

# The One Minute Manager Prepares for Mediation: A Multidisciplinary Approach to Negotiation Preparation

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If I had six hours to chop down a tree,  
I’d spend the first hour sharpening the ax.

– Abraham Lincoln<sup>1</sup>

#### INTRODUCTION

We are often advised to prepare for negotiation, and scholars in many disciplines (law, economics, psychology, and others) have developed a rich mosaic cataloging dispute resolution processes. Debates rage about the role of economic analysis in legal disputes and whether neutral mediators should help parties “evaluate” claims or merely “facilitate” party communication. But practitioners have a tree to chop down in six hours and need practical tools. While the best ax is only as good as the human muscle behind it, even those with well-honed “guts”<sup>2</sup> can sharpen their results with analytical

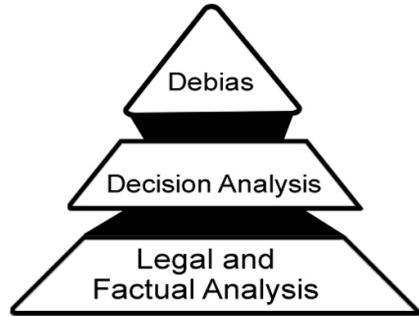
1. JOSHUA N. WEISS, YOU DIDN’T JUST SAY THAT! QUOTES, QUIPS, AND PROVERBS FOR DEALING IN THE WORLD OF CONFLICT AND NEGOTIATION 19 (2005), available at [http://www.pon.org/downloads/quote\\_book.pdf](http://www.pon.org/downloads/quote_book.pdf).

2. Marjorie Corman Aaron & David P. Hoffer, *Using Decision Trees As Tools for Settlement*, 14 ALTERNATIVES TO HIGH COST LITIG. 71, 71 (1996); see also Max H. Bazerman et al., *Negotiation with Yourself and Losing: Making Decisions With Competing Internal Preferences*, 23 ACAD. MGMT. REV. 225 (1998); Eric Bonabeau, *Don’t Trust Your Gut*, HARV. BUS. REV., May 2003, at 116, 118 (“Intuition is a means not of

tools and psychological debiasing. With planning, they also improve the odds of dropping the tree in the yard rather than on the house.

This article endeavors to explain simple tools that may assist lawyers and managers in preparing for mediation success.<sup>3</sup> Part I reviews an outline for traditional legal and factual analysis of litigated cases. Part II layers economic decision tree analysis atop that foundation. Part III acknowledges that we all have biases and draws on psychological scholarship to help isolate their effects. Part IV synthesizes this analytical work into an adapted negotiation planning instrument. Finally, because different people play different roles in unraveling a dispute, Part V offers a decision tree designed to help disputants not only design a dispute resolution process tailored to their case, but also decide what roles should be cast and who would be the most effective choice for each role.

Since car negotiations are easy targets and nearly ubiquitous, we will periodically turn to the hypothetical purchase of a new Chevrolet Impala and some legal claims that might later arise



from its performance and use. Our “gut” sense may get us close by ruling out clearly erroneous valuations like \$100,000. But there are limits to that precision. One trip to the dealership confirms that gut senses are not evenly pared with repeat playing dealers that are making enough money off of repeated transactions to keep the showrooms glittering and their sales people well-employed. Economic

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assessing complexity but of ignoring it. That’s valuable information if you’re a firefighter in a burning building or a solder on a battlefield. It’s not valuable if you’re an executive faced with a pressing decision about investing millions in a new product for a rapidly changing market.”); Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 1 (2007) (describing a model that “accounts for the tendency of the human brain to make automatic, snap judgments, which are surprisingly accurate, but which can also lead to erroneous decisions”); *but see generally* MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005) (arguing that intuition can lead to accurate decisions).

3. Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281, 282 (2006) (asserting that mediation “success flows logically from the following normative standard: disputes should settle in mediation if there are one or more sets of agreement terms that both parties would prefer to accept rather than try the case to an adjudicated conclusion”). Thanks to Kenneth H. Blanchard and Spencer Johnson for popularizing the term “One Minute Manager” with their 1982 book *The One Minute Manager*. Many other books and articles incorporating the phrase have followed.

analysis will help us examine negotiations from the dealer's perspective – as if we were going to negotiate this purchase or try these claims 100 times. Some outcomes will be high and others low, but the vast majority will fall in between those end points. Some may also be multidimensional in that they involve much more than price. Our focus here is on helpful *processes* rather than mathematically elegant results – as if world chess champion Garry Kasparov used IBM's Big Blue to enhance his own human skills,<sup>4</sup> rather than framing the debate in terms of man or machine.

### I. RIGOROUS LEGAL ANALYSIS FORMS THE BASIS FOR NEGOTIATION PREPARATION

[Preparation] is the be-all of good trial work. . . . Everything else, felicity of expression, improvisational brilliance, is a satellite around the sun.

Thorough preparation is that sun.

– Louis Nizer<sup>5</sup>

Lawyers are trained to rigorously analyze legal issues and to negotiate deals – whether forming new ventures or resolving disputes.<sup>6</sup> Litigators additionally assess the many vagaries that come with local fora and the presentation of complex topics in short time frames. These skills are essential to case valuation.<sup>7</sup> Because it is impossible to say with certainty how the other side will act or react, what facts and themes will develop, and even when the case will be calendared

4. See generally Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933, 961 & n.121 (2006) (citing *GAME OVER: KASPAROV AND THE MACHINE* (Thinkfilm 2003) (documenting chess world champion Garry Kasparov's narrow defeat by a computer manufactured by IBM dubbed 'Deep Blue')); see also Arno R. Lodder, *Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model*, 10 HARV. NEGOT. L. REV. 287, 290-91 (2005).

5. Joseph F. Anderson, Jr., *Setting Yourself Apart from the Herd: A Judge's Thoughts on Successful Courtroom Advocacy*, 50 S.C. L. REV. 617, 618 (1999) (quoting Jerrold K. Footlick et al., *Lawyers on Trial*, NEWSWEEK, Dec. 11, 1978, at 98, 99).

6. Robert J. Rhee, *The Effect of Risk on Legal Valuation*, 78 U. COLO. L. REV. 193, 254 (2007) ("Attorneys achieve better results than unrepresented clients not only because they are better tactical negotiators, but also because they are better situated to negotiate."); William F. Samuelson, *Computer-Aided Negotiation and Economic Analysis*, 11 NEGOT. J. 135, 136-37 (1995); David M. Saunders & Roy J. Lewicki, *Teaching Negotiation with Computer Simulations: Pedagogical and Practical Considerations*, 11 NEGOT. J. 157, 158 (1995) ("[M]ore preparation leads to better negotiation outcomes.").

7. Rhee, *supra* note 6, at 253 ("Attorneys are crucial to the proper pricing of transactions: '[l]awyers function as transaction cost engineers.'" (quoting Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 255 (1984))).

by the court, litigators naturally resist urges to mathematically assess chances of success and budget associated transaction costs.<sup>8</sup> That is not to say that they do not thoroughly evaluate cases.<sup>9</sup> Litigators are masters at developing simple themes from warehouses full of documents and terabytes of data that help guide fact finders through complex case facts. That is an art that cannot be replaced by algorithm.<sup>10</sup> Economic analysis can, however, take that essential legal analysis and improve negotiation preparation in important ways.

New York litigator Louis Solomon reviews the essentials of the rigorous legal analyses that lie at the base of any economic analysis.<sup>11</sup> In the Case Evaluation chapter of the ABA Litigation Section's commercial litigation manual, he concludes that<sup>12</sup> "the importance of intelligent, critical, analytical, yet realistic case evaluation cannot be overstated."<sup>13</sup> Solomon notes that case evaluations should begin early<sup>14</sup> and be updated consistently,<sup>15</sup> including at certain regular intervals.<sup>16</sup> The goal is assessing risk, not achieving perfection.<sup>17</sup> In a

8. Louis M. Solomon, *Quantitative Techniques for Case Evaluation and Their Limitations*, METRO. CORP. COUNS., Oct. 2006, at 21 ("The difficulty is also that, without detracting from the brilliance of our fellow practitioners, complex mathematical modeling abilities are not always associated with good litigation skills.").

9. Marjorie Corman Aaron, *Do's and Don'ts for Mediation Practice*, DISP. RESOL. MAG., Winter 2005, at 19, 20 ("Some of the finest counsel give short shrift to damages . . . . Get the parties' theories of damages and supporting evidence out on the table.").

10. G. Richard Shell, *Computer-Assisted Negotiation and Mediation: Where We Are and Where We Are Going*, 11 NEGOT. J. 117, 117 (1995) ("Negotiation and dispute resolution are fundamentally 'people' activities. Nuances of expression, timing, communication, framing, and persuasion often make the difference between success and failure in bargaining and mediation.").

11. Louis M. Solomon & Bruce E. Fader, *Case Evaluation*, in 1 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS 353, 353-404 (Rober L. Haig ed., 2d ed. 2005); Louis Solomon, *Achieving Optimal Evaluation of Business and Commercial Cases*, CORP. COUNSELOR, July 2006, at 3.

12. Solomon & Fader, *supra* note 11, at 353-404.

13. *Id.* at 356-57, 371.

14. *Id.* at 371 ("Cases are often won or lost based on the prefilng evaluation and planning, both from the offensive side and from the defensive side (which may decide to appear as the offensive side).").

15. Rhee, *supra* note 6, at 218; Solomon, *supra* note 11.

16. Solomon, *supra* note 11. Solomon notes:

While there is no set of magical moments when cases should be evaluated and reevaluated, at a minimum, careful stock should be taken at the following stages:

- Immediately after the suit is filed (or before if you are the plaintiff);
- When motions on the pleadings are being considered;
- Once early motion practice is completed;
- After document discovery is undertaken;
- After discovery, either after depositions are completed and summarized or when summary judgment motions are being contemplated or responded to;

recent article, he condenses the evaluation process into five key steps: 1) identify potential issues; 2) evaluate issue relationships and overall case bearing; 3) evaluate the risk or probability of each outcome (fact and law intensive); 4) evaluate possible upside and downside exposure; and 5) identify the indirect and collateral issues from the client's perspective.<sup>18</sup> "Simply stated, the case evaluation process includes determining strengths and weaknesses, risks and probabilities, and the upsides and downsides of the case."<sup>19</sup> The evaluation should go beyond identifying causes of action and their associated remedies<sup>20</sup> to include venue, choice of law,<sup>21</sup> judge, jury pool, circuit, pretrial motions, collateral consequences, and whose case is easier to explain.<sup>22</sup> Solomon cautions litigators to view litigation from the client's perspective although this is "something closer to a necessary evil than an intoxicating, addictive end in itself."<sup>23</sup> While assessing potential outcomes is part of such analyses, Solomon also rightly questions elevating numerical approaches like decision trees above what they deserve.<sup>24</sup> After all, IBM's Deep Blue only narrowly beat Kasparov after several years of play. But a seasoned litigator and business executive armed for negotiation with robust legal and economic analyses would be as formidable as Kasparov and Deep Blue playing chess on the same team. Kasparov could test individual moves against strategic goals by running multiple outcome scenarios on Deep Blue.

Advocates combine intuition and experience to gauge case prospects. But even if they conclude that their client has a good chance of winning at trial, a good chance of winning means different things to different people. "The party who has been consistently reassured by

- 
- In the months leading up to the trial;
  - During and after trial; and
  - When an appeal is being contemplated or responded to.

*Id.*

17. Solomon & Fader, *supra* note 11, at 357 ("[P]erfection cannot be the goal of case evaluation.").

18. Solomon, *supra* note 11.

19. *Id.*

20. Solomon & Fader, *supra* note 11, at 368 ("Separate but related to the analysis of facts and law is a realistic evaluation of damages or ultimate relief available to the client or to the other side.").

21. *Id.* at 367 ("An optimal case evaluation must proceed against the backdrop of what law will be applied by the court to critical issues [and] . . . what law the appellate court will apply once the findings have been made . . .").

