to receive without reference to their trial alternative.

Lawyers and parties who enter mediation often expect the neutral to evaluate the issues in dispute. The 2008 *Report of the American Bar Association Task Force on Improving Mediation Quality*, for example, reported that 80 percent of the users of commercial mediation believe that some analytical input by a mediator is appropriate in at least half of all cases, 60 percent of users think it is helpful to have a mediator predict the likely court result, and 84 percent think it is helpful for a mediator to recommend specific settlement terms.

Having educated a mediator about their case, disputants anticipate that she will think about what she has heard. Professional mediators are not "potted plants" and do, in fact, form judgments much of the time. Lawyers and parties are thus reasonable to think that they can ask a mediator "What do you think?" or "How do you see this argument?" or "Where do you predict the damages will fall out?"; if a mediator refuses to answer, it is understandable that they may feel frustrated.

On the other hand, many mediators can recount a time they provided an evaluation, were rebuffed, and soon thereafter the process ground to a halt. Experienced lawyers talk of frustration with mediators who announce a "reasonable settlement number" and then alienate or entrench clients by trying to push the outcome toward their opinion. Because evaluation can be powerful, both negatively and positively, it is critical for mediators to evaluate appropriately, skillfully, and with minimum collateral damage, just as a surgeon must choose the optimal technique to achieve his goal with minimum postoperative harm.

Some commentators reject evaluation entirely, arguing that mediators should limit themselves to "reality-testing" through strategic questions.

The very idea of reality-testing, however, assumes the questioner has formulated an opinion about what is "reality" in the case and what is not. In practice, we think litigants often perceive evaluation in what some would describe as mere reality-testing. A mediator could ask, for example, "What are your thoughts on the causation issue?" "Do you think there's a problem on causation?" "How would you answer the argument on causation?" "Don't you have a causation problem here?" These differences in phrasing alone communicate a viewpoint, and even when a mediator's phrasing is scrupulously neutral, her facial expressions, tone of voice, and body language may suggest a judgment.

If disputants can sense a mediator's opinion in any event, there is an advantage to neutrals in offering a viewpoint skillfully, and to lawyers in knowing when and how to request one. This chapter looks first at classic evaluation and then examines how a technique known as decision analysis can enhance an evaluative opinion.

1. Evaluation

a. Benefits and Dangers

Benefits. Evaluation can cause litigants to question and reevaluate their own judgments and "bottom lines." When a neutral who has listened thoughtfully to a presentation of facts and arguments disagrees with a litigant's prediction of victory, the party may be motivated to rethink its position. Evaluation can, for example, help overcome the impact of selective perception and other cognitive forces discussed earlier.

A mediator evaluation can also satisfy a litigant's emotional desire for "my day in court." An evaluation approximates the civil justice paradigm—both sides present their stories and arguments and a neutral renders a judgment—but within the safer, nonbinding confines of mediation. Having presented their cases to a neutral, even one without a black robe, parties may feel less need to do it again before a judge.

A mediator's evaluation can also provide psychological or professional cover to litigants who realize negotiation concessions are necessary, but who do not want to move from an entrenched position without a rationale. Business representatives, insurance adjusters, government officials, and even individuals who feel obligated to family members often use evaluations to protect them from after-the-fact criticism.

Example: A mediator was working on a dispute between a government loan agency and a borrower who had defaulted on his mortgage. As the mediation progressed, it became clear the original lender had handled

the foreclosure process poorly, making it difficult for the agency that inherited the loan to collect it. The agency representative was concerned about being criticized by a review board, however, for not making sufficient efforts to collect bad debts.

In caucus, the agency's lawyer asked the mediator to give him a letter evaluating the case and endorsing the decision to compromise. The agency wanted to show the letter to his board to obtain approval for the settlement, but did not want it to be shown to the borrower's lawyer, in case the settlement effort failed. The borrower's counsel agreed, the mediator wrote the letter, and the case was resolved.

Lawyers can also use evaluations to justify settlement to stubborn clients. Mary Alexander, a former president of the American Trial Lawyers Association, explains this effect:

My practice focuses on personal injury cases. . .The single most useful service provided by mediators is to provide a reality check for clients. People often come into a lawyer's office with very real injuries, but unrealistic expectations about what they can obtain from the court system. They have heard somewhere about a large award and assume it is typical, when in fact it is not. Clients are often in dire financial straits and physical pain, making it hard for them to listen to a lawyer's warnings about trial risk.

When a mediator, especially a former judge, explains the realities of present-day juries—often in language that turns out to be very similar to what I had said earlier—it makes a real impression. Clients are able to become more realistic, and to accept a good offer when it appears.

Disputants can also use evaluation as a convenient scapegoat for a difficult decision, even when the disputant privately agrees with the assessment. ("Once the mediator said the case was worth $100,000, there was no way I was going to be able to settle it for any less. . .")

Dangers. Mediator evaluation can also create a serious risk of harm to the process, making settlement more difficult. First and foremost, mediators who evaluate risk damaging their credibility as neutrals. As long as litigants believe that a mediator is impartial, they are willing to consider options, listen to questions, and make painful compromises. When a mediator evaluates, however, a disputant may conclude the mediator has "gone over to the other side," assuming that because the mediator *thinks* the other side will win, the mediator must *want* settlement to be skewed

in the other side's favor. When the mediator next asks for compromise in such circumstances, the disputant is likely to resist.

A mediator's evaluation also risks negative emotional impact. In *Beyond Reason: Using Emotion as You Negotiate*, Roger Fisher and Daniel Shapiro write of people's "core emotion concerns." One of these is "affiliation"—the feeling of being liked and having a connection with another. Mediators seek to develop this sense of personal affiliation with the parties and lawyers in their cases. Disputants, however, often fail to separate the intellectual process of case evaluation from their personal sense of connection with the mediator. When a mediator evaluates her case negatively, the disputant's feeling of affiliation with the mediator may evaporate. Feeling alienated from or betrayed by the mediator, the litigant will then filter even the most innocent comment through feelings of antagonism—the phenomenon of attribution bias described earlier.

If these risks are not enough, consider these additional concerns. A "global" opinion of case value may freeze the bargaining process because neither side wants to accept a settlement worse than the neutral's "right" number—even when it would be wise to do so. A defense representative, for example, may refuse to compromise further, for fear of being second-guessed by his employer if he offers more than the mediator's assessment of the litigation outcome. In these circumstances, a mediator's evaluation can become a take-it-or-leave-it offer to both sides.

A deal "worse" than the mediator's trial evaluation will often be desirable, however, because a litigant's business or personal interests would be harmed by continued litigation. A plaintiff in an age discrimination case, for example, may have a good chance of winning a better award two years hence, but what will she do in the meantime? How is the litigation affecting her marriage or the family's ability to pay college tuition? Is she less likely to be able to secure a comparable job while the case is pending? These factors are not part of the legal case, but may carry far more value for the litigants.

The expectation of a mediator evaluation can also discourage bargaining. After all, why confront painful decisions about concessions when the neutral may soon vindicate one's position? Disputants may also assume the mediator will place her evaluation between their last offers, and thus be concerned that offering additional concessions will simply shrink the zone in which they can "win" in the evaluation. In a more general sense, participants who expect an evaluation may feel less responsibility for resolution of their dispute, disengage from negotiation, and cease looking for ways to break impasse.

The expectation of an evaluation also changes the focus of the dialogue. Participants emphasize their legal arguments, seeking to persuade the mediator as judge and jury. This, in turn, can cause parties to become

even more convinced of the strength of their arguments and angry at the other side's advocacy. Evaluations also tend to turn the parties' (and perhaps also the mediator's) attention away from nonlegal barriers to settlement and creative solutions. And if the real barrier to agreement is a party's unresolved feelings of grief or a similar nonlegal issue, evaluation will be irrelevant.

Evaluation also assumes certain "truths" about mediators that may not be accurate: that the mediator is in fact neutral, not "rooting" for one side or the other, and that the neutral's evaluation has greater claim to "reality" because his perspective is not corrupted by the psychological traps and tendencies discussed in this book. It is worth asking if all of these assumptions are true—for example, that neutrality renders mediators immune from psychological forces.