22. Solomon, *supra* note 11.

23. Solomon & Fader, *supra* note 11, at 362.

24. Solomon, *supra* note 8; Solomon & Fader, *supra* note 11, at 377.

counsel that he has a ‘good case’ may be startled (and sobered) to learn that counsel still only assigns it a 55% chance of success.”<sup>25</sup>

Assigning probabilities of success is not at all foreign to the law. Federal Rule of Civil Procedure 23 requires class action litigants to factor “the likelihood of success on the merits . . . against the amount and form of the relief offered in[to] the settlement.”<sup>26</sup> Judge Richard Posner reversed a class action settlement for failure to follow Rule 23. In doing so, he noted that “the district court should at a minimum make an effort ‘to quantify the net expected value [(“NEV”)]<sup>27</sup> of continued litigation to the class, since a settlement for less than that would not be adequate.”<sup>28</sup>

25. Aaron & Hoffer, *supra* note 2, at 71.

26. Solomon, *supra* note 8.

27. Rhee, *supra* note 6, at 194 (“For many years, law and economics scholarship has subscribed to the conventional wisdom that the value of a legal dispute is its expected value, defined as the probability of liability multiplied by the expected judgment amount.”); see generally William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); Alan E. Friedman, Note, *An Analysis of Settlement*, 22 STAN. L. REV. 67 (1969); see also Steven Shavell, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 401-11 (2004).

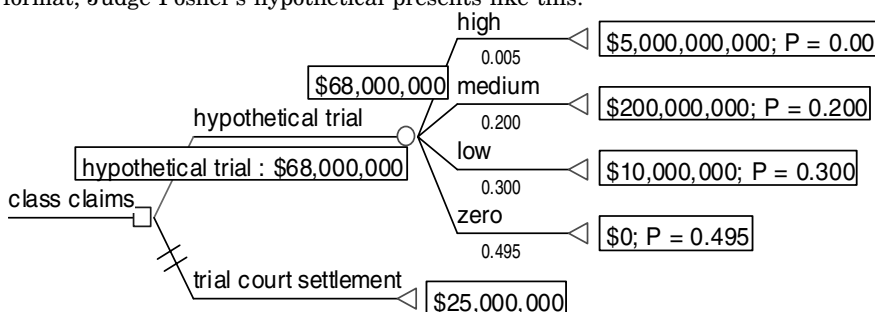
28. Solomon, *supra* note 8 (quoting *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 284-85 (7th Cir. 2002)). Judge Posner continues in *Reynolds*:

Determining [NEV] would require estimating the range of possible outcomes and ascribing a probability to each point on the range . . . . A high degree of precision cannot be expected in valuing litigation, especially regarding the estimation of the probability of potential outcomes . . . the judge could have insisted that the parties present evidence that would enable four possible outcomes to be estimated: call them high, medium, low, and zero. High might be in the billions of dollars, medium in the hundreds of millions, low in the tens of millions. Some approximate range of percentages, reflecting the probability of obtaining each of these outcomes in a trial (more likely a series of trials), might be estimated, and so a ballpark valuation derived.

Some arbitrary figures will indicate the nature of the analysis that we are envisaging. Suppose a high recovery were estimated at \$5 billion, medium at \$200 million, low at \$10 million. Suppose the midpoint of the percentage estimates for the probability of victory at trial was .5% for the high, 20% for the medium, and 30% for the low (and thus 49.5% for zero). Then the net expected value of the litigation, before discounting, would be \$68 million; discounting, depending on an estimate of the likely duration of the litigation, would bring this figure down, though probably not to \$25 million – and any discounting might be inappropriate, as we explained. These figures are arbitrary; our point is only that the judge made no effort to translate his intuitions about the strength of the plaintiffs’ case, the range of possible damages, and the likely duration of the litigation if it was not settled now into numbers that would permit a responsible evaluation of the reasonableness of the settlement.

Economic analyses cannot replace rigorous legal analyses; in fact, there is nothing to economically analyze if the legal parameters are not first set.<sup>29</sup> Without capturing the strengths and weaknesses, risks and probabilities, and upsides and downsides of a litigated case through legal analysis, the weighted probabilities are meaningless. After legal analysis has captured these variables, however, economic analysis develops alternative scenarios as if we were selling 100 cars or trying a lawsuit 100 times. The by-product of the combined analysis is a powerful tool that focuses attention on the problem to be solved rather than the personalities of the litigants and advocates.<sup>30</sup> By bracketing the potential outcomes through legal analysis and estimating the likelihood of those outcomes through economic analysis, litigants start working a puzzle together. They probably do not come

Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 285 (7th Cir. 2002). In decision tree format, Judge Posner's hypothetical presents like this:



Such cases are relatively rare (a Westlaw search of “ALLFEDS” conducted on March 26, 2007 for the preceding three-years resulted in four cases), *see* Synfuel Techs., Inc. v. DHL Express (USA), Inc., 463 F.3d 646, 653 (7th Cir. 2006) (reversing class action settlement, citing *Reynolds*); *Acosta v. Trans Union, LLC*, 240 F.R.D. 564, 570 (C.D. Cal. 2007) (denying approval of class action settlement concluding that it was not fair, adequate or reasonable); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 58 (D. Mass. 2005) (approving \$75 million settlement as fair, reasonable, and adequate); *Sylvester v. CIGNA Corp.*, 369 F. Supp. 2d 34, 49-50 (D. Me. 2005) (denying class settlement, finding that it was unfair, unreasonable, and inadequate: “Although the Court must be careful to not engage in a trial on the merits, many courts faced with proposed class action settlements do compare the proposed settlement with the likely result of litigation, which implicitly requires the court to consider the prospects of the case, including risk, complexity, expense and duration. This particular inquiry focuses on whether the proposed settlement is adequate in light of ‘the net expected value of continued litigation to the class,’ to the extent that it can be reasonably quantified.”).

29. Bonabeau, *supra* note 2, at 123 (“These new decision-support tools don’t eliminate human intuition; they harness its power while remedying its most pernicious flaws . . . . But these instincts are subjected to the rigors of analysis and at the same time freed from the brain’s constraints in imagining possible solutions.”).

30. Aaron & Hoffer, *supra* note 2, at 71 (“While experienced lawyers can sometimes develop an intuitive sense of what a case is worth, their intuition may not be sufficient in a case of considerable complexity. Furthermore, intuitive ‘gut sense’ valuations are hard to support or explain to clients.”).

to the same analysis, but they are focused on a future outcome informed by past events. Lawyers are well-qualified for this task. Joe Jaworski<sup>31</sup> went from trying lawsuits to complicated scenario planning for a world wide group of oil companies with state-of-the-art strategic planning systems.<sup>32</sup> Developing 30-year economic and energy scenarios with current facts is not all that different than what advocates face modeling litigation outcomes.<sup>33</sup> Even with similar fact patterns and the same law, litigants experience different outcomes at trial. Scenario planning imports business tools into uncertain legal situations. In the process of calibrating potential outcomes, parties come to more clearly understand what terms of art like “probable,” “reasonably possible,” and “remote” mean.<sup>34</sup>

## II. DECISION TREE ANALYSES HELP DEVELOP AND TEST SCENARIOS

Decisions are very expensive,  
they cost you everything else.

– Irvin Yalom<sup>35</sup>

Like a hypothetical car dealer, some days are better than others for litigants. The dealer may trade reductions in sticker price for lower trade-in values or financing and warranty profits. The buyer may use Kelley Blue Book values or quotes from other dealers to develop real alternatives. In the end, the buyer can always keep driving her old car. Negotiations are heavily influenced by such alternatives:<sup>36</sup> negotiate a lower price, buy from a competitor, or keep driving the old car. Alternatives not only increase the objectivity of

31. Former Senior Partner, Bracewell & Patterson, and Fellow of the American College of Trial Lawyers.

32. JOSEPH JAWORSKI, *SYNCHRONICITY: THE INNER PATH TO LEADERSHIP* 181 (1996).

33. *Id.* at 169.

34. Aaron & Hoffer, *supra* note 2, at 71 (“One cannot calculate a decision tree containing branches labeled “very likely” or “extremely unlikely.”); Solomon notes definitional and other differences between the 1975 Statement of Financial Accounting Standards (“FASB”) No. 5, “Accounting for Contingencies,” (“Accounting Statement”) and the American Bar Association’s Statement of Policy Regarding Lawyers’ Responses to Auditor’s Requests for Information (“ABA Statement”). Solomon & Fader, *supra* note 11, at 395 (“The case evaluation process . . . may implicate the lawyer’s or client’s duty to disclose precisely because the process utilizes probability concepts and creates the prospect of triggering the probability-driven concepts of the Accounting Statement and ABA Statement.”).

35. IRVIN D. YALOM, *EXISTENTIAL PSYCHOTHERAPY* 318 (1980) (“For every yes there must be a no. To decide one thing always means to relinquish something else.”).

36. Bazerman et al., *supra* note 2, at 226 (“In a purely rational model, individuals would never pay to have less options available – it is a simple axiom that more options are better than less.”).

our own decisions, but also help frame logical arguments to others.<sup>37</sup> This may seem evident in a commodity scenario such as the car purchase decision, but it is less so in legal matters.

Economists and social scientists have used quantitative decision-making techniques since the late-1950s.<sup>38</sup> Mathematical statistician Howard Raiffa is credited with the application “of decision analysis and game theory to the contexts of negotiation and dispute resolution.”<sup>39</sup> Raiffa’s *The Art and Science of Negotiation*<sup>40</sup> brought diverse disciplines together for negotiation-centric research.<sup>41</sup> Game theory

37. Parties in negotiation or mediation are often faced with tactical questions like “How do we convince the other side that we really are at the end of the line?” Decision trees help clarify alternatives not only for parties, but for mediators and opponents. If other alternatives become preferred at certain levels, that is likely to be more convincing than a conclusory, “This is our final offer.”

38. Solomon, *supra* note 8, at 21. *See generally* Lucian A. Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404 (1984); Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, J. LEGAL STUD. 225 (1982); Don L. Coursey & Linda R. Stanley, *Pretrial Bargaining Behavior Within the Shadow of the Law: Theory and Experimental Evidence*, 8 INT’L REV. L. & ECON. 161 (1988); John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971); Posner, *supra* note 27; George L. Priest, *Selective Characteristics of Litigation*, 9 J. LEGAL STUD. 399 (1980); George L. Priest, *Reexamining the Selection Hypothesis*, 14 J. LEGAL STUD. 215 (1985); Priest & Klein, *supra* note 27; I. P. L. P’ng, *Strategic Behavior in Suit, Settlement, and Trial*, 14 BELL J. ECON. 539 (1983); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982); Linda R. Stanley & Don L. Coursey, *Empirical Evidence on the Selection Hypothesis and the Decision to Litigate or Settle*, 19 J. LEGAL STUD. 145 (1990) (historical review); Jennifer F. Reinganum & Louis L. Wilde, *Settlement, Litigation and the Allocation of Litigation Costs*, 17 RAND J. ECON. 557 (1986); Donald Wittman, *Is the Selection of Cases for Trial Biased?*, 14 J. LEGAL STUD. 185 (1985); Donald Wittman, *Dispute Resolution, Bargaining, and the Selection of Cases for Trial: A Study of the Generation of Biased and Unbiased Data*, 17 J. LEGAL STUD. 313 (1988).

39. Gregory Todd Jones, *Fighting Capitulation: A Research Agenda for the Future of Dispute Resolution*, 108 PENN ST. L. REV. 277, 295 (2003). Aaron & Hoffer, *supra* note 2, at 71 (“Long popular in the business community, decision analysis has evolved as a tool for lawyers to help make decisions in complex litigation.”); Bazerman et al., *supra* note 2, at 235 (“*Decision Analysis*, defines an area of intellectual thought that outlines how to give prescriptive advice to decision makers.”); *see also* HOWARD RAIFFA, *DECISION ANALYSIS: INTRODUCTORY LECTURES ON CHOICE UNDER UNCERTAINTY* 271 (1968) (“The spirit of decision analysis is divide and conquer: Decompose a complex problem into simpler problems, get one’s thinking straight in these simpler problems, paste these analyses together with logical glue, and come out with a program for action for the complex problem.”)

40. HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982).

41. Jones, *supra* note 39, at 295. *See generally* Bazerman et al., *supra* note 2, at 236. Bazerman recalls the story of Raiffa’s decision whether to leave Columbia for Harvard: “According to the story, [Raiffa] visited with a friend, also his dean at Columbia, and asked for advice. Sarcastically, the dean replied to Raiffa (borrowing from

has been applied to calculate the effects of legislative policy<sup>42</sup> and more recently alternative dispute resolution practice.<sup>43</sup> A fundamental assumption of economic theory is that people with perfect information<sup>44</sup> act rationally.<sup>45</sup> Our experience tells us otherwise, especially in litigation.<sup>46</sup> But if litigants build economic scenarios atop their legal analysis, they begin to see an emerging range of potential outcomes. A first step in that process is to take the brackets provided by a legal analysis and develop simple decision trees.