There is hubris in a mediator's confidence that his evaluation, because of his neutrality, is representative of what any or even most neutrals would say. Most mediators would deny they are conveying a point of view simply because it is theirs and would say, instead, that theirs is the neutral view—what experienced, dispassionate observers generally would say about the case. As the following experiment shows, this assumption is probably wrong.

Example: More than a hundred litigators from national law firms and corporations sat as arbitrators in a mock case. After reviewing stipulated facts, opening statements, excerpts of testimony, and closing statements, they were asked to render awards. The arbitrators' decisions regarding liability on contract and fraud theories diverged widely, and their awards also varied greatly, ranging from $100,000 to $6 million. These differences appeared even though the arbitrators were working from identical case files and were homogenous in their training and demographics.

In summary, evaluation can:

- Prompt a reassessment of an unrealistic case valuation.
- Satisfy emotional needs by providing a "day in court."
- Provide cover from criticism from an absent supervisor or constituency.
- Shield a lawyer or party from blame for a compromise.

However, it can also:

- Harm the mediator's credibility and destroy rapport.

- Make disputants refuse to accept outcomes less favorable than the evaluation.
- Freeze bargaining.
- Distract disputants from focusing on the real obstacles to agreement.
- Shift resolution toward the mediator's individual viewpoint.

Given its inherent dangers, our fundamental advice regarding mediator evaluation is this: "only when necessary, and with humility." To us, "necessary" means evaluation should be undertaken as a strategy of last resort, when it appears to be the only way to break a negotiation deadlock. At that point—even if all the risks of evaluation come to pass—they are of no ultimate consequence, because the case probably would not settle in any event. Of course when evaluation is necessary, the best practice is to capture its benefits *and* limit its risks. In the discussion that follows, we suggest ways to be as sure as possible that evaluation is necessary, the timing is right, and the opinion is tailored to minimize risk and maximize effectiveness.

b. Whether to Evaluate

When should an evaluative mediator not offer an opinion? The simple answer is this—when it is not necessary. Many apparent disagreements about legal issues do not require evaluation. It may be, for instance, that:

- The problem is caused by lack of or differences in the parties' information.
- A disputant is only pretending to disagree.
- The disagreement is not driving settlement decisions.

Lack of information. The simplest and most common reason parties disagree about the merits, as explained in Chapter Seven, is that they are operating from different or incomplete sets of data.

Example: In a case involving alleged injuries to the plaintiff's back and knee in a skiing accident, the parties had experts concerning the design of the ski lift, but neither side had consulted a medical expert about the plaintiff's back injury. Settlement positions were far apart because the plaintiff attributed his back problem to the accident and the insurer did not.

When questioned by the mediator, the defense agreed that if the back injury was clearly caused by the accident, the plaintiff's settlement

range would be reasonable. The mediator responded by suggesting the defense consider commissioning an informal neutral medical review, or perhaps working out a settlement amount for the knee alone, pending further consideration of the plaintiff's back condition.

Disagreement is only feigned. When lawyers pound the table in caucus to emphasize unshakable optimism about their (mediocre) case, mediators may come to accept their sincerity, even if they doubt their intelligence. Or when a business principal asserts his 100 percent conviction that his "project manager's story will be believed by any jury in America," a mediator may assume his loyalty to his manager has rendered him deaf to the story's inconsistent ring.

Experimental data show, however, that absent highly specialized training, most of us are not very good at detecting lies, and hard experience has convinced us that mediation performances are often rehearsed to spin the mediator (Freshman, 2006). Some participants do know "deep down" that their witnesses are flawed or their legal argument tenuous, but they don't feel comfortable acknowledging it to the mediator. If a party has expressed unshakable faith in the merits of its case but offers a reasonable opening offer and keeps moving, there is simply no need for mediator evaluation.

Disagreement exists, but does not drive decision making. Parties may sincerely assess a legal case as "worth" only nuisance value or as virtually unshakable, but they may have reasons to pay more or accept much less than they think their case is worth. Their personal value system may, for example, find meaning in effectuating constructive changes, seeing demons get their due, or honoring individual contributions to an institution. An evaluation would be irrelevant to the decision making of these parties, but still risk alienating them. Before evaluating, therefore, ask what will motivate your disputants to settle. What do they hope to accomplish? If they did believe the risks of litigation were stacked against them, would it change their settlement decision? If not, then what would? Looking back from the future, what would make the participant feel settlement was worthwhile?

c. When to Evaluate

Delay an evaluation until as late in the mediation as possible. Waiting makes sense for three reasons: (1) it allows you to try other techniques and screen out false signals; (2) even where apparent impasse is caused by divergent views of the merits, the longer you wait the greater the chance

evaluation will become unnecessary or less controversial; and (3) an evaluation delivered late in the process has greater power to move the parties toward settlement.

Waiting allows the participants time and reason to adjust their own evaluation of the case. People may come to recognize that weaknesses in their case are apparent to others. They may become more realistic about the case or at least about the other side's willingness to move. And as they invest more time in the mediation, people may become more committed to settling.

A later evaluation is also likely to be more powerful because the mediator has had time to gain the parties' trust and understand the issues being evaluated. Waiting also allows a mediator to learn more about the parties and their manner of thinking and speaking, allowing her to phrase the evaluation in more palatable ways. All this makes any opinion more persuasive.

Finally, waiting increases the chance the evaluation will yield enough movement to reach settlement. We find that evaluation gets us one "bump" in the parties' positions, and while the bump may be a substantial one, it cannot easily be repeated. If a mediator evaluates when the parties are still far apart, the resulting bump is unlikely to be enough to bring about a settlement, and the parties will slow down and lock in. If the same opinion is offered later in the process, after the parties have adjusted their expectations and closed some of the gap between them, it can inspire a bargaining leap far enough to reach agreement, or at least bring it within view. For all these reasons, evaluation should be a very late arrow in a mediator's quiver.

Suggestion: As a rule of thumb, never evaluate until:

- You have completed at least one complete round of caucus meetings.
- You have diagnosed and addressed other obstacles to agreement.
- Bargaining is stalled or stalling.
- You have talked with the disputants about offering an opinion.

There is one final "when" issue: should you obtain explicit consent from all parties before giving an evaluation? At one level, this is a matter of contract, which can be resolved by putting a sentence into the mediation agreement giving you the right to opine at your discretion (see the sample agreement in the Appendix). In practice, most civil litigators seem to expect a mediator to give an evaluation and would be disappointed if the neutral allowed a mediation to fail without doing so. Sometimes, however, disputants want to delay an evaluation because they do not want to focus on the merits and/or prefer to continue bargaining.

Example: A lawyer was pursuing a tort claim on behalf of a baseball coach at a private school who had recently died from unclear causes. The lawyer's theory was that the coach's death was due to "multiple chemical sensitivity" triggered by turf treatments. The school's position was that this theory was unfounded, but even if it was true such a claim was barred by the state workers' compensation law, which prevented employees from suing employers in tort. The school's representatives said, however, they were willing to offer special benefits to the coach's family as a purely voluntary gesture.

During the joint session, the plaintiff's lawyer played heavily on the "sympathy" card and at the same time threatened that the coach's widow was ready to rally alumni to attack the school for its stinginess. In response to the mediator's questions in caucus, the lawyer admitted privately to problems with his legal case. He asked the mediator not to opine about legal issues, however, because he thought as a tactical matter he would do better relying on a mix of threats and sympathy than his legal claim. The school, on the other hand, asked the mediator to point out to the plaintiff how weak the claim really was.

The mediator carried both sides' messages to the other. He privately suggested to the plaintiff that its legal case appeared to have serious problems, but did not give either side an explicit opinion about case value. The result was an agreement.

Suggestion: You have the following options when considering an evaluation:

- Offer an opinion whenever it seems necessary, without seeking permission—provided the applicable rules allow this.
- Check with both parties before evaluating. This is particularly appropriate if you wish to offer a global opinion ("I see the settlement value of this case as X because I see a trial value as in a range of Y to Z") or a comprehensive analysis of how you think the fact-finder would rule on each disputed issue.
- Raise the option of evaluation with the party most resistant to bargaining further, as a way to prod it to consider whether it would prefer to make a significant move than to receive your opinion.
- Offer each side a menu of options:
  - Continue the bargaining, provided someone makes a new offer.
  - Participate in a confidential listener exercise (described in Chapter Nine).
  - Get evaluative feedback in the form of a settlement figure, a comprehensive analysis of the case, or less formal views on limited issues.
  - Receive a mediator's proposal (also covered in Chapter Nine).

While indicating that we would be willing to undertake any of these options, we sometimes point out that the parties have successively less control as they go down the menu and that some, like the confidential listener exercise, require the assent of both sides. Presented with these options, many disputants decide to defer an evaluation and instead make a new offer or ask the mediator to play confidential listener.

d. Structuring the Evaluation

What issues?

The first question is what to evaluate. It is our sense that 20 years ago neutrals routinely provided flat opinions of "settlement value" or "what the case is worth." We believe mediators are now less apt to give bare, global evaluations and instead to think of evaluation as a means to jump-start a stalled negotiation—more like filling a "pothole," than building a road to a predetermined destination. The legal issue driving impasse may be relatively narrow, for instance whether the liquidated damages clause in a contract will be enforced. If so, there is no need to evaluate other issues on which the parties are closer to agreement. Indeed if the evaluator's view of other issues differs from that of the parties, an evaluation could worsen their disagreement.

Suggestion: If your evaluation is intended to stimulate bargaining, ask yourself:

- What disagreements appear to be driving the impasse? For example, is the stumbling block liability or damages? What aspect of damages?
- How specific an opinion do the disputants need to get over their impasse?
- Do both sides need evaluative comments or only one? (Don't give an evaluation to a party who doesn't need it or is likely to react by toughening its position.)

Less may be more

A corollary to not evaluating unnecessarily is to build on the parties' opinions as much as possible, or "piggy-back." A plaintiff may have a more-or-less realistic take on liability but a highly inflated estimate of damages. If so, you might acknowledge the strength of the liability arguments, even if you do not entirely agree with them, and focus your evaluative

comments on damages. It is easier to change a person's mind on one issue than two, and your concession on one point will often induce disputants to accept your viewpoint about another more significant issue.

Indeed, it is useful to highlight all of the elements of a party or lawyer's analysis with which you more-or-less agree before discussing where your evaluation differs from theirs. The fact that you accept the disputant's position on several issues makes it easier for it to listen to your somewhat different but well-reasoned analysis on a few (significant) other points.

If, however, you think a comprehensive settlement number is needed, you can provide one. This type of evaluation carries the greatest risk, however, and requires the most skill and diplomacy.

What standard to apply?

Prediction of the outcome in adjudication. Frame your evaluation as a prediction of how the likely adjudicator of the dispute would resolve a key issue or the entire case. If the alternative is a court, anticipate a judge; if it is a jury trial, a jury; if arbitration, the likely arbitrator.

Personal standard of fairness or the legally right result. Neutrals are sometimes tempted to focus on how they personally would decide the matter. Don't! Offering your own opinion about the "fair" or "legally right" outcome is dangerous, because it means personally rejecting the arguments of at least one side and perhaps both. Once a party learns that you believe her position is "less fair or right" than the other side's, she is likely at least to suspect your neutrality. And, in any event, your personal opinion is entirely irrelevant, because you are disqualified from ever adjudicating the case.

What it will take to settle. Another standard mediators sometimes apply is this: what will it take to settle this case? In other words, given the negotiation dynamics and the attitudes of the parties, what terms are likely to be minimally acceptable to everyone? Applying this standard, if one side were stubbornly unrealistic about the likely court outcome, a mediator would "bend" her opinion toward that view in order to secure an agreement. In doing this, the mediator is not actually evaluating legal issues, but rather the bargaining dynamics.

There is nothing inherently wrong with this approach, and it is often less risky than offering an evaluation of the legal merits. Disputants who might quarrel with a mediator's opinion about a legal issue will readily accept a neutral's assessment that its adversary will only agree to settle on unpalatable terms. After all, the mediator is merely recognizing what the party has been saying all along—that its opponent is unreasonable.

Interestingly, parties who would reject a settlement recommendation couched as an evaluation of the merits will sometimes accept the same terms if they are framed as a "what it will take" opinion, and vice versa. A party's reaction probably turns on whether it prefers to adapt to an opponent's unreasonableness or to a mediator's disagreement with its legal arguments. As a mediator your challenge is to assess which approach is most likely to be acceptable to a particular disputant.

It is hard for parties to disagree with the mediator's assessment of "what it will take," because it is unabashedly based on his reading of the other side. Moreover, as the bargaining progresses a mediator can offer several such opinions without contradicting himself, much like a weather forecaster who revises her forecast about the severity of an approaching storm.

How to prepare?

In some cases, an initial conference call with counsel will reveal that the participants hold widely divergent views on the merits and expect the mediator to give an evaluation. While a mediator should not necessarily commit to evaluate, she should prepare for it by asking for the critical documents on which the lawyers are basing their assessments. If lawyers place great weight on selected deposition testimony, court opinions, an expert's report, or critical correspondence, the mediator should review them. Early review of such documents is especially important, and easy to justify on a cost basis, in complex, high stakes cases.

One note of caution: while preparation is invaluable in a complex case, it is best to avoid forming any evaluation, even privately, on the basis of documents alone. We find the picture often changes dramatically after people present their case in joint session and a round or two of caucusing. If you have formed an opinion prematurely, you, like the disputants, will become subject to selective perception and may not be listening as well as you should.

Mediators commonly prepare their evaluations in the midst of the process, out of concern that adjourning will cause a loss of momentum. "Dead time," while waiting for a group to decide on its next offer, provides an opportunity to think through a simple analysis. In complex cases, however, you may need more time to formulate a good assessment and may have to call for an adjournment to do so.

In some cases, evaluation takes place through an informal dialogue. A mediator may ask if her input would be helpful, and if the answer is yes will explain her views, after which the caucus negotiation process continues. In such situations, the mediator hopes a relatively informal opinion will increase the party's willingness to move and influence its final settlement decision.

Evaluation may have more impact, however, if it is delivered in a distinctive, formal way. Particularly when the stakes are large, the issues are

complex, and the mediation process has brought new issues to light or a participant wants a written opinion, lawyers may suggest the process be adjourned, allowing them time to brief key points and the mediator to prepare a formal "tablets from the mountain" opinion.

e. Delivering the Evaluation

What format?

Most mediators deliver evaluations to disputants in a caucus setting, to avoid humiliating a party in front of an adversary. Evaluating in caucus allows the neutral to articulate and even appear to accept a party's perspective, before turning to jointly analyze a significantly different question: what will some future decision maker do with this case? In caucus discussions, we often move deliberately to the disputant's side of the table to emphasize that we are jointly looking at a problem. We may concede the opposing side's key witness might well be lying, but then note that the witness has the demeanor and credentials to impress a lay jury. This is not something we could do with both parties present.

Another option is to hold a more formal session, creating more of a feeling of a "day in court." In this format, a mediator might ask the parties and lawyers to meet again in joint session and present summary arguments, with the mediator in the role of advisory judge. Going through this process may make parties more ready to settle. Doing an evaluation in a "moot court" format is dangerous, however, because it casts the mediator more firmly in the role of judge, making it seem the evaluation is a personal opinion, undermining the perception he is neutral, and making later interaction more difficult. Even if you hold semi-formal arguments, it rarely makes sense to deliver your "opinion" in the presence of both parties, as the following example shows.

Example: A company that designed a software system for the Massachusetts welfare program sued the state for $9 million it had refused to pay under the contract, and the state counterclaimed for $15 million in federal reimbursements it said had been lost because of problems with the software. The case went to mediation with a neutral known for his work as an arbitrator.

After a morning of unsuccessful discussions, the neutral announced that he would hear arguments from the parties and then give an advisory opinion. After listening to each side, the neutral retired briefly and returned to deliver his views. He said the state owed nothing under the contract, and the evidence on the counterclaim was not clear enough to reach a conclusion.

The participants had assembled to hear the verdict, and as it was announced the claimant's CEO reacted as if he'd been hit with a two-by-four. The state welfare commissioner was affected as well. He had previously been anxious to settle the case with a small payment, but after hearing the evaluation was eager to collect his $15 million. It was only with much difficulty that the lawyers negotiated a walk-away agreement.