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Raiffa's writings) that Raiffa should identify the relevant criteria, weigh each criterion, rate each school on each criterion, do the arithmetic, see which school had the best overall score, and go there. Raiffa's apocryphal response was 'No, this is a serious decision.'" *Id.*

42. See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1387 (2006).

43. See generally DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* (1994); Marc B. Victor et al., *Evaluating Legal Risks and Costs with Decision Tree Analysis*, in *SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL* §12:20 (Robert L. Haig ed., 2000); David P. Hoffer, *Decision Analysis as a Mediator's Tool*, 1 HARV. NEGOT. L. REV. 113 (1996); David P. Hoffer, *Computer-Based Risk Analysis: A Tool for Mediators*, ADR ONLINE MONTHLY, Jan. 1998, <http://www.ombuds.org/center/aaron/center/hoffer.html>; Jones, *supra* note 39, at 297. There are relatively few cases utilizing decision trees in the last three years and none appear to be in this context. See, e.g., *In re Buffalo Molded Plastics*, 354 B.R. 731, 739 (W.D. Pa. 2006) (proffered decision tree outlined decisions for the court); *Crafton v. Blaine Larsen Farms, Inc.*, No. CV-04-383-E-BLW, 2006 WL 908061, at \*1 (D. Idaho Jan. 7, 2006) ("five-step 'decision tree' for resolving whether witness designations are timely"); *Depew v. ShopKo Stores, Inc.*, No. Civ. 03-0539-S-BLW, 2006 WL 47357, at \*1 (D. Idaho Jan. 6, 2006) (similar to *Crafton*); *In re Welding Fume Prod.*, No. 1:03-CV-17000, 2005 WL 1868046, at \*30 (N.D. Ohio Aug. 8, 2005) (use of decision trees in medical diagnoses). Fewer appear in major state court databases. See, e.g., *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 48 TEX. SUP. CT. J. 735 (2005), *aff'd*, No. 02-0730, 2008 WL 274878 (Tex. Feb. 01, 2008).

44. See Gregory Todd Jones & Douglas H. Yarn, *Evaluative Dispute Resolution Under Uncertainty: An Empirical Look at Bayes' Theorem and the Expected Value of Perfect Information*, 2003 J. DISP. RESOL. 427, 438 (2003) (defining theoretically perfect information as "information so probative as to allow the decision maker to proceed with certainty, in the case of a litigant, for example, knowing in advance whether litigation would be won or lost").

45. Max H. Bazerman et al., *Explaining How Preferences Change Across Joint Versus Separate Evaluation*, 39 J. ECON. BEHAV. & ORG. 41, 41 (1999) ("A central tenet within economics is that the individual acts to maximize expected utility."); Jones, *supra* note 39, at 297.

46. Rhee, *supra* note 6, at 213 ("[L]itigation is hardly a game of perfect and complete information, and mutual cooperation is often opportunistically engaged as strategy.").

A. *Decision Trees Are Used to Analyze Complex Business Decisions*

I can calculate the motions of the heavenly bodies,  
but not the madness of people.

– Sir Isaac Newton<sup>47</sup>

Decision trees represent strategic alternatives graphically. Whether drawn on a white board<sup>48</sup> or with computer software,<sup>49</sup> decision trees help clarify choices. Decision trees also allow users to mathematically project weighted average values for alternatives that are beyond our direct control. In litigation, those alternatives (tree branches) are often formed “in the shadow of the law.”<sup>50</sup> Searching for potential solutions and assigning a range of outcomes to them is the tough part.<sup>51</sup> The process itself is as valuable as the result because it structures our analysis and focuses our attention on the component parts of the problem. In considering the range of outcomes and their probabilities, the parties not only come to a more realistic

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47. Bonabeau, *supra* note 2, at 119.

48. Aaron & Hoffer, *supra* note 2, at 73 (“The exercise of creating the tree and mounting it on a large paper easel, blackboard or large computer screen, removes the analysis from the arena of ego and emotion.”).

49. See Marjorie C. Aaron, *The Value of Decision Analysis in Mediation Practice*, 11 NEGOT. J. 123, 131 (1995) (“Particularly when taken back to a business setting, the printout of a computer-generated analysis lends additional credibility.”). Software certainly speeds recalculation of scenarios with changed assumptions, but the first round seems to be more effective drawn out for everyone to follow. TreeAge is used here. Other software providers include Lumenaut, @RISK, Precision Tree, Expert Choice, DPL, and HIVIEW. See also Samson Vermont, *The Economics of Patent Litigation*, in FROM IDEAS TO ASSETS: INVESTING WISELY IN INTELLECTUAL PROPERTY 327, 339 (Bruce Berman ed., 2002).

50. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979); Cooter et al., *supra* note 38, at 225 (“Pretrial bargaining may be described as a game played in the shadow of the law. There are two possible outcomes: settlement out of court through bargaining, and trial, which represents a bargaining breakdown.”).

51. See Bonabeau, *supra* note 2, at 119 (“[T]wo key components of decision-making or problem solving exercises: *searching* for possible solutions and *evaluating* those solutions in order to choose the best one or ones.”); Robert B. Calihan et al., *The Role of Risk Analysis in Dispute and Litigation Management*, presented at the American Bar Association’s 27th Annual Forum on Franchising (Oct. 2004), available at <http://www.litigationrisk.com/Paper%20on%20Risk%20Analysis%20for%20ABA%20Forum%20on%20Franchising.pdf> (“One of the benefits of trying to capture a lawsuit in the decision-tree format is that it forces you to think more carefully about the interrelationships and dependencies among the various issues.”). See generally Marc B. Victor, *Litigation Risk Analysis and ADR*, in ADR PRACTICE BOOK §17 (John H. Wilkinson ed., 1990), available at [http://www.litigationrisk.com/Litigation%20Risk%20Analysis\(tm\)%20and%20ADR.pdf](http://www.litigationrisk.com/Litigation%20Risk%20Analysis(tm)%20and%20ADR.pdf).

view of their options, they are able to communicate those scenarios in a common vernacular.<sup>52</sup>

The trees themselves are taught to MBA candidates when they evaluate strategic business problems<sup>53</sup> and are increasingly used by companies in a variety of industries.<sup>54</sup> Recent scholarship draws similarities between the valuation of lawsuits and stock options.<sup>55</sup> While a broader market certainly exists for financial options, the legal system essentially forces parties to write “call-options” for each other in filed legal claims.<sup>56</sup> The defendant involuntarily writes an option that someone else determines to be in the money or not depending on whether its binding decision is above or below the defendant’s anticipated outcome.<sup>57</sup> There are several methods of quantifying outcomes based on legal analyses. None are better than

52. Aaron & Hoffer, *supra* note 2, at 71 (“The party who has been consistently reassured by counsel that he has a ‘good case’ may be startled (and sobered) to learn that counsel still only assigns it a 55% chance of success.”)

53. Aaron, *supra* note 49, at 130; Bonabeau, *supra* note 2, at 119 (“The traditional tools of decision sciences – system dynamics, decision trees, real options, portfolio management, and so on – constitute an important class of rational decision-making techniques that can be invaluable when you’re faced with lots of options.”).

54. Jacob W. Ulvila & Rex V. Brown, *Decision Analysis Comes of Age*, HARV. BUS. REV., Sept.-Oct. 1982, at 130, 133 (“Companies in a wide range of industries are using decision tree analysis to make a variety of decisions.”). See Bonabeau, *supra* note 2, at 117 (“When combined with the experience, insight, and analytical skills of a good management team, [decision-support] tools offer companies a way to make consistently sound and rational choices even in the face of bewildering complexity – a capability that intuition will never match.”).

55. See Rhee, *supra* note 6, at 223 (“It is easy to see an analogy between an option and a lawsuit, but option pricing does not apply well to the general framework of legal valuation. . . . ‘You typically need DCF [discounted cash flow] to value the underlying asset.’” (quoting RICHARD A. BREALEY ET AL., PRINCIPLES OF CORPORATE FINANCE 1005 (8th ed. 2006))); see also FIN. ACCOUNTING STANDARDS BD., STATEMENT 123: ACCOUNTING FOR STOCK-BASED COMPENSATION (1995); William J. Blanton, *Reducing the Value of Plaintiff’s Litigation Option in Federal Court: Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 2 GEO. MASON U. L. REV. 159 (1995); Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267 (2006); Michael W. Kalcheim, *Apportioning Stock Options at Divorce: A Detailed Guide*, 91 ILL. B.J. 454 (2003); Mark Klock, *Financial Options, Real Options, and Legal Options: Opting to Exploit Ourselves and What We Can Do About It*, 55 ALA. L. REV. 63 (2003); Darren K. Oglesby, *Valuing Stock Options in the Marital Context: Speculate, Agree, or Wait and See?*, 20 J. AM. ACAD. MATRIM. LAW. 39 (2006); Robert J. Rhee, *The Application of Finance Theory to Increased Risk Harms in Toxic Tort Litigation*, 23 VA. ENVTL. L.J. 111 (2004).

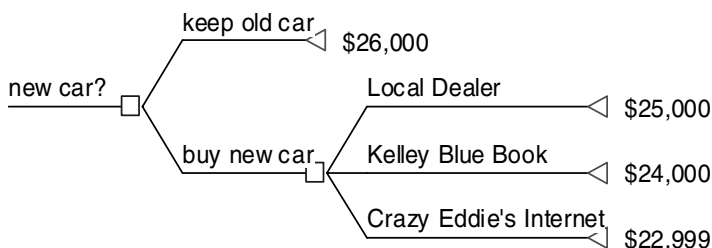
56. Rhee, *supra* note 6, at 207-08; see also Grundfest & Huang, *supra* note 55, at 1288-89; Lucian Arye Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1, 4 (1996).

57. Rhee, *supra* note 6, at 226.

their human inputs and should not replace rigorous legal analysis. Here we use NEV.<sup>58</sup>

Since we all have different appetites for risk, the question becomes how we manage those risks with the information we have and how much we are willing to pay for improved information. Scenario planning can help guide decisions under uncertainty. Perhaps an overly simplified illustration of the choices facing the car buyer makes the point. Starting left to right, we plot a hypothetical customer's alternatives.<sup>59</sup>

FIGURE 1. CAR BUYER'S PURCHASE DECISION



The graph depicts the buyer's potential alternatives. There is a price at which she will keep driving her present car (here \$26,000). On the "buy new car" side of the tree fork, she may have found the Kelley Blue Book price (\$24,000) and some unknown Internet seller (\$22,999). The Blue Book is merely a reference point since its publishers will not sell her the car for the listed price.<sup>60</sup> The Internet dealer may be a weak option, but it is an option. She may risk

58. *Id.* at 237 ("This article does not dispute that expected value is the most important determinant of value in the sense that it sets the general range of settlement values, i.e., the proverbial 'are the parties playing in the same ballpark.' If the parties cannot agree on the broad valuation parameters, there is little hope of private resolution."). Rhee then works perceptions of risk in mathematically as a determinant of value. While his analysis is persuasive, we have left risk-tolerance and aversion to subjective adjustment by repeat players in Part III. *See also* Bonabeau, *supra* note 2, at 119 ("You can't just run the numbers; you have to incorporate the expertise, judgment, and, yes, intuition of seasoned professionals. You have to bring people into the evaluation state of the decision-making process."); Baruch Fischhoff, *Debiasing, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 422, 431 (Daniel Kahneman et al. eds., 1982) ("Although statistical methods may guide [appraisal of whatever knowledge is available], at some point or other judgment is needed to assess the confidence that can be placed in one's best guess at the state of the world.").