It is not necessary to evaluate the same issues with both parties. The fact that you give an evaluation of a particular issue to one side, for example, does not require you to give an evaluation of the issue to the other. Indeed if you think one side has an excellent legal case, there is usually no reason to tell them so—it will simply harden their position. You may cover liability and damages with the plaintiff if it seems overly optimistic on both issues, but focus only on liability with the defense because its take on damages seems reasonable.

However, if you do opine to both sides on the same ultimate issue, your bottom-line assessment to each must be the same. Although we try to adopt as much of each disputant's perspective as we can, we *never give different substantive opinions* to the different sides (for example, by telling each they are likely to lose).

Note that your view of an issue may be affected by your limited knowledge of the case. The party or her lawyer may know facts they have not shared; for example, a mediation statement may highlight a strong expert's report that affects the mediator's assessment, but counsel may know her witness, in fact, presents poorly.

It is often helpful to emphasize the areas in which you think a party's viewpoint is correct. As we have noted, communicating your honest assessment where it matches or is even a bit stronger than your audience's on a particular issue is good practice. A mediator might say, for example, "Look, I know people expect a mediator to harp on every weakness, but I would rather be clear. While anything is possible, I tend to agree with your point that provable damages are likely be fairly modest in this case. However, I see the chances on liability differently. . ."

When a mediator evaluates in private caucus, there is a risk participants will suspect him of giving different opinions in different rooms, telling each side bad news to encourage it to move toward the center. This is more likely to occur when participants have not worked with a mediator before, he has not had time to build trust, or he was imposed on the parties by a court. To dispel this suspicion, you may want to address it directly. Explain that it's not your practice to give different opinions to different parties, and that while you may phrase things differently, the

substance of your evaluation will be consistent, as the lawyers will find out when they compare notes after the mediation is over.

One option is to put evaluations into writing on a notepad or whiteboard. This allows you to check your reasoning, visually reinforces the information, and makes it clear you are not "winging it" but have done your homework. We find it helpful to present numeric evaluations in the "scratch-pad" or decision-tree formats described later. We generally limit the written analysis to an outline, to leave leeway to adapt our oral explanation to the sensitivities of each side.

You may also note in passing that you have made a certain point in the other room. ("Now, I've said to the plaintiff I see real concerns about their ability to prove consequential damages, but I have to say I'm also concerned about your ability to avoid any liability at all. . .") Doing this confirms that you are balanced and the other side is being "taken to the woodshed" as well.

How? Tactfully, strategically, empathetically

As an immediate prelude to evaluating in caucus, consider summarizing silently, to yourself in the hallway, a party's perspective and arguments as well as your empathy for that side's predicament. The goal is for the participants in the room to feel you "get it"—that you fully understand their perspective. When you then turn to points where you differ, the participants will be more receptive. They can't easily tell themselves you didn't listen and dismiss your opinion. To hear someone articulate their views, and then thoughtfully explain why and where she disagrees with them, can be arresting.

When evaluating, be mindful of adapting your style of communication to your audience. Research confirms that "mirroring"—adopting another's body language, speech patterns, tone, and energy—can create rapport and positive emotion (Nadler, 2004). In a caucus room with informal, colorful participants (for example, representatives of an artists' collective suing their building's structural engineers), you can speak informally with colorful metaphors and expressive gestures. When meeting with the engineers, you would present your analysis in more precise and formal language, toning down your gestures and vocal range.

One reason to be careful about how you deliver an evaluation is that from the disputants' perspective the news is almost always at least somewhat bad, making the process a negative experience. Why does it matter if participants experience negative emotion in mediation? Research suggests negative emotions impair the ability to bargain by affecting cognition, thus reducing creativity, energy, and willingness to stick with a task (Shapiro, 2004). Because evaluation is likely to have a negative emotional impact, it makes sense to try to offset this as much as possible. This can be done through the manner in which you communicate and by expressing appreciation of a party's perspective and empathy for his circumstances.

The importance of distancing yourself

To reduce the likelihood participants will hold an evaluation against you, remember to emphasize that it is not your personal opinion about what is fair, but rather a prediction about how strangers—a judge or jury—would react to the case. You might stress that while these strangers will do their best to decide the dispute honestly, they won't know very much about the "real" situation and, if the dispute involves technical points, may have difficulty understanding it.

While acknowledging that the participants have superior command of the facts, you might note that your relatively superficial education about the case puts you in a position similar to the jury's. Precisely because you haven't probed the case as deeply as they have, you may be better able to appreciate the reaction of a more superficial observer like the future adjudicator. Again, use the language of prediction and do not claim certainty. By articulating your evaluation and acknowledging uncertainty, you encourage participants to acknowledge the uncertainty of their views as well.

As important as what you say, however, is what goes on in your mind: it is critically important that you not become invested in your evaluation. Having stated an assessment of a claim, it is natural to become annoyed when listeners don't "get it" and stubbornly persist in claiming a flawed case is bulletproof, a jury will sympathize with their unpalatable witnesses, and so on. Remember that the disputants may be rejecting your views for reasons other than their accuracy: agreeing with them, for example, may require accepting more of a loss compared to their hoped-for result than they are able to do at the moment. Or the opinion may call for a greater concession than their bargaining strategy allows. Or you may, just possibly, be wrong—after all, the parties or lawyers usually do know more about the case than you do.

Example: In a recent case involving alleged fraud in a commercial contract, a mediator agreed liability was uncertain, but suggested that to prove the millions of dollars claimed in damages more proof would have to be offered. The case did not settle, and a year later the mediator received a triumphant e-mail from plaintiff's counsel, informing her of a $40 million damage award on not much more proof. As he had predicted, the local jury had decided to teach a lesson to the multinational corporate defendant, notwithstanding the slimmest of presentations on damages.

Remember that the case will only be tried once. Be humble when evaluating. No one can know the future. Becoming wedded to your evalua-

neutrality and create an adversarial relationship with people you are trying to assist.

One option is to express your prediction in probabilities ("I see an approximate 45 percent chance of winning on liability") and note that it will almost certainly prove wrong, because in any one trial, one side will win and the other will lose. To deal with this, consider putting your prediction in the form of multiple trial outcomes. ("If this case were tried ten times, I think you would win four or five times, but I am concerned you would also lose five or six times.") This allows you to agree with a party that it may in fact win, while also communicating that it is more likely it will lose.

For an example giving an evaluation, see Chapter 16 of the DVD.

f. After the Evaluation

Good evaluations do not necessarily settle cases. As noted, they are used more often to restart stalled bargaining processes than to propose a final set of terms. Mediators therefore need to think about what should happen *after* the evaluation to promote effective negotiations. Do the parties need time to reflect on what they have heard? To consult an outsider for more authority? In smaller cases, or when the principals are present, a mediator can give an evaluation and then ask for new offers. But if a case is complex or the evaluation surprises the listener or suggests a settlement range outside his authority, parties may need to adjourn to consider the implications.

Evaluation can be an effective tool to help break through merits-based barriers. You must next consider how to bring the negotiation to closure. If bargaining is to resume ask yourself these questions: Who should make the next concession? Are inventive terms possible that would obscure or cushion one side's defeat? Should you make a "what it will take" suggestion to take advantage of the impact of the evaluation, or cushion the result for the loser?

In conclusion, use evaluation only as a tool of last resort, and don't let it overshadow more facilitative techniques. But when facilitation fails and impasse looms because of parties' apparent unrealistic views of the merits, offering an evaluation may be the key to bringing the process to a successful result.