59. The numbers used in these models are simply assumptions.

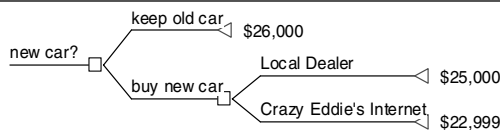
60. Later scenarios may reduce the impact of or eliminate the Blue Book option since it is an informational reference rather than an actual seller. While brainstorming options and alternatives, however, we simply list the potential alternatives without judging the idea or the person offering it. It is easy to delete a non-viable branch later.

purchasing the car from the Internet dealer, especially if it comes with the same manufacturer’s warranty. Regardless of selected option, her rigorous preparation will improve her outcome. Not only will the other data points bracket what she will pay, having that comparative information will improve her confidence in negotiations. “A close companion of preparation is confidence.”<sup>61</sup> Armed with specific comparables and alternatives, she stands a better chance of negotiating the local dealer down to the \$24,000 range than she would with a general plea. Still, her preparation develops tradeoffs. Her local dealer may remain slightly higher than either the Blue Book price or the Internet deal, but the local dealer may be able to include incentives that the Internet dealer would not, or which the Blue Book did not reflect in its summary listings. Nonetheless, the buyer has options and a methodical way to evaluate them because of the research she performed. The options are under her control here (decisions over which she has control are depicted with square nodes (□). The ending triangles (◁) depicting terminal nodes) denote the payoffs associated with each tree branch – purchase prices here. By graphing her alternatives, available information and “gut” reactions are forced into a methodical framework that then becomes easier for her to process.<sup>62</sup>

B. *Legal Claims Share Similarities with Complex Business Decisions*

Conflict lies at the core of innovation.

– Emanuel R. Piore<sup>63</sup>



61. See Anderson, *supra* note 5, at 620 (“The best way to have confidence is to know you have prepared as well as possible and will present the case to the best of your ability.”).

62. Aaron, *supra* note 49, at 126; Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 118 (1996) (“I do not question the basic premise that litigants *try* to achieve the best possible outcome, but I do question their ability to identify the most favorable options when risk and uncertainty are involved.”).

63. WEISS, *supra* note 1, at 8.

Legal claims share many attributes of strategic business choices.<sup>64</sup> In business choices and legal claims, there are alternatives, there are probabilities that each alternative might occur, and there are choices to be made among the developing outcomes. The question ultimately is whether the parties will retain control of the matter by negotiating a value to an intangible claim or turn that valuation exercise over to others; thus, injecting an element of chance into the process. As with the car buying decision, parties to a liability claim have alternatives. Of the many conflicts that naturally result from human interaction, few take the form of legal claims and 98.2% of filed claims settle pre-trial.<sup>65</sup> Our task here is not to question whether that is good or bad, but to prepare for the fact that negotiation skills are critical to the effective resolution of legal claims.

### 1. *Car Buyer Becomes Plaintiff with a "Lemon"*

Once a legal claim is asserted, the parties will either negotiate a creative solution among themselves or turn the problem over to others for a binding decision. Assume the car turns out to be a "lemon."<sup>66</sup> The buyer may try to negotiate a replacement or a refund from the dealer. Once those interests become legal claims, formalistic legal remedies are associated with each cause of action.<sup>67</sup> These cause of action monikers (breach of contract or warranty, violation of

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64. Rhee, *supra* note 6, at 255 ("Litigation and settlement are alternative pricing mechanisms to value a legal dispute under conditions of uncertainty and in the absence of market pricing.").

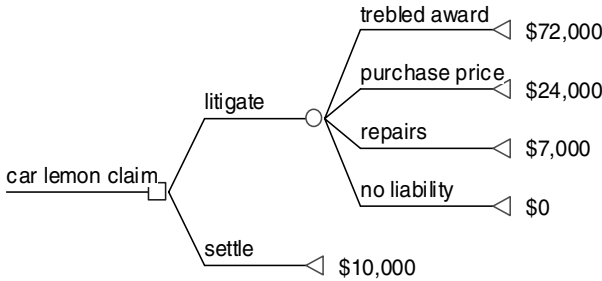
65. Marc Galanter, *The Vanishing Trial: An Examination of Trial and Related Matters in State and Federal Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004). See also *Vanishing Trial Symposium*, 2006 J. DISP. RESOL. 1 (2006); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIR. LEGAL STUD. 705, 705 (2004); Nathan L. Hecht, *Jury Trials Trending down in Texas Civil Cases*, 69 TEX. B.J. 854, 854 (2006) (citing Galanter, *supra* note 65 and Nathan L. Hecht, *The Vanishing Civil Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163, 187 (2005)) (noting that while total dispositions in Texas state courts are up since 1986, jury trials dropped to 0.64% in 2005).

66. See generally George A. Akerlof, *The Market for Lemons: Qualitative Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489, 495 (1970) ("An asymmetry in available information has developed: for the sellers now have more knowledge about the quality of a car than the buyers . . . . The presence of people in the market who are willing to offer inferior goods tends to drive the market out of existence – as in the case of our automobile 'lemons.'").

67. See Bebchuk, *supra* note 38, at 413 ("The greater the amount that depends on the trial's outcome, the greater the difference between any two given defendant types in terms of the expected outcome of litigating against them, and consequently the more severe the adverse selection problem, and the greater the likelihood of litigation.").

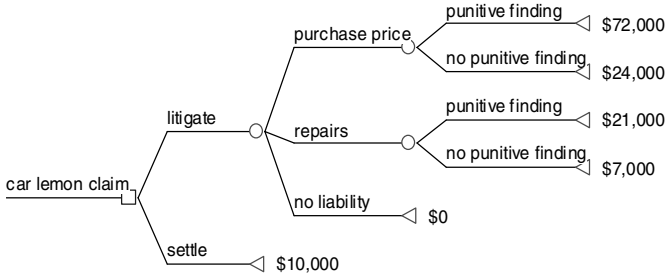
consumer protection statutes, etc.) subsume the underlying interest, which remains the same: the buyer seeks compensation for a “lemon.” Assume the causes of action provide four primary remedies: repair (\$7,000), purchase price refund (\$24,000), trebled punitive outcome (\$72,000), and no liability (\$0). While rigid, they do not foreclose fluid negotiated outcomes. The buyer could settle for \$10,000, even though that number is not a theoretically available legal outcome. Solomon urges lawyers preparing a formal legal analysis to evaluate upside and downside exposures. Here we graph those exposures as assumed outcomes (▽).

FIGURE 2. BASIC LEMON CLAIM



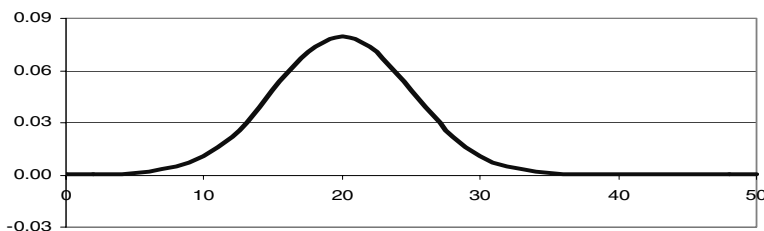
The basic structural change to this tree over the car purchase decision in Figure 1 turns on control. Once the buyer elects to litigate, the outcomes to the right of that fork are tied to chance nodes (○) rather than decision nodes (□) because they are no longer under the sole control of the plaintiff. And, of course, there are various ways to illustrate the alternatives.<sup>68</sup> The objective of the graphing

68. In many jurisdictions, the “punitive” portion of the trial may be bifurcated and made contingent on an actual damage finding. Some claims may also be subject to arbitration while others are not and proceed to trial. Consumer protection statutes may add attorneys’ fees to “punitive” findings. Defendants may also try to reverse cost calculations with “offer of judgment” type rules, *e.g.*, FED. R. CIV. P. 68. And, of course, \$1 today is worth more than \$1 after appeals have been exhausted in several years. All of these factors can easily be accounted for in iterative decision trees.



exercise is to capture the range of outcomes early. If the plaintiff controlled the outcome, she would choose the \$72,000 payout. But her choice is to negotiate her own settlement in view of her legal alternatives or take a chance on various legally available but uncertain outcomes at trial.<sup>69</sup> The probabilities<sup>70</sup> assigned to the chance nodes (○) are percentages that must sum to 100.<sup>71</sup> As we assign probabilities to outcomes, it may be helpful to think in terms of a statistical curve on which we distribute 100 potential outcomes. We can beat the odds in small samples (seven tails in 10 coin tosses), but the law of large numbers proves that we cannot keep that streak alive in samples of 100 or more. Just ask anyone who has been to Las Vegas.<sup>72</sup>

FIGURE 3. OUTCOME DISTRIBUTION



The top of the curve does not fall at the midpoint between potential litigation outcomes.<sup>73</sup> Our legal and factual analysis may indicate that the plaintiff is more likely to recover “repairs” or even the

69. See Rhee, *supra* note 6, at 200-01 (“The theory is simple. The plaintiff’s minimum settlement value is the expected value, being the expected judgment multiplied by the probability of liability, minus litigation costs. The same analysis applied for the defendant, except that transaction cost is added to the settlement value.” (citation omitted)); Posner, *supra* note 27, at 418 (“The plaintiff’s minimum offer is the expected value of the litigation to him plus his settlement costs, the expected value of the litigation being the present value of the judgment if he wins, multiplied by the probability (as he estimates it) of his winning, minus the present value of his litigation expenses.”).

70. Rhee, *supra* note 6, at 200.

71. See Aaron & Hoffer, *supra* note 2, at 72; Marc B. Victor, *Risk Evaluation in Intellectual Property Litigation*, in *INTELLECTUAL PROPERTY COUNSELING AND LITIGATION* 1, 5 (2002), available at [http://www.litigationrisk.com/Risk%20Evaluation%20in%20IP%20Litigation%20\(web\).pdf](http://www.litigationrisk.com/Risk%20Evaluation%20in%20IP%20Litigation%20(web).pdf) (“[D]on’t form an opinion about your likelihood of success on an issue until you have thought *thoroughly* about how *both* sides will argue the issue.”).

72. See generally BEN MEZRICH, *BRINGING DOWN THE HOUSE: THE INSIDE STORY OF SIX MIT STUDENTS WHO TOOK VEGAS FOR MILLIONS* (2003); Calihan et al., *supra* note 51, at 7 (“At least two industries owe their long existences to the soundness of making decisions based on such probability-weighted averages: the insurance industry and the gambling industry.”).

73. Later refinements in the article will incorporate transaction costs (e.g., court costs, attorneys’ fees and expenses) that have the effect of broadening the curve and the overlapping zone of potential agreement.

“purchase price”<sup>74</sup> than she is to recover punitive damages. The curve helps us think about multiple outcomes as we move through the probability assignments. While such curves are normally built with large samples, we begin here with the target probabilities for high, medium, low, and zero outcomes. In doing so, we are less likely to overweigh our preferred outcome, unduly discount the small probability of a remote outcome, or fail to account for the worst-case scenario. By throwing a range of outcomes on a curve, we are also more likely to contemplate and communicate “best” and “worst” case scenarios rather than blended averages, which may indeed sum to “good case.” With the range of outcomes assumed in Figure 2, we return to Solomon’s fourth point and evaluate their probabilities.

Assume our legal and factual analyses indicate that a certain malice finding is a predicate to the \$72,000 trebled award. The facts may reveal evidence that will help the plaintiff satisfy that burden, but for now we assume that the odds are against it. Without inflammatory evidence, the chances of recovering more than the purchase price of the car may be remote. While a chance of a punitive outcome remains in the analysis, assume our repeat playing advocates gauge it as a five percent chance.<sup>75</sup> A lesser evidentiary showing will facilitate recovery of the “purchase price,” which becomes the medium outcome. It too is hard to quantify, but we assume for now that it approaches a 20% probability. Since the legal analysis indicates that the buyer is more likely to recover her out of pocket repairs to the car,<sup>76</sup> the repeat players assign a 50% probability to the low end of the developing tree labeled “repairs.” Holding dispositive motions and appeals aside for now, the advocates further assume that there is a 25% chance that the plaintiff loses at trial. Of course, estimates are inevitable and the results will vary based on the position we are playing at the time,<sup>77</sup> but the estimates can be fine tuned as participants

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74. Since the value of the car is a point of contention, we do not value it here. To prevent a double recovery, however, the car may be surrendered or its value netted to prevent a double recovery.

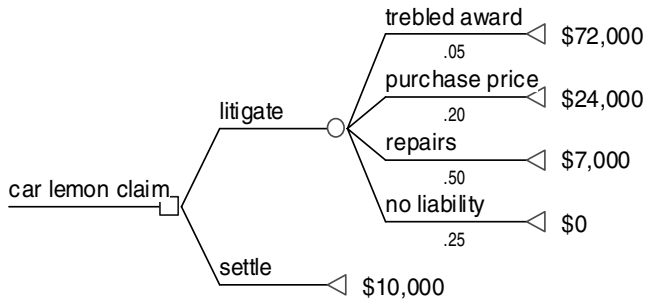
75. Solomon & Fader, *supra* note 11, at 385 n.1.

76. Attorneys’ fees, expenses, interest and the time value of money certainly impact decision trees. For simplicity, they are not folded in at this point.