2. Decision Analysis

For most of us, the logic and procedure underlying the method known as "decision analysis" is quite natural and accessible. When faced with a decision, we inevitably choose among paths at the proverbial fork in the road. To choose wisely, we try to anticipate options and assess probabilities associated with each path. For a businessperson, the decision might be

development or both. He would be wise to consider the likelihood of success in product development and to estimate the resulting revenues and costs. Litigants faced with deciding between settling or pursuing a litigation path should similarly consider challenges along the way, the likelihood of success at each step, and the range of possible results. Decision analysis uses the same logic and provides a quantitative method for considering the litigation path and comparing it to settlement options.[1]

Lawyers, clients, and mediators implicitly accept the logic of decision analysis when they argue about the merits of a case, discuss strengths and weaknesses, and relate them to a "reasonable" settlement figure. A lawyer whose defense client is *just about certain* to lose, and then be forced to pay *at least* $500,000 and *quite likely* between $700,000 and $1 million, will advise her client to offer much more in settlement than if she thinks the client has a *good chance* of avoiding liability, with a $300,000 award *most likely*, and only a *slight chance* of an award exceeding $500,000. This lawyer is considering different uncertainties in the case, and relating her assessment of probabilities and outcomes to settlement. However, because she is using inherently vague prose to express probabilities, she cannot communicate clearly the size of each risk or the impact of cumulative risks. (If you doubt this, ask a few people to write down, in percentage terms, what one of the italicized words means to them—we guarantee their percentages will be very different!) If the same lawyer were using decision analysis, she would assign numerical probabilities to her assessment of each risk and then estimate the monetary value of each possible case outcome, after deducting costs to be incurred before making a settlement recommendation.

Why work with decision analysis in mediation?

Decision analysis can help move participants toward settlement in mediation. Assigning numerical probabilities to possible twists and hard-dollar estimates to potential case outcomes can prove illuminating to participants who haven't related their lawyer's assessments, expressed in prose, to settlement value. Numbers tend to capture peoples' attention, perhaps by rendering the future more concrete. Using decision analysis enables participants to understand the cumulative impact of risk in the litigation, relating various theories to a precise outcome. It enables them to see the likelihood of each possible case outcome—whether, after all is said and done, there's a 10 percent chance of collecting more than $150,000, or less than a 30 percent chance of collecting more than $75,000, etc. By mathematically discounting each case outcome by its probability, decision

1. In litigation, decision analysis generally compares settlement to litigation risks that may be predicted but not controlled. Litigants analyze the risks and consequences associated with the litigation and decide whether to litigate or settle for a certain amount. While this chapter uses the term *decision analysis*, a purist may prefer using the narrower

analysis yields a number both sides might view as "reasonable" settlement value.

Sometimes decision analysis is helpful not because of the numbers, but because discussion around the numbers helps participants detach—emotionally and personally—from their case. Decision analysis almost necessarily uses less emotional, less personal language than we often hear in mediation. No longer are parties arguing directly back to their lawyer's or mediator's suggestion that "your witness isn't very strong and you may lose this motion." Rather, they are looking at the numbers and discussing whether another witness, if located, could raise the percentage chance of winning a motion by 10 percent. The focus of attention is "mediated" by the easel, scratch pad, or computer on which the analysis is shown, and the task and tone become less oppositional and more focused on working with the problem.

Of course, the end numbers calculated through decision analysis can have power. When participants accept the logic of the method and recognize that the probability and payoff values in the decision analysis of their case are reasonably accurate, they may readjust their internal benchmark about what constitutes a fair settlement. The final discounted case value may thus have dramatic impact, providing reason or excuse for movement in negotiation toward settlement.

Do not assume that decision analysis should be limited to mediations involving engineers, business administrators, CFOs, and accountants. In our experience, a wide range of people, even many lacking post–high school education, can also understand it. No calculus is involved, just basic arithmetic. Most people do understand betting, and the logic of discounting for risk when making decisions. That is all you need. Even if a disputant does not follow the math, he will understand that a logical analytic method has been applied to his case, and its results may persuade him to adjust his settlement position. Whether introducing decision analysis will be productive in mediation depends less on whether participants will understand it—they will—and more on whether it will matter to them when making settlement decisions.

Two formats: scratch pads and tree structure

There are two ways of doing decision analysis. One we'll call a basic "scratch-pad" format. The other we'll refer to as "tree format" because it involves drawing horizontal treelike structures on paper or computer to demonstrate the interrelationships of the issues in the case. The two methods are logically identical, but they appear quite different.

Scratch-pad analysis may seem more familiar to people who are comfortable making quick bottom-line calculations. They may not need or care to see a map of the litigation and its flow or how one issue may affect

whiteboard and marker. For more complex cases, an Excel spreadsheet can be used. One of the chapter authors generally uses the scratch-pad format, although will occasionally hand-draw full "trees."

The other author prefers the tree format as being more elegant and effective for people who process information visually. The tree method creates a map of the possible twists and turns in a case, using horizontal tree branches, generally moving over time from left to right, with the probabilities of each possible event carried on the drawing, ending with all the possible case outcomes at the far right. In relatively simple cases, a mediator can draw the decision tree entirely by hand on a regular note pad or easel. As with the scratch pad, a calculator makes the arithmetic easier. In more complex cases, analysis is best done on a computer using decision-tree software. (We use the TreeAge software available from TreeAge.com, but other software is available.) Printing it out is recommended if more than one or two participants will want to study and discuss it.

For examples of feedback in scratch pad format see Chapters 13, and in tree format Chapter 16, of the DVD.

A note on that final, calculated number—"discounted case value"

When using decision analysis in litigation, many people refer to the final number as the "settlement value" or the "reasonable settlement value" or the "case value." These terms suggest a normative claim—that someone is "unreasonable" by refusing to settle at or about that number.

In fact, the end number predicts the average result *if and only if* the event being analyzed will occur many times. When using this method for public health decisions that will be tested in large patient populations or business decisions to be tested over repeated consumer transactions, the number predicts a real average result. Remember, however, that when applied to litigation, the method still predicts the average of many, many hypothetical trial outcomes. *In fact, there will only be one trial.* The final calculated number from the decision analysis is not what will happen in that one trial; it is the *weighted average* of all the things that might happen. In reality, the trial will yield one and only one of the possible judgments or damages awards in the scratch-pad list or shown on the far right-hand side of the tree structure.

Because it cannot be said that a litigant should always settle for the "roll-back" or final, calculated number this analysis yields, we will not to refer to it as the "settlement value" here. We use the term "discounted case value" as reflecting the method's use of probabilities to discount the value for the various ways a case might end.

The analysis is only as good as the data

Whether using a scratch-pad format or formal decision trees, the out-

counsel is evaluating with prose such as "very likely" or "highly improbable" or with percentages. Carefully considered, experienced, and objective review of the probabilities in the case is essential.

Whatever the numbers, working through the process is valuable, because it forces you to explain and clarify your thoughts. Substituting alternative percentages and verdicts also helps identify which issues greatly affect case value and may therefore deserve close attention.

The method's central value is in revealing the cumulative impact of risk

If most mediation participants would agree that it makes sense to settle at a point that accounts for litigation risk, why do they so often cling to widely divergent positions? It may be due to perception bias and other psychological traps described in Chapter Seven, which cause them to estimate probabilities or damage awards optimistically. Yet often, when decision analysis is performed using participants' own estimates, the resulting discounted case value is far from their stated view of the "value of the case."

Successive hurdles. The central reason is parties' failure to consider the cumulative impact of risk in successive stages of the litigation. For example, a plaintiff's attorney may say he has a 60 percent chance of surviving summary judgment and also a 60 percent chance of prevailing at trial. The value of a verdict if the plaintiff wins, he says, will be $100,000, and the value of the case is therefore $60,000 (0.60 × $100,000). He has failed to appreciate that the likelihood he will both survive summary judgment and win at trial is much lower than 60 percent, because the risks on each event must be multiplied against each other. The chance of surmounting two risks in litigation, each with a likelihood of 60 percent, is 0.60 × 0.60, or 0.36, and the discounted value of litigating through trial in this case would be $36,000.

Suggestion: Whether using scratch pad or trees, when explaining the concept we sometimes analogize the situation to flipping a coin twice in a row. The chance of getting heads on any one flip is 50–50, but as even nonmathematical disputants appreciate, the chance of getting heads twice in a row is lower than 50 percent. Winning two separate issues in a case is like getting heads twice.

Using a scratch-pad format, we might make this notation:

0.60 × 0.60 = 0.36 chance of a plaintiff verdict
0.36 × $100,000 = $36,000 (discounted case value)

Using a tree structure format, we would first sketch it as shown in Figure 8.1.