77. Aaron & Hoffer, *supra* note 2, at 73 (“Rough as these estimates may sound, probability and damage figures are implicitly estimated, roughly and in aggregate, every time a lawyer makes a decision about whether or not to settle a case for a given dollar amount. Estimating them individually and with attempted precision spreads the uncertainty across all of the issues in the case and enables more focused analysis of the uncertainties most crucial to the decision.”).

work through and test various scenarios.<sup>78</sup> With our assumed outcome probabilities assigned under each branch, the tree now looks like this.

FIGURE 4. INITIAL PROBABILITIES ASSIGNED TO LEMON CLAIM



Additionally, our legal analysis tells us that the parties may also bring or face a motion for summary judgment (“MSJ”) or other dispositive or exclusionary motion. While the odds are against such motions in our hypothetical jurisdiction, an MSJ or *Daubert*-type<sup>79</sup> motion may reduce our claims or evidence, and with it our chances of a high outcome even if it does not eliminate any of the individual causes of action. The real test of any such contingencies may not even come until appeal, and appeals themselves have an additive impact on transaction costs when they are expected to last for years. For this round, let us assume that the chances of a MSJ being granted are 10%.

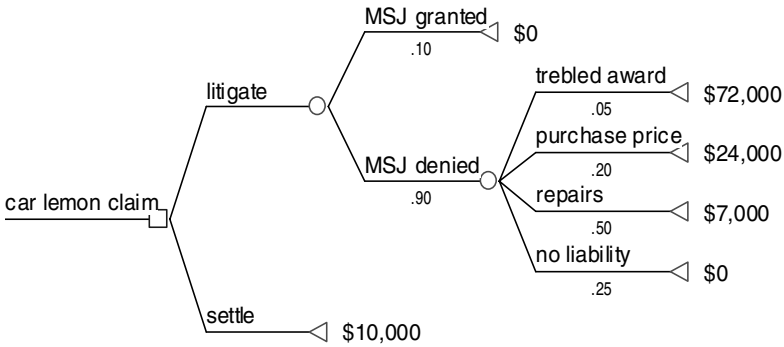
78. Solomon & Fader, *supra* note 11, at 390. Solomon and Fader note:

A simple approach to testing the robustness of a case evaluation is to vary the numerical estimates on the decision tree or other portrayal of the probabilities and see how the client and lawyer react to the sensitivity of changes in results. If minor adjustments in the estimates of probabilities create major changes, and if (as in most cases) assessing the estimates to begin with requires judgment as to which reasonable people could differ, the amount of weight the client gives to the numerical assessment should be affected as a result.

*Id.*

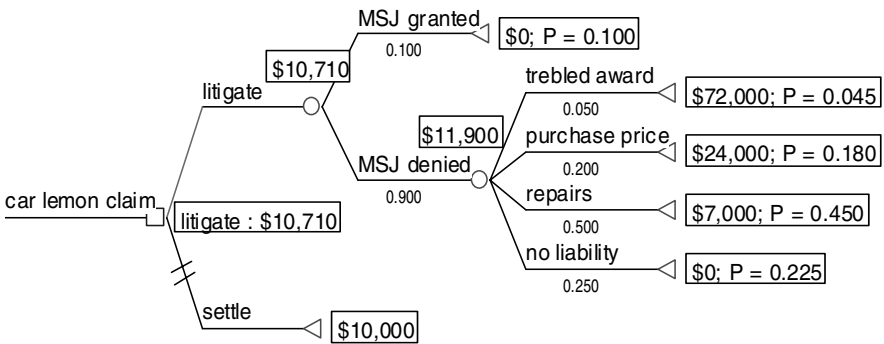
79. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). *Daubert* motions are often used to exclude some types of expert testimony. See generally Blanton, *supra* note 55.

FIGURE 5. SUMMARY JUDGMENT BRANCH ADDED TO LEMON CLAIM



These potential outcomes (payoffs multiplied by their respective probabilities) are not cast in stone. Solomon urges that legal analyses be revisited regularly and our assumptions will certainly mature with improved information.<sup>80</sup> Once we have the decision forks in place, and have assigned payouts and probabilities to each, we mathematically compute the likelihood of each potential outcome by rolling the calculations back from right to left. The product is a NEV for each fork.

FIGURE 6. CALCULATIONS ON FIGURE 5 ROLLED BACK TO NEV



The NEV of the “litigate” option (\$10,710) approaches the amount hypothetically expected in settlement (\$10,000) and assumes that the

80. See generally Avishalom Tor & Max H. Bazerman, *Focusing Failures in Competitive Environments: Explaining Decision Errors in the Monty Hall Game, the Acquiring a Company Problem, and Multi-Party Ultimatums*, 16 J. BEHAV. DECISION MAKING 353 (2003) (showing that decision-makers make systematic errors in competitive games because they fail to take into account the impact of information held only by other parties on the decisions likely to be made by these other parties in light of the rules of the game).

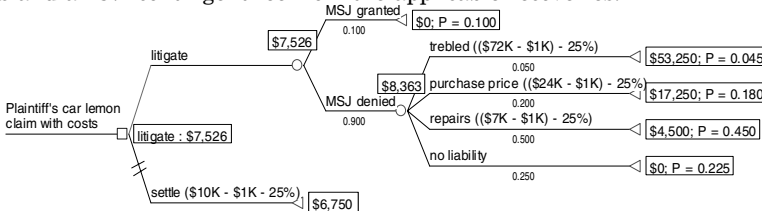
plaintiff's transaction costs<sup>81</sup> (\$1,000 in expenses and a 25% contingency fee) are either recoverable or not due.<sup>82</sup> The plaintiff's best-case scenario is a trebled purchase price (\$72,000) minus her transaction costs, which have no effect on the final number to the extent that they are recovered in the final judgment. Her worst-case scenario is \$0. Since she has an estimated 68% (0.90 x 0.75)<sup>83</sup> chance of *some* recovery, she may be said to have a "good case." She does not have a "good chance" at \$72,000. She is much more likely (50%) to recover "repairs." These calculations illustrate how bracketing outcomes and assigning probabilities to each fork crystallize decisions. Once her advocate or a mediator solves for NEV, it becomes clear that "good case" means an outcome closer to \$10,710 than \$72,000 – though \$72,000 is certainly in play. We will turn to risk appetites in Part III.

2. Indignant Dealer Reviews Its Options Too

The car dealer's perspective is different. The dealer may be indignant at the possibility of paying \$72,000 for \$7,000 in repairs to a new car it did not manufacture.<sup>84</sup> So it negotiates its attorneys' fees

81. Rhee, *supra* note 6, at 194-200 ("Thus, the key variables in pricing a dispute have been identified as transaction cost and expected value . . . . Transaction cost is defined narrowly as the direct economic cost of attorneys and other expenses related to resolving a dispute such as the cost of time and energy – all costs that are typically associated with the expense of litigation and reducible to a cash equivalent."). Transaction costs include more than attorneys' fees and expenses, and these other amounts can be significant. David M. Cutler & Lawrence H. Summers, *The Costs of Conflict Resolution and Financial Distress: Evidence from the Texaco-Pennzoil Litigation*, 19 RAND J. ECON. 157, 157 (1988) ("[The] dispute between Texaco and Pennzoil over the Getty Oil takeover reduced the combined wealth of the claimants on the two companies by over \$3 billion . . . . When the litigation was settled, about two-thirds of the loss in wealth was regained. These fluctuations in value exceed most estimates of the direct costs of carrying on the litigation . . . ."); *See generally* Robert H. Mnookin & Robert B. Wilson, *Rational Bargaining and Market Efficiency: Understanding Pennzoil v. Texaco*, 75 VA. L. REV. 295 (1989). For illustration, "transaction costs" here refers to attorneys' fees and expenses.

82. We can check the impact of that assumption by subtracting \$1,000 in expenses and a 25% contingent fee from the applicable recoveries:

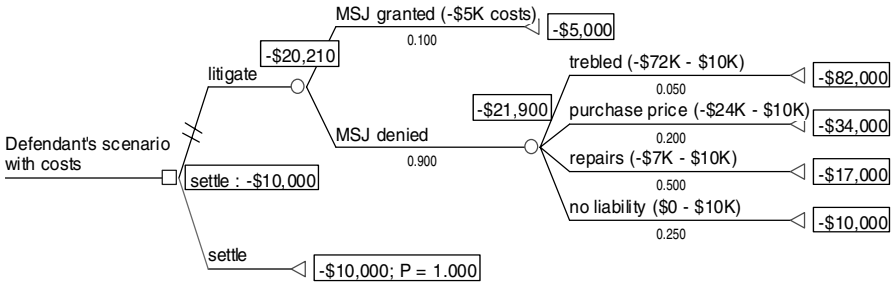


83. Ninety percent chance MSJ is denied multiplied by the seventy-five percent chance of anything but a "no liability" finding.

84. Claims and cross-claims against the manufacturer are omitted here for illustration but can easily be added using these same methods in multiparty claims.

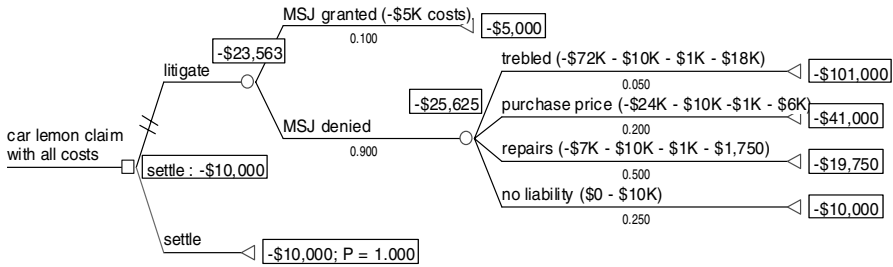
down with the prospect of repeat legal work for the attorney handling this piece of litigation. Even so, we assume that it will cost the dealer \$10,000 to try the case to conclusion and \$5,000 through any successful MSJ. For now, we hold the assumptions in Figure 5 constant while adding the dealer's negotiated transaction costs.

FIGURE 7. DEFENDANT'S SCENARIO INCLUDING ONLY ITS TRANSACTION COSTS



Now the dealer sees the possibility of paying \$82,000 for \$7,000 in repairs. The legal analysis also explains that a fee award for the plaintiff could worsen the scenario by stacking on additional transaction costs.

FIGURE 8. DEFENDANT'S SCENARIO INCLUDING ITS OWN AND PLAINTIFF'S TRANSACTION COSTS

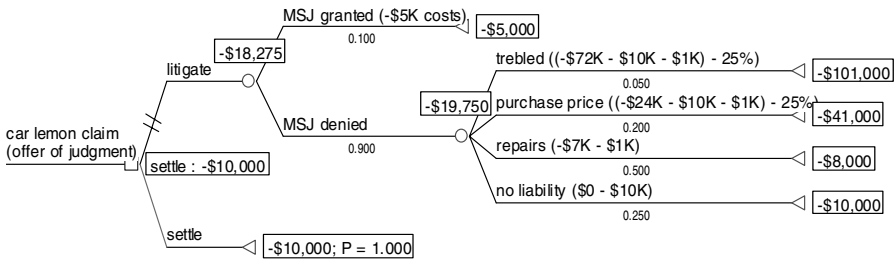


The dealer's best case scenario is -\$5,000 if it wins the MSJ. Its worst case scenario is -\$101,000 if it has to pay its own costs plus an award of plaintiff's costs. After the initial shock wears off, we work leftward through the rest of the analysis. In doing so, we recall that the probability of that worst case scenario is assumed to be five percent and that the weighted value (NEV) of the combined outcomes are -\$23,563. The dealer is unlikely to quickly accept NEV since it

still approximates the purchase price of the car, but the analysis begins to put the best and worst case scenarios in perspective.

The dealer seeks to change the cost dynamic.<sup>85</sup> After reviewing its legal analysis, the dealer makes procedural “offer of judgment” for \$8,000 (\$7,000 in repair costs plus \$1,000 in fees through offer) in an effort to shift transaction costs to the plaintiff if she fails to better the result at trial. If the plaintiff accepts the offer of judgment, the dealer loses \$8,000 plus its own transaction costs (presumably reduced). If tried, however, the dealer may recover its costs if the plaintiff’s award is “repairs” or less due to its offer of judgment. Changing those assumptions, the decision tree looks like this.