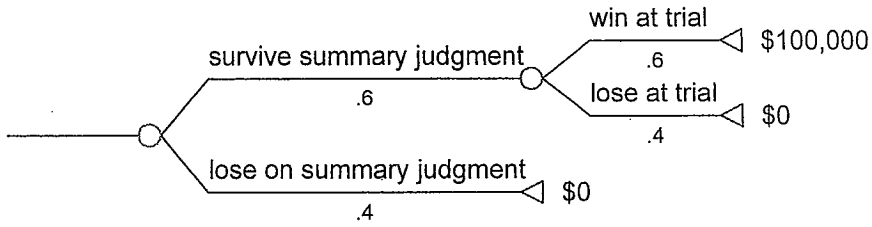

Figure 8.1

This tree records the lawyer's professional judgment that the plaintiff has a 60% (0.6) chance of surviving summary judgment by displaying 0.6 beneath that labeled branch. Thus, a probability of 40% (0.4) is displayed beneath the branch labeled "lose on summary judgment." The next phase of the litigation occurs after—to the right of—the "survive summary judgment" branch. (If the plaintiff loses, there is no next phase. For simplicity's sake, we have ignored any appeal option.) Having survived summary judgment, the next pair of branches would be "win at trial" or "lose at trial" with a 60 percent probability assigned to winning and a 40 percent probability assigned to losing. As in the scratch-pad example, we have assumed the "payoff" or damages will be $100,000 if the plaintiff wins and $0 if the plaintiff loses. The end node—the last thing that can happen in the litigation—is represented by the triangle symbol. The payoff number and its probability (shown as "P =") appears to the right of that node.

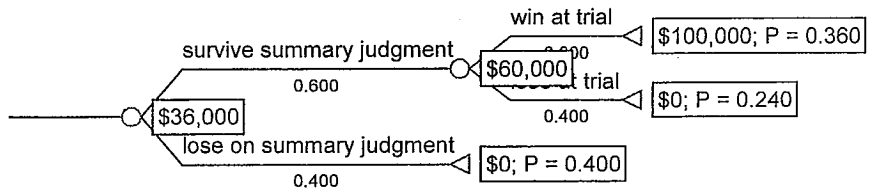

Figure 8.2

As depicted in Figure 8.2, to find the case's discounted value, the decision tree would be "rolled back," which means the values of all possible outcomes are discounted by their probabilities and summed. Calculations typically start at the right side. By multiplying the probability of plaintiff's verdict at trial by its payoff and multiplying the probability of defense verdict by its payoff and adding the two figures together, a discounted value of $60,000 is calculated (or "rolled back") and displayed beside the chance node that branches into the trial possibilities (win at trial or lose at trial), and after or to the right of the node "survive summary judgment." Thus, the expected value of the case after surviving summary judgment and before trial would be $60,000, as reflected earlier.

Any assessment of this litigation must also account for the summary judgment phase. Thus, the discounted value of the trial branches—$60,000—must be multiplied by the probability that the litigant will "survive" summary judgment (the opponents motion will be denied), 60 percent. The litigation's discounted case value is thus $36,000. The $24,000 difference reflects the additional discount for the risk of losing on summary judgment.

Different possible verdicts. The calculation of cumulative risk also affects the value of cases in which there are different possible verdict amounts. Assume the plaintiff in the preceding case has $100,000 in provable injuries but is also seeking punitive damages, which if granted will raise his recovery to $500,000—if he can collect it (punitive damages are generally not covered by insurance). Asked to put a percentage on the verdict possibilities, the plaintiff lawyer says the odds of obtaining a $500,000 verdict are at least one in three. He believes the case is therefore worth about $150,000 and will not settle for less. The lawyer's estimates of a high verdict seem optimistic to the mediator, but he plugs them into the model to see how they play out. The scratch-pad calculation goes as follows:

Likelihood of overcoming summary judgment: 60%
Likelihood of winning at trial: 60%
If these events occur, likelihood of damage awards is:

$100,000 – 66%
$500,000 – 34%

This yields the following valuation:

				Likelihood of
Liability:	Summary Judgment	Trial		plaintiff verdict
	.60	× .60	=	.36
Damages:	.66 × $100,000	= $ 66,000		
	.34 × $500,000	= $170,000		
		$236,000		

Discounted case value: .36 × $236,000 = $85,000

The decision tree drawn for this case would look like Figure 8.3.

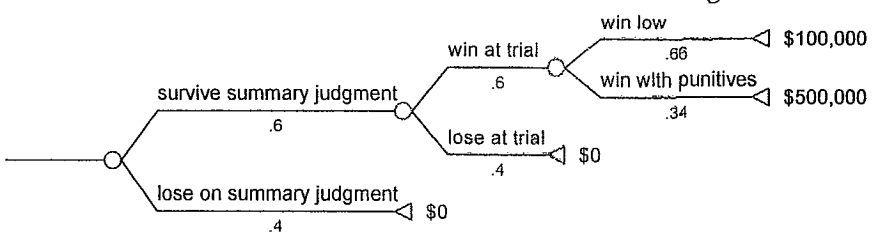

Figure 8.3

The discounted case value would be found by calculating or "rolling back" as shown in Figure 8.4.

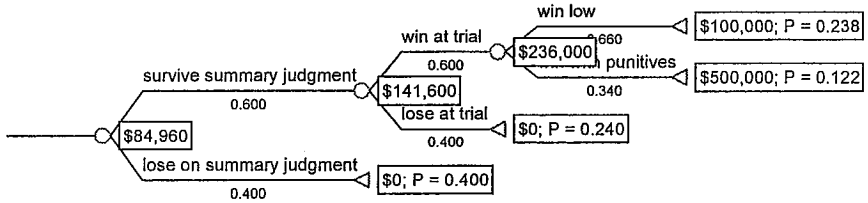

Figure 8.4

By setting forth these numbers and doing the math in scratch-pad or tree format, the mediator can demonstrate to the lawyer—and, equally important, his client—that even if the lawyer's assumptions are true, the discounted case value will be only about $85,000.

A lawyer may see the results on the motion and at trial as linked: "If I can convince the judge to deny summary judgment, the court will be rolling my way and our chances at trial will be more like 80 to 90 percent." The mediator can quickly redo the math, plugging in 85 percent in place of 60 percent for trial risk. This raises the likelihood of a plaintiff verdict to 51 percent (0.60 × 0.85). But 51% × $236,000 is still only a bit over $120,000, well below the attorney's $150,000 estimate. Implication? It may be time for the plaintiff to rethink its settlement goal.

At this point the plaintiff might ask: "Try to persuade the defendant to come up to $150,000." The mediator might respond: "I would be happy to convey that you won't settle for less than $150,000. But if the other side won't meet that number, it probably makes sense, considering the risks, to accept a different number, as long as the offer is at least as high as your discounted case value."

A basic truth—the cumulative impact of risk—drives this example. Even aggressively optimistic litigants cannot avoid its effects. Assuming the plaintiff's chances of overcoming each hurdle are as good as his lawyer believes, the likelihood of surmounting all the hurdles and winning the large prize is still only modest.

Dealing with complex realities: multiple verdicts

Suppose a case in which the plaintiff has an 80 percent chance of surviving summary judgment and a 60 percent chance of winning on liability,

making 48 percent the cumulative probability of success for the plaintiff. However, a liability finding could result in a range of possible verdicts. To keep the analysis manageable, we commonly assume three scenarios—excellent, poor, and average. In a commercial dispute these might be:

- Out-of-pocket damages: $100,000.
- Lost profits plus out-of-pockets: $250,000.
- Punitive damages plus profits and out-of-pockets: $2 million.

As the number of possibilities increases, it becomes more and more difficult for lawyers and clients to estimate case value using "gut judgment." Decision analysis can help. Again, the mediator has a choice between using the parties' estimates or her own, but the method is the same. Assume the probabilities of each verdict are as follows:

- Out-of-pocket damages: 50 percent.
- Lost profits plus out-of-pockets: 45 percent.
- Punitive damages plus profits and out-of-pockets: 5 percent.

What is the value of the case now? The likelihood of a plaintiff's win on liability is still 48 percent. We must now divide the victory into three parts, corresponding to the three possible verdicts. We can calculate the value of each verdict chance, then aggregate those values to arrive at the total verdict value, then multiply the result by 0.48. In scratch-pad format (again using a hand calculator) we would write:

Out-of-pockets	.50 × $100,000	=	$ 50,000
Lost profits	.45 × $250,000	=	$112,500
Punitives	.05 × $2,000,000	=	$100,000
	Average value of verdict	=	$262,500

Discounted case value = 0.48 × $262,500, or $126,000

Using a tree format, the analysis would look like Figure 8.5.

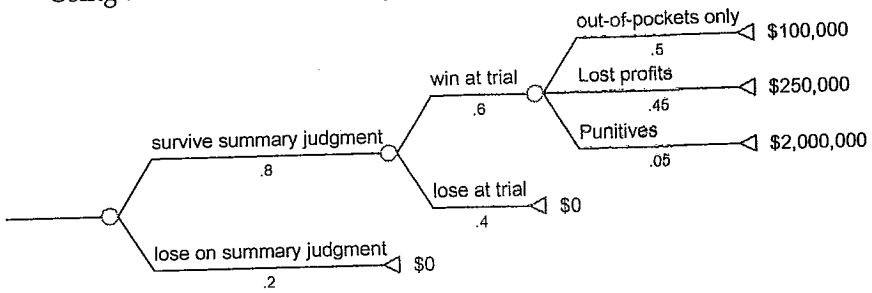

Figure 8.5

Of course, one case will yield only one outcome—zero if the plaintiff loses and either $100,000, $250,000, or $2 million if it wins. We remind participants that this calculation means only that if the case could be litigated 100 times, the plaintiff would be predicted to win 48 times and lose, recovering nothing, 52 times. Within the 48 times the plaintiff would win, the verdict would come in at one of the three levels, with the likelihoods as stated. Given these assumptions, analysis tells us the weighted average of plaintiff's recovery over 100 cases would be $126,000, as indicated in Figure 8.6.

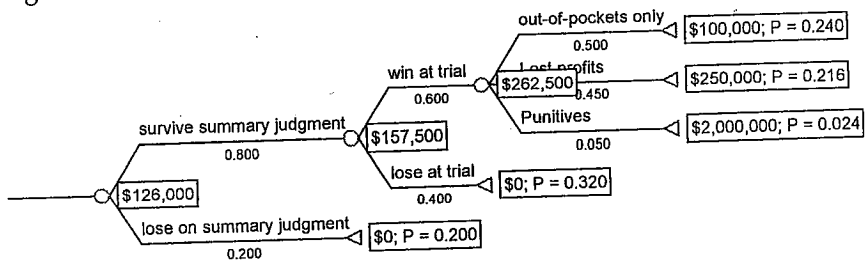

Figure 8.6

The tree format may be preferable for representing the complexities of reality

It may be that *no* format could represent every possible nuance and future uncertainty. Is it possible that three jury members will be killed on the eve of their second day of deliberations, requiring a mistrial? It is possible the defendant CEO will be found to have a criminal record? Is it possible a jury will disregard the damages theories presented and fashion their own? The impossible does happen sometimes.

More often, there are many foreseeable twists and turns to litigation. In a typical employment discrimination case, the plaintiff can survive summary judgment or not; win or lose at trial; or be awarded back pay only, emotional distress damages and back pay, or back pay plus emotional distress plus front pay. A wide range of years might be applied to the front pay award. Punitive damages could be awarded in any or all of these scenarios. Where a plaintiff was a commission salesperson, the jury might use a higher or lower estimate of annual past or future lost compensation.

If a litigant wants to assess her case, she might reasonably seek to estimate a range of numbers for each of these damages categories—back pay, front pay, emotional distress, and punitive damages—and consider the likelihood of each. At some point, the scratch-pad format may be difficult to follow, and the visual mapping aspect of the decision-tree format may prove more useful. The array of branches on the tree, building from back pay only to back pay and front pay, accounting for a range of emotional distress damages, a range of punitive damages, etc., more fully represents the complexity of the case and makes it easier to track and to discuss it.

Sensitivity analysis

Particularly where the parties' assessments on one or two issues differ significantly from each other or from the mediator's, it is worth asking how important these disagreements really are—that is, how much difference would it make to the final value of the case if one person were correct or the other? It turns out, as you might expect, that not all components are equally important.

Sensitivity analysis asks the question: if we change the probability on a given issue or adjust a damages estimate, how much will it change the discounted case value? Participants inclined to argue every issue are sometimes surprised to learn that many of their disagreements don't much affect overall value. Sensitivity analysis identifies the issues that are worthy of greater attention ("drive the numbers").

Example: Assume in the preceding example that the parties disagree strenuously about whether the law allows the plaintiff to recover lost profits or limits him to out-of-pocket damages. The plaintiff estimates a 70 percent chance of recovering lost profits and only a 25 percent chance of being limited to out-of-pockets, while the other side sees the percentages as 50 and 45 percent, respectively. How much difference does this disagreement make to discounted case value?

A simple sensitivity analysis method is to recalculate with alternative numbers. Here, the discounted case value using the plaintiff's percentages would be:

Out-of-pockets	0.25 × $100,000 = $ 25,000
Lost profits	0.70 × $250,000 = $ 175,000
Punitives	0.05 × $2,000,000 = $100,000
Total verdict value:	$300,000
Discounted case value:	0.48 × $300,000 = $144,000

Sensitivity analysis shows that raising the likelihood of recovering lost profits by a full 25 percentage points increases the value of the case by less than $20,000 ($144,000 versus $126,000). However, it would also show that assumptions about the likelihood of punitive damages have a major impact. The mediator can point this out and suggest more careful focus on analyzing the risk of punitive damages, instead of arguing over lost profits.

Using a tree format, the two trees would be presented and contrasted as shown in Figure 8.7:

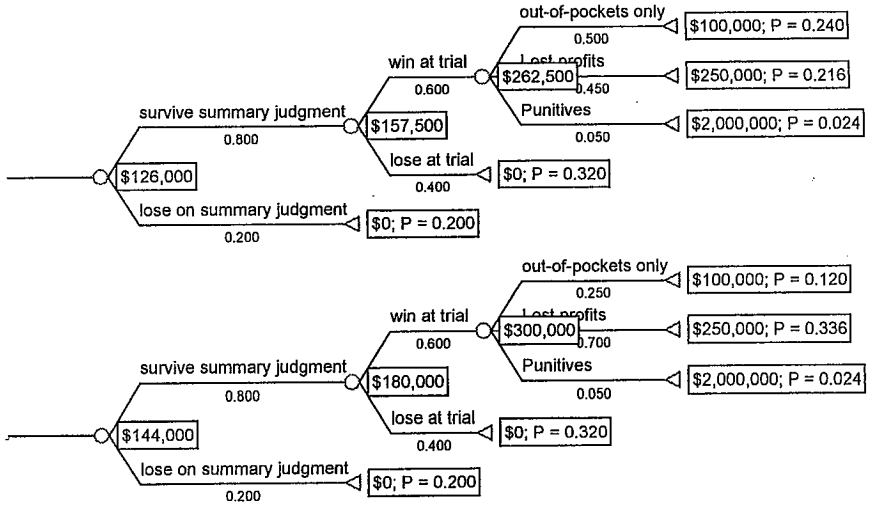

Figure 8.7

Decision analysis software enables you to easily generate a graph that shows the relationship between changes in one variable and the discounted case value (see Figure 8.8).

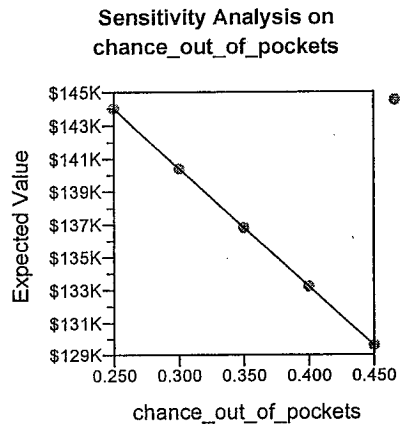

Figure 8.8

Decision analysis can facilitate more thoughtful evaluation by participants

After introducing the basic logic of decision analysis, the mediator can suggest that participants use it to analyze their own case. The mediator then guides the participants through a simple series of questions, such as: What could happen next? What are the chances of each possibility? If that happens, what could happen next? What are the chances. . .? Upon reaching the step of estimating final outcome, the mediator facilitates participants' consideration of various payoffs and subtraction of any costs that will be incurred from the present through the end point.