FIGURE 9. DEFENDANT MAKES EARLY “OFFER OF JUDGMENT”



The offer of judgment tightens NEV by \$5,288 (-\$23,563 to -\$18,275). During this iterative process, disagreement will likely focus more on the probabilities assigned to the outcomes than the outcomes themselves.<sup>86</sup> Counsel can anticipate scenarios ranging from a “no liability” verdict that costs \$10,000 in attorneys’ fees up to an outlying chance of treble damages loaded with transaction costs.

85. Scholars also note a potential change in the frequency of settlement depending on cost allocation:

Our model also has implications for the analysis of institutions for reallocating the payoffs from trial. The institution of offers to compromise creates a subsidy for generous offers and a tax on high demands, thereby increasing the frequency of settlement. If each party bears his own legal fees (American rule), then trial is less risky than it would be if the loser paid the legal fees of both parties. If the expectations of litigants are rational, rather than optimistic, then more trials will occur when trials are less risky (American rule). If the expectations of litigants are optimistic, then more trials will occur when the loser has to pay the winner’s legal fees (British rule), provided that litigants are not too risk adverse.

Cooter et al., *supra* note 38, at 247.

86. Rhee, *supra* note 6, at 214 (“Like a financial market that exists because traders disagree on value, the legal market exists only because parties disagree on the proper valuation of the disputed right.”).

Reasonable minds may disagree about the likelihood of each, however. Part of that dynamic is a function of the parties' assigned positions in the conflict and their lack of complete information. But notice what happens when parties agree on the basic structure of the tree. They are now arguing about the future and who decides it rather than the history that brought them to this point. Litigants are now making strategic business decisions within bracketed outcomes. Their lawsuit may reduce to a legitimate dispute over the likelihood of a single outcome. The plaintiff will more favorably estimate her own chances of a punitive recovery than the dealer will. If so, the parties can focus their time and resources on that issue rather than overemphasizing the history that pushed them to a filed lawsuit. Additional analysis may turn up documents or legal precedents that reinforce one party's position or the other. The parties may agree to adjourn mediation pending a summary jury trial centered on the disputed point of fact.<sup>87</sup> If the mock jury is shocked by the dealer's alleged conduct, the analysis can be recalibrated to reflect that information. Of course, the opposite is also true. Decision trees can be repeatedly rerun to test NEV's sensitivity to changes in the disputed variable based upon additional information obtained during the process.

While these examples are over-simplified for illustration, one can see how layering economic analysis atop a rigorous legal and factual analysis quantifies risks in ways that are as convincing to parties as to the repeat legal players that represent them. The exercise also demonstrates how far off the economic assumptions would have to be to eliminate a Zone of Potential Agreement ("ZOPA")<sup>88</sup> and increase the likelihood of impasse. With transaction costs included, these parties may have an opportunity to negotiate a deal between the estimated values of their litigation alternatives:

Defendant/dealer (Fig. 8)	\$23,563
Plaintiff/purchaser (Fig. 6)	<u>\$10,710</u>
Difference	\$12,853

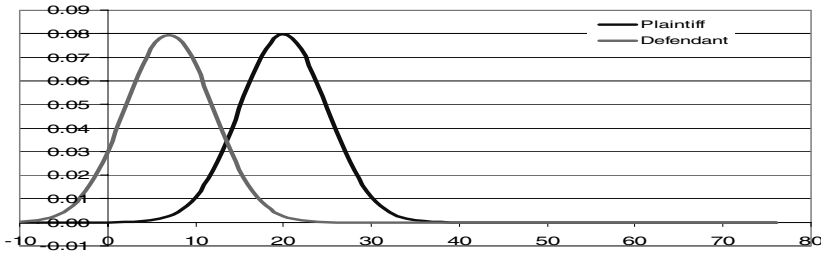
Graphically, the curves overlap to form a ZOPA:

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87. Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 67 n.7 (1994) ("Going from mediation to an evaluative procedure, and then back to mediation is referred to in Ury, Brett and Goldberg (1993) as a 'loop back' procedure.")

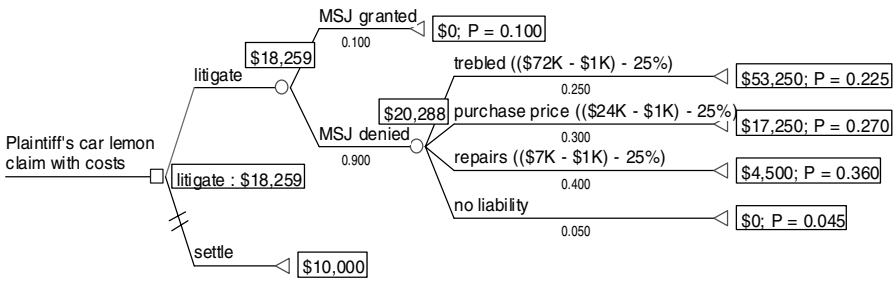
88. ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATION TO CREATE VALUE IN DEALS AND DISPUTES 19-20 (2000).

FIGURE 10. DISTRIBUTION OF POTENTIAL OUTCOMES FORM ZOPA



One of the advantages to this type of modeling is that it can be easily revised. In a matter of minutes, we can change and solve “What if . . . ?” questions. For instance, let’s see what happens to ZOPA if the plaintiff’s chance of a trebled award climbs to 25% (5% in Figure 6) and her chance of a “no liability” finding falls from 25% to five percent. The middle of the curve flattens and NEV rises to \$18,259 as a result.

FIGURE 11. PLAINTIFF’S ODDS IMPROVE OVER FIGURE 6.

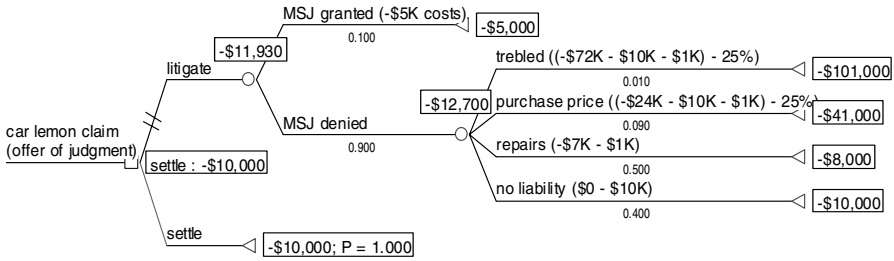


Of course, the dealer’s aspirations are moving in the opposite direction, as are its assumptions over those previously depicted in Figure 9. Here, the dealer assumes that:

1. the plaintiff’s chances of a trebled recovery fall to one percent from five;
2. the likelihood of a “no liability” finding moves up to 40% from 25;
3. the “purchase price” outcome moves downward to nine percent from the earlier estimate of 20%; and
4. a “repairs” finding stays constant at 50%.

As a result of these changed assumptions, NEV falls to \$11,930.

FIGURE 12. DEFENDANT'S ODDS IMPROVE OVER FIGURE 9.



The exercise illustrates with easily manageable numbers how economic analyses can extend and give voice to legal and factual analyses we accept as routine. Joe Jaworski and his team at the Shell Group formulated multiple scenarios using similar techniques. Rather than pick one outcome, they developed scenarios utilizing different assumptions. Without reaching a single conclusion, various decisions are tested by varying the assumptions to measure the impact of the change on the potential outcomes.<sup>89</sup> Settlement may make more sense under certain scenarios than it does under others.

While reasonable people will invariably reach different conclusions about the probabilities and resultant outcomes, the process itself helps everyone more clearly analyze and communicate what “good case” or “good chance” mean in a common vernacular while encouraging the “participants to see themselves as rational actors facing an important decision.”<sup>90</sup> The process also reduces the prospect of seeing patterns where none exist, a worthy by-product.<sup>91</sup> An 80% chance of success in six crucial stages of a military operation does not make for good odds. Even though it may be tempting for a president to give the go-ahead when generals report that the overall chances for a plan are “good” (because each individual stage has an 80% chance of success), the combined results are a surprisingly low 26%.<sup>92</sup> Mathematically, the problem is represented as 0.80 to the sixth power or

89. JAWORSKI, *supra* note 32, at 169.

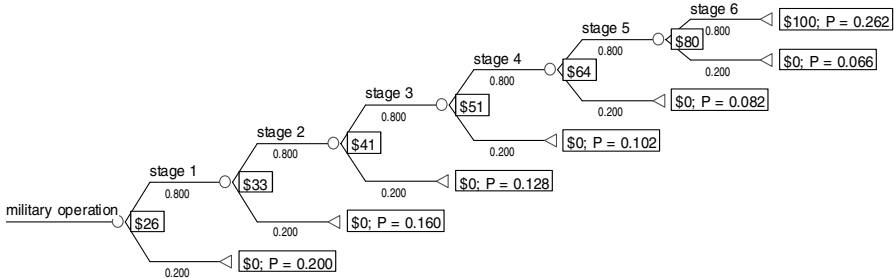
90. Aaron & Hoffer, *supra* note 2, at 73.

91. Bonabeau, *supra* note 2, at 119 (“Indeed, the human drive to find patterns is so strong that they are often read into perfectly random data. Moreover, human beings like to assume that cause directly precedes effect, which makes it difficult to anticipate the second-, third-, and fourth-order effects of path dependence.”).

92. Jeffrey M. Senger, *Decision Analysis in Negotiation*, 87 MARQ. L. REV. 723, 723-24 (2004).

$0.80 \times 0.80 \times 0.80 \times 0.80 \times 0.80 \times 0.80 = 0.26$ .<sup>93</sup> This is represented graphically in Figure 13.<sup>94</sup>

FIGURE 13. MILITARY OPERATION ODDS



Decision-makers may decide to discount or disregard these assumptions, but they will inevitably make more rational decisions after going through the analysis.<sup>95</sup> Chess master Kasparov was only beaten once by IBM's Big Blue in several rounds of play. If Kasparov had the ability to test each of his moves with Big Blue's program and quick processing speed prior to making it, he would undoubtedly have been an even more formidable player. Litigants must make choices or turn them over to others for a binding decision. Unwilling to drain every swamp looking for evidence, they are often faced with making decisions with less than perfect information. The challenge then is to make the best decision with the information they do have or budget an appropriate amount based upon the developed choices. Economic analysis helps narrow the field from the legally possible to the economically viable.

### III. ADJUST FOR PSYCHOLOGICAL BIASES

In one of our concert grand pianos,  
243 taut strings exert a pull of 40,000 pounds on an iron

93. *Id.* at 724.

94. The payout is set at \$100 so that the net expected values translate into percentages.

95. Solomon & Fader, *supra* note 11, at 368 ("[I]f the probabilities of each of the four elements necessary for the plaintiff to recover were, say 80/20, 70/30, 50/50, and 45/55, then the plaintiff's ultimate chance of success would be the multiple of all those (.80 x .70 x .50 x .45, for a total of 12.6%). The problem arises because many litigators looking at this case might genuinely advise the client that the plaintiff has a better chance of succeeding than 12.6%. That is so even though the litigator fully recognizes that the mathematics lead to the 12.6% result." (citing Dan L. Goldwasser, *Introduction to Claims Analysis and Evaluation*, in 550 *PRAC. L. INST./LITIG.* 7 (1996)).

frame.

It is proof that out of great tension may come great harmony.

– Theodore E. Steinway<sup>96</sup>

If humans were completely rational and shared the same information, their legal and economic analyses might match up if we neutralized transaction costs.<sup>97</sup> But we know better. “The lesson of behavioral decision theory is merely that in certain predictable circumstances, people’s judgment will lead them astray.”<sup>98</sup> Litigation is one of those predictable circumstances. Rigorous legal and economic analyses break complex decisions into their component parts with a view toward offsetting the “limitations of human decision making skills.”<sup>99</sup> But we must realize that even the most seemingly objective analysis is imbibed with our own biases. Our job is not done when we input those biased predictions into a mathematical model. We must not only “try to put ourselves into our opponent’s shoes,” we must consciously take account of and discount for known human bias.<sup>100</sup> The resulting analyses compound our scenario planning but improve the snapshot we create. Successful trial lawyers are equipped to this task too. They innately know what themes will play at trial and those that will ring hollow. They also excel as predictors of human behavior and apply that skill from negotiation to jury selection.

#### A. *Risk Tolerance and Loss Aversion Change Our Perspective*

Could a greater miracle take place  
than for us to look through each other’s eyes for an instant?