We might reasonably ask how decision analysis can be useful if participants (counsel or parties) supply the key estimates of probability, payoff, and costs. After all, can't participants be expected to offer unrealistic estimates? Won't that yield an unrealistically skewed analysis? The answer is, sometimes. However, even somewhat unrealistic probability estimates over several stages in litigation, applied to somewhat unrealistic outcome estimates, may yield a "discounted case value" far higher or far lower than a participant's current settlement position. Participants may be more willing to move from entrenched positions when *their own analysis* suggests it would be appropriate.

For an example of using decision analysis with estimates supplied by counsel, see Chapter 13 of the DVD.

Using decision analysis for mediator evaluation

Of course, where the participants' estimates are dramatically unrealistic, or they have failed to include important possible litigation twists, turns, and outcomes, their analysis may just confirm their entrenched positions. The mediator's evaluation, presented as probability and payoff or cost estimates, will reflect a very different picture.

To present an evaluation using decision analysis, the mediator reviews each step of a possible litigation path, discussing and recording what might happen next—summary judgment for the defense; no summary judgment; partial summary judgment on a particular issue; no liability; high, mid-range, or low damages; punitive damages; and so forth—and assigns the mediator's probability and damages estimates to each. If using a scratch-pad approach, the mediator can list the issues on a whiteboard or memo pad and then plug in the numbers, explaining how he arrived at each estimate along the way. Alternatively, the mediator might talk through the entire analysis verbally, then present the written scratch-pad calculation to back it up. Using the tree format, the mediator would draw the structure of the tree on a whiteboard, easel, or computer. She might insert and discuss probability estimates at each step, or draw the tree structure first and go back over it to fill in her estimated probability numbers and outcome values.

Whether using scratch-pad or tree sketches, we recommend a mediator think through his judgment of important percentages and values in the analysis outside the caucus room, before presenting his evaluation to the parties. This enables the mediator to anticipate which points are likely to be controversial with the audience and how to deal with them. Consistent with our advice that "less is more" in evaluation, we recommend the mediator "piggy-back" where possible. In other words, the mediator's analysis may incorporate a participant's probability or damages numbers that are not too far off, substituting the mediator's numbers only where his evaluation differs greatly.

Example: Consider again the example in Figure 8.3, and assume the mediator thinks that some of the advocate's estimates are skewed. In particular, she thinks the plaintiff is too optimistic when he estimates a 34 percent chance of collecting a large punitive award.

If the plaintiff wins on liability, the mediator puts the chance of a $100,000 verdict at 90 percent and a $500,000 verdict at only 10 percent. She thinks the plaintiff's estimates of 60 and 80 percent chances of success on the summary judgment motion and at trial are perhaps somewhat optimistic, but she decides to accept them and concentrate on the issue of punitive damages. The scratch-pad analysis would be:

Liability: 48%
Damages: 0.48 × 0.90 × $100,000 = $43,200
0.48 × 0.10 × $500,000 = $24,000
Discounted case value: $67,200

The analysis shows that the plaintiff's estimate of the probability of recovering punitives greatly affects the discounted case value. The mediator would explain her reasons for her different probability estimate, using the techniques discussed in the first portion of this chapter.

If using a tree format, the tree would look like Figure 8.9:

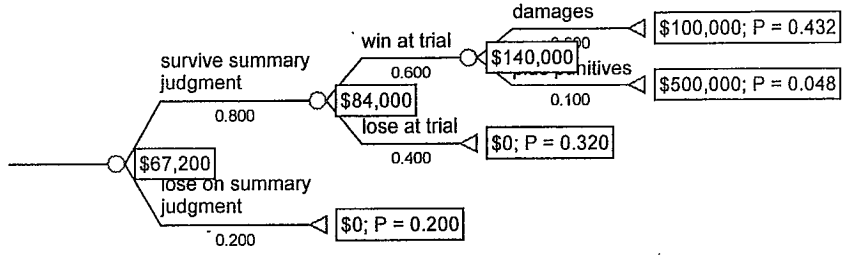

Figure 8.9

Choices in logistics and process for calculation

One of the authors writes out his numerical calculations (multiplying risk times payoffs, etc.) before entering the caucus room. This avoids the distraction of doing arithmetic while interacting with participants. The other author usually prepares a rough sketch of the decision tree outside of the caucus room, but prefers to enlist the participants in performing calculations, even when using the mediator's probability and payoff estimates. She might say to everyone in the room with calculators: "OK, what's 0.37 times $425,000?", write that number down on the tree, and

then ask, "What's 0.20 times that. . .", and so forth. That way, participants are drawn into the calculation process and, perhaps, invested in the outcome of the analysis. Even if a mediator chooses to do some calculating outside the caucus room, however, it does not prevent him from changing the numbers and recalculating as part of a dialogue with the participants. (To facilitate calculations, it is helpful to carry a small calculator in your briefcase.)

The chances of that happening are . . .

Whether using a tree format or scratch pad, some litigants are unmoved by the discounted case value, because there will only be one trial. However, the calculated odds of particularly desirable or undesirable results may be compelling.

Imagine a case in which the plaintiff's counsel estimates an 80 percent chance of surviving summary judgment, a 60 percent chance of winning at trial, a 20 percent chance of a low verdict of $50,000, a 60 percent chance of a $120,000 verdict, and a 20 percent chance of a $200,000 verdict. Given these probabilities and dollar estimates, she would have a 52 percent chance of a $0 recovery, a 9.6 percent chance of recovering $50,000, a 28.8 percent chance of recovering $120,000 and only a 9.6 percent chance of recovering $200,000. A $45,000 offer might be more attractive when the plaintiff considers a 61.6 percent chance of getting $50,000 or less at trial (including a 52 percent chance of $0), and that the $45,000 offer is not much less than $50,000.

These may be shown on a scratch pad or using the tree format. On a tree, you would multiply just the percentages along each branch from left to right, and then multiply each possible outcome by its end percentage. The final possibility of each outcome is shown as "P =" on the far right-hand side, as indicated in Figure 8.10.

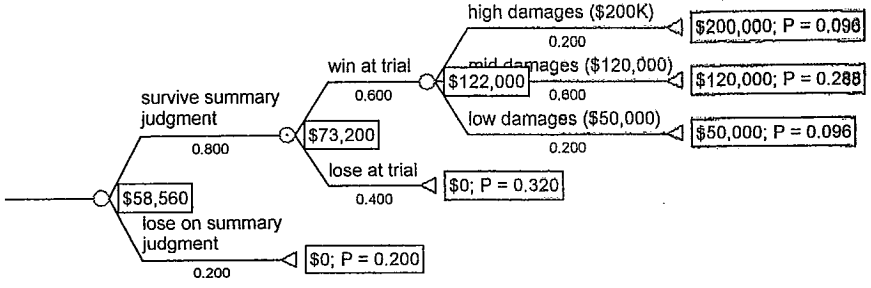

Figure 8.10

On the defense side, imagine the $120,000 payment, plus lawyer's fees that would be added to each end point, would render the defendant

company unable to make payroll without risky borrowing. Apparent on the tree, the 38.4 percent risk of a $120,000 or higher verdict (plus fees) may be too substantial for her to bear, and may encourage her to increase her offer to $45,000 or more.

The method as mediator between mediator, parties, and decision

Introducing decision analysis in mediation helps distance the parties from the emotions, "principles," and other meanings wrapped up in their case. It enables the mediator to frame settlement as a decision problem and elevates the use of logic and careful, reasoned analysis. The language of the discussion almost inevitably becomes less highly charged. Even if an issue is potentially difficult—the credibility of a witness, the likelihood of punitive damages for malfeasance—participants' energy and focus are directed toward the scratch pad, the easel, or the computer. The dynamic becomes less argumentative. Even when the mediator presents a very different evaluation of an issue, disagreement tends to be directed toward the scratch pad, easel, or computer software intermediary.

Finally, for some participants, the rolled-back "discounted case value" number does seem logical and fair in the end. Or, at the very least, it provides a rationale for their movement toward settlement because the decision analysis—the formula calculations or the computer—pointed in that direction. They can bring it back to the office; put it in the file; show the boss, their spouse, or anyone who asks; and prove that they made a smart and logical decision.