– Henry David Thoreau<sup>101</sup>

Even if the chances of success are held constant, some people are risk-takers and others are risk-adverse.<sup>102</sup> Everyone gambles, but

96. WEISS, *supra* note 1, at 9.

97. Korobkin, *supra* note 3, at 288.

98. Rachlinski, *supra* note 62, at 118. For a thorough discussion of psychological biases in decision-making, see generally MAX H. BAZERMAN, *JUDGMENT IN MANAGERIAL DECISION MAKING* (6th ed. 2006).

99. Rachlinski, *supra* note 62, at 118; see generally Robert Cooter, *The Cost of Coase*, 11 *J. LEGAL STUD.* 1 (1982); Korobkin, *supra* note 3; Fischhoff, *supra* note 58.

100. Bonabeau, *supra* note 2, at 118 (“Scholars of human cognition have shown that our thinking is subject to all sorts of biases and flaws, most of which operate at a subconscious level – at the level, in other words of intuition.”).

101. WEISS, *supra* note 1, at 24.

102. Solomon & Fader, *supra* note 11, at 385. Two different people can assess a situation and determine that a 5-10% possibility exists for the same negative outcome. Yet it would not surprise us, in such a situation, that one decision maker would immediately embrace undertaking the risk, discounting it as ‘only 5-10% risk,’ while another decision maker would immediately reject the very same strategy, precisely

differently.<sup>103</sup> Building a business is risky in itself, without attendant litigation.<sup>104</sup> Filing and defending lawsuits is also inherently risky. But we all manage risk. To some that means taking a flight and to others it means managing a portfolio of lawsuits of various prospects, either as a trial lawyer or a complex business.<sup>105</sup> The question is the extent to which we can predict the impact of these risk proclivities on negotiations.<sup>106</sup> More accurate predictions allow us to better frame proposals for negotiation.<sup>107</sup>

Nobel Laureates Amos Tversky and Daniel Kahneman and others have done important descriptive work in the areas of adaptive thinking and bounded rationality<sup>108</sup> that begins to explain why people do not act rationally.<sup>109</sup> While it is difficult to determine exactly how much more risk-seeking or risk-adverse a party to a particular suit is at a given point, researchers have proven generalities that can guide us.

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*because* there is a 5-10% risk of that adverse outcome. *Id.*; Rhee, *supra* note 6, at 237 (“Relative risk preference and perception are important factors.”).

103. Cooter et al., *supra* note 38, at 245 (“Think of trial as a gamble. The expected value of the gamble is what a gambler believes the payoff to be on average . . . . The risk of the gamble is the difference between the best and worst possible payoffs.”); Rachlinski, *supra* note 62, at 114 (“Every litigant gambles. When they choose to file suit, take discovery, file motions, decline settlement offers, and appeal, they take chances.”).

104. Kevin R. Casey, *Law Firm ADR Departments Can Respond to Market Challenges*, 25 ALTERNATIVES TO HIGH COST LITIG. 1, 10 (2007) (“Business people generally avoid litigation – it is only when sufficient disappointment, distrust, frustration, or anger combine that business litigation occurs.”).

105. Rhee, *supra* note 6, at 237 (“Single-play parties, typically individuals, are subject to the variance of an individual case and cannot diversify their risks by holding a portfolio.”).

106. Rhee suggests using asset pricing theory to mathematically discount risk into our calculations. *Id.* (“Higher risk results in greater discount to value.”).

107. Korobkin, *supra* note 3, at 308 (“Psychologists have documented, however, that the framing of choices often matters.”).

108. See generally Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341 (1984); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979); Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. 251 (1986); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981); Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q.J. ECON. 1039 (1991); Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and the Status Quo Bias*, J. ECON. PERSP., Winter 1991, at 193 [hereinafter Kahneman et al., *Endowment Effect*]; Jones, *supra* note 39, at 295.

109. Jones, *supra* note 39, at 298.

Prospect theory<sup>110</sup> suggests that risk tolerances depend on whether a party faces a gain or loss.<sup>111</sup> “[P]laintiffs and defendants face markedly different decisions in litigation.”<sup>112</sup> Typically, plaintiffs face an upside recovery that their defendants face the prospect of paying. That changes the lens through which each views potential outcomes. Unless they have high sunk costs or face fee-shifting provisions, plaintiffs face a sure gain by settlement or the potential of a larger gain at trial. Without counterclaims or offers of judgment, defendants are looking through the other end of the telescope – they face a sure loss by settling or the potential of a worse outcome at trial. In experiments, Tversky and Kahneman found that a large majority of subjects facing gains preferred a certain \$240 to a 25% chance of \$1,000 (NEV = \$250). On the other hand, when facing a loss, the same group preferred a 75% chance of loss of \$1,000 (NEV = \$750) to a sure loss of \$750.<sup>113</sup> Even beyond starting positions, the framing of a proposal alone has an effect on how it is received. Research demonstrates “that the appeal of a settlement depends on whether the settlement is *characterized* as a loss or as a gain.”<sup>114</sup> People tend to make risk-averse choices when facing a gain; that is, they prefer certain gains over larger but riskier gains.<sup>115</sup> People facing losses, however, “tend to make risk-seeking choices;”<sup>116</sup> they prefer riskier outcomes to sure losses. There are certainly exceptions, and counterclaims may invert the names, but the principles are instructive as we hammer-test our legal and economic models for human bias. Not only might the negotiating sequence change, but attorneys<sup>117</sup> and third-parties may also influence the negotiation dynamic by the way in which they frame proposals.<sup>118</sup>

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110. Rachlinski, *supra* note 62, at 121 (“[P]rospect theory predicts that people make either risk-adverse or risk-seeking choices depending upon the characterization of the decision as a loss or as a gain.”).

111. There are other risk tolerance theories. *Id.* (“Expected utility theory predicts that people make either risk-adverse or risk-neutral choices depending upon the magnitude of the stakes relative to their total wealth.”). Some commentators believe prospect theory to be more persuasive. *Id.* at 121, 176.

112. *Id.* at 118.

113. Korobkin, *supra* note 3, at 309.

114. Rachlinski, *supra* note 62, at 119, 121.

115. *Id.* at 119.

116. *Id.*

117. *Id.* at 118.

118. *Id.* at 120 (“[U]nderstanding the impact of framing on litigation creates a new perspective on the role of attorneys in litigation. Their ability to present settlement offers to clients as either gains or losses give them the power to overcome the cognitive biases of their clients, reducing the cost of those biases.”).

Kahneman emphasizes the point by comparing salary offers of \$40,000 and \$45,000 to people making \$35,000 and \$50,000.<sup>119</sup> He notes that the “psychological differences between the alternatives”<sup>120</sup> is more negative for the person starting at \$50,000 and facing the prospect of making less.”<sup>121</sup> Another experiment reinforces the concept. Groups of students were assigned the task of buying and selling coffee mugs.<sup>122</sup> The sellers set a median price of \$7.12 with exactly the same information the median buyer had when it offered \$2.88 for the mug.<sup>123</sup> The same bias holds true when we buy and sell personal items. We want more for our beloved house than others are willing to pay. Effective brokers help us reach a point of equilibrium either at the beginning of their engagement based on comparable information or later in the process as specific offers provide additional perspective. So it is with lawsuits. Well-intentioned parties and lawyers arrive at different valuations of the same outcomes not because of forces of good or ill, but because of differences in assigned position. Advocates aspire to argue each side with equal vigor, but the irony is that if they do, the probability assumptions will still not match. Someone is still arguing a higher price for the seller and the buyer is still trying to get a better deal. The parties and advocates simply reverse roles to reflect their new positions. Negotiators recognize that sellers and plaintiffs will usually assign higher values to a negotiated item than buyers and defendants. That spread can be expected to reduce the number of completed transactions beneath what economic theory would predict, unless we can neutralize the risk aversion bias.<sup>124</sup>

Outcome aspirations are influenced by human bias and tempered by the expert opinions of lawyers.<sup>125</sup> If those aspirations are

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119. Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective*, in BARRIERS TO CONFLICT RESOLUTION 45, 54 (Kenneth Arrow et al. eds., 1995).

120. *Id.*

121. *Id.* at 55.

122. *Id.*

123. *Id.*

124. John Bickerman, *Evaluative Mediator Responds*, 14 ALTERNATIVES TO HIGH COST LITIG. 70, 70 (1996) (“One reason cases don’t settle is that parties have different estimates of the litigation risk. Through careful questioning and persistent prodding (part of evaluative mediation), parties adjust their views of the case. As their estimates of litigation grow closer, the likelihood of settlement increases.”).

125. Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It?*, 79 WASH. U. L.Q. 787, 807-08 (2001) (“The attorneys’ use of the expected value analysis approach eases the convergence of the clients’ aspiration levels and perceptions of substantive fairness.” (citations omitted)).

aggressive, the chances of impasse naturally increase.<sup>126</sup> To the extent that aggressive aspirations are the product of a risk-seeking attitude coupled with incomplete information, a mediator may unearth that reality and help the parties adjust accordingly. While some decision tree software allows for the assignment of different risk profiles, and while option theory prices risk proclivities in to valuation, risk appetites are a subjective area that call for manual adjustment by repeat players.<sup>127</sup> One scenario might assume that the defendant is risk-seeking and favors a chance of losing at trial over a sure but lesser loss in negotiation. If the defendant makes an offer to what it assumes to be a risk-adverse plaintiff, it will likely frame that offer in terms of a gain – “with this offer, you will keep the car you selected and take away \$X.” Framing an offer is just marketing. It’s really no different than Walt Disney drawing a big, soft glove over Mickey Mouse’s otherwise unattractive claw.<sup>128</sup> Whether the result of our psychological analysis is a modified decision tree or an adjustment to the frame through which our offers are presented, we do well to recognize that not everyone views risk from the same perspective.

B. *Optimistic Overconfidence: The Lake Wobegon Effect*<sup>129</sup>

The pessimist sees difficulty in every opportunity.

The optimist sees opportunity in every difficulty.

– Winston Churchill<sup>130</sup>

Life would be tough without optimists<sup>131</sup> and they are often risk-takers. “A common feature of human behavior is overoptimism,” scholars have noted, including in the litigation context.”<sup>132</sup> Faced

126. Korobkin, *supra* note 3, at 310-12; see also Max H. Bazerman & Margaret A. Neale, *The Role of Fairness Considerations and Relationships in a Judgmental Perspective of Negotiation*, in *BARRIERS TO CONFLICT RESOLUTION*, *supra* note 119, at 87.

127. Korobkin, *supra* note 3, at 314 (citing Jean R. Sternlight, *Lawyers’ Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 336-37 (1999) and Ian Weinstein, *Don’t Believe Everything You Think: Cognitive Bias in Legal Decision Making*, 9 CLINICAL L. REV. 783, 820 (2003)).

128. GLADWELL, *supra* note 2, at 169.

129. Overoptimism is also referred to as the Lake Wobegon effect – where all of the children in Garrison Keillor’s fictional town are above average. See generally GARRISON KEILLOR, *LAKE WOBEGON DAYS* (1985).

130. WEISS, *supra* note 1, at 14.

131. Korobkin, *supra* note 3, at 284.

132. Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 875 (2007) (quoting Christine Jolls et al., *A Behavioral Approach to Law & Economics*, 50 STAN. L. REV. 1471, 1524 (1998)). See generally Oren Bar-Gill, *The Evolution and Persistence of Optimism in Litigation*, 22 J.L. ECON. & ORG. 490 (2006); Senger, *supra* note 92, at 733.

with a nasty lawsuit, we all want lawyers to champion our cause.<sup>133</sup> That is their job. As repeat players with a portfolio of cases, lawyers<sup>134</sup> instinctively value cases. Economic analyses may test and extend those instinctive valuations. But when the tests come, the client probably does not want their champion to be the one poking holes in their case and they sure do not want the other side to point out their shortcomings. Most are, however, open to questions by impartial third-parties based on a rounded view of the case. The answers to those questions may impact their valuation. If the spread between assumptions is wide enough to eliminate a zone of agreement, the parties raise the risk of negotiation impasse and may end up surrendering the decision to someone else.

Overconfidence leads us to discount small probabilities,<sup>135</sup> assume luck runs in our favor,<sup>136</sup> and distort unattractive consequences.<sup>137</sup> It is human nature to place more emphasis on “facts that are consistent with our desired outcomes”<sup>138</sup> and to make self-serving assessments of our own ability.<sup>139</sup> Over 80% of interviewed entrepreneurs described their chances of success as 70% or better, and 33% described them as “certain.”<sup>140</sup> That compares with a five-year survival rate for new firms around 33%. Couples about to be married estimated their chances of later divorcing at zero, even though most know that the divorce rate is between 40% and 50%.<sup>141</sup> Negotiators in final arbitrations overestimated the chance that their offer would be chosen by 15%.<sup>142</sup> Surveys find the Lake Wobegon above-average

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133. See Korobkin, *supra* note 3, at 290. See also Cooter et al., *supra* note 38, at 225.

134. Korobkin, *supra* note 3, at 292. See also Robert Axelrod, *The Emergence of Cooperation Among Egoists*, 75 AM. POL. SCI. REV. 306, 312 (1981) (“The great enforcer of morality in commerce is the continuing relationship, the belief that one will have to do business again with this customer, or this supplier, and when a failing company loses this automatic enforcer, not even a strong-arm factor is likely to find a substitute.”).

135. See Solomon & Fader, *supra* note 11, at 368.

136. Dan Lovallo & Daniel Kahneman, *Delusions of Success: How Optimism Undermines Executives' Decisions*, HARV. BUS. REV., July 2003, at 56, 59.

137. See Solomon & Fader, *supra* note 11, at 385-86.

138. Korobkin, *supra* note 3, at 285.

139. See *id.* at 287. See also Lovallo & Kahneman, *supra* note 136, at 58 (“The typical pattern of such attribution errors, as psychologists call them, is for people to take credit for positive outcomes and to attribute negative outcomes to external factors, no matter what their true cause.”).

140. Kahneman & Tversky, *supra* note 119, at 48.

141. Korobkin, *supra* note 3, at 284-85.

142. Kahneman & Tversky, *supra* note 119, at 47.

effect across demographics – college professors, high school students, truck and taxi drivers, and even negotiators.<sup>143</sup>

Although most negotiators believe that they are more “fair” than average, in specific mediations they tend to overestimate their trial alternatives.<sup>144</sup> Advocates naturally focus attention on case assets while under-appreciating the weaker issues.<sup>145</sup> Myopically focusing on the strengths of a case blurs our focus on less favorable points. Focusing tightly on the merits of the case also increases the risk of undervaluing the transaction costs associated with continuing to trial.<sup>146</sup> While overconfidence is prevalent among negotiators, it is not constant. So we cannot just cut the probabilities on both sides by 15% and balance the decision trees. What we can do is prepare alternative scenarios looking through different ends of the same telescope. Some scenarios will be rosy and others thorny, but together they are more likely to cover the range of potential outcomes – worst case to best case. Disciplining ourselves to articulate *specific explanations* for various outcomes can break our single-minded focus on a single scenario. In the process, we reduce overconfidence.<sup>147</sup>

### C. *Perfect Information – Why We Settle “On the Courthouse Steps”*

I cannot divine how it happens that the man  
who knows the least is the most argumentative.

– Giovanni della Casa<sup>148</sup>

Lawsuits sound more promising to lawyers and judges when they only hear one side. As information improves, that promising bloom may fade.<sup>149</sup> We actually share a “tendency to *undervalue* those aspects of the situation of which [we are] relatively *ignorant*.”<sup>150</sup> The first-number mentioned in a negotiation, or “anchor,” is more persuasive with less information. Subject matter experts are less likely to be fooled by anchors than newcomers. However, even professional

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143. Korobkin, *supra* note 3, at 287 (“[T]his phenomenon leads to the result that as perceived control over events and outcomes increases, so does the observed level of optimistic overconfidence.”).

144. *Id.* at 288.

145. *Id.* at 289.

146. *Id.*

147. *Id.* at 297.

148. WEISS, *supra* note 1, at 12.

149. See Rhee, *supra* note 6, at 242 n.177

150. Kahneman & Tversky, *supra* note 119, at 46 (emphasis added).

real estate agents were manipulated by varied listing prices.<sup>151</sup> First offers can have the same effect in the litigated case. When study subjects were given only half of the evidence in a case, they actually predicted the jury's decision with *greater confidence* than those who were given all of it. That is not to say they were right, just confident – *and* not able to adequately compensate when informed that their evidence was lopsided.<sup>152</sup> While overconfidence helps us rally the troops for battle, “[o]ptomistic overconfidence is not a desirable trait for generals recommending war or for attorneys urging a lawsuit.”<sup>153</sup> But that is a bit unfair. The general and the attorney are hired guns. Their role is to ready the battle by developing legal positions and marshaling the supporting evidence. The legal system assigns decision making to other players. If the parties do not want to surrender that decision completely to others, an effective mediator can draw these scenarios out based on party views and then confidentially test each outcome before their eyes. That allows the advocates to do their assigned job while others systematically explore outcomes with ever improving information.

We instinctively want more information before making decisions. But repeat players and seasoned executives are accustomed to making decisions under uncertainty. Shell executives made strategic investment decisions based on Joe Jaworski's 30-year global economic and energy scenarios.<sup>154</sup> Clients systematically take such risks. Yet, lawyers are held to a different standard. Sixty percent certainty in a new product launch is great. Missing 40% of the hypothetically available information in discovery may spell trouble for an attorney. So part of our analysis may include estimating the amount parties are willing to spend discovering potential evidence. Since price and risk are inversely correlated in investments and lawsuits, if parties accept the risk of limited information by adjusting litigation budgets downward, risk allocations may need to follow to rebalance the equation.

Decision trees can help us determine how much parties are willing to pay to close informational gaps. As one would expect, the price of perfect information is related to the spread between decision points (“litigate” v. “settle”). Let's assume that our hypothetical car buyer

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151. Dan Orr & Chris Guthrie, *Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis*, 21 OHIO ST. J. ON DISP. RESOL. 597, 607 n.21 (2006).

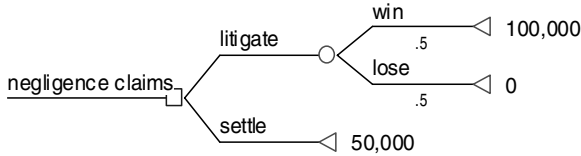
152. Kahneman & Tversky, *supra* note 119, at 46.

153. *Id.* at 48.

154. JAWORSKI, *supra* note 32, at 169.

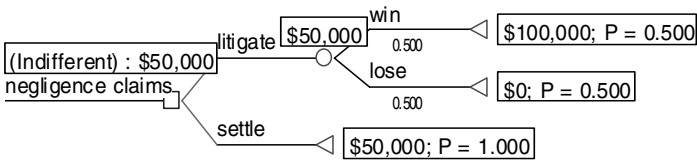
not only bought a “lemon,” but was involved in an unrelated automobile accident. Overly simplified, her legal analysis tells us that negligence is the principal claim arising from the accident and that the range of remedies is \$0 to \$100,000. Each outcome shares a 50:50 probability. A settlement offer is outstanding for the NEV of \$50,000. This is illustrated in Figure 14.

FIGURE 14. FIFTY-FIFTY SHOT AT \$100,000



The economic analysis reflects the simplicity of the hypothetical – the plaintiff should be indifferent to the two options since they both equal \$50,000. But the gap between winning and settling is still wide. So NEV may not be as helpful as improving the information she has available to make a dichotomous choice.

FIGURE 15. NEV OF FIFTY-FIFTY SHOT AT \$100,000



While decision points are rarely this elementary,<sup>155</sup> in this scenario the plaintiff’s decision is whether to accept the \$50,000 offer or spend more money discovering additional information to improve her odds of a \$100,000 win – and an enhanced settlement offer.<sup>156</sup> Since she stands to double her money, she may seek more information than she might want if a \$75,000 settlement offer produced a closer call. But how much will she and her lawyer spend to take a swing at the \$100,000 outcome?

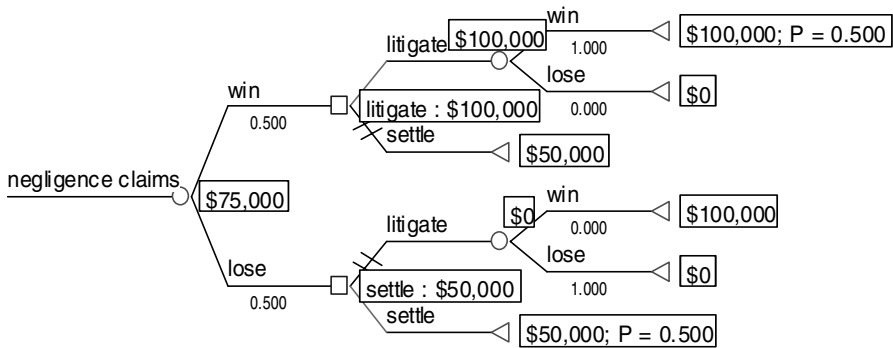
Decision tree programs help calculate the “value of perfect information.” The underlying logic is also instructive. Once the plaintiff has a \$50,000 settlement offer (or reasonably expects one in that range), she is bracketed by a choice between a 50% chance of recovering \$100,000 and a sure \$50,000 settlement. Since the offer comes

155. A more thorough analysis might reveal other complexities; *i.e.*, higher potential recoveries for a gross negligence finding, transaction costs, counterclaims, time value of money, etc.

156. Rhee, *supra* note 6, at 242.

early, she must make that choice with less than perfect information. Of course, if she knew the jury was coming back with a \$100,000 award, she would not settle (“win” fork). If she knew the jury was going to zero her out, she would take the offer. But her choices come in the real world. The amount she should be rationally willing to spend to discover additional information turns out mathematically to be no more than half the spread between outcomes in this case. That multiplier changes as the underlying assumptions change. We take the probabilities (50:50) and solve for the difference between the outcomes by examining each scenario. That means we set the “litigate” probabilities on the “win” and “lose” forks to 100:0. The “win” outcome is swinging for \$100,000 at trial and the “lose” outcome prefers to “settle” at \$50,000. NEV for the new “win”/“lose” fork is \$75,000. Therefore, plaintiff should be unwilling to spend more than \$25,000 on additional information to decide between a \$50,000 settlement offer and the chance of \$100,000 award at trial. Of course, the information she discovers could also be damaging and push her closer to \$0.

FIGURE 16. VALUE OF PERFECT INFORMATION



Litigants often face these choices irrationally. Many people will spend more money to “increase the probability of a desirable outcome from 0.99 to 1 than from 0.80 to 0.85.”<sup>157</sup> But the decision to spend sizeable amounts of money to only incrementally improve informational certainty should be made wide-eyed. We all make decisions with less than perfect information. In litigation, we do well to balance price and risk.

157. Kahneman & Tversky, *supra* note 119, at 51.

D. *Attribution Errors and Anger*

Even a dog knows the difference between  
being stumbled over and being kicked.

– American Proverb<sup>158</sup>

The same psychological lenses that imbibe litigants with confidence also color their perception of other's conduct. In our mind's eye, good things happen to us because of our industry and talent; bad things happen because of other people. When others do something to us, it was within their control (internal). But when we are accused of an error, external circumstances lie at the root. These perceptions are both natural and biased. "People feel the desire to retaliate against those with whom they are angry, but not against those with whom they are not angry, even when the other person's actions have resulted in a negative experience."<sup>159</sup> The likelihood of settling a lawsuit is impacted not only by the legal and economic analyses, but also by the parties' attitudes toward one another.<sup>160</sup>

In his best-selling book *Blink: The Power of Thinking Without Thinking*,<sup>161</sup> Malcolm Gladwell notes that "there are highly skilled doctors who get sued a lot and doctors who make lots of mistakes and never get sued."<sup>162</sup> The differentiator is not shoddy medical care, but "something else" – "patients say that they were rushed or ignored or treated poorly"<sup>163</sup> and it made them mad. "'People just don't sue doctors they like,' is how Alice Burkin, a leading medical malpractice lawyer, puts it."<sup>164</sup> Medical schools teach bedside manners and "[i]nsurers list a good bedside manner and a willingness to answer patient questions as effective ways to reduce the odds of facing a malpractice suit."<sup>165</sup>

Trial lawyers are equipped as repeat players to help clients factor attribution errors into their analyses. Mediators can help reduce

158. WEISS, *supra* note 1, at 53.

159. Korobkin, *supra* note 3, at 300.

160. *Id.* at 300-01.

161. *See generally* GLADWELL, *supra* note 2.

162. *Id.* at 40. *See also* Lonny Sheinkoph Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 218 (2007).

163. GLADWELL, *supra* note 2, at 40.

164. *Id.*

165. Elizabeth Stewart Poisson, *Addressing the Impropriety of Statutory Caps on Pain and Suffering Awards in the Medical Liability System*, 82 N.C. L. REV. 759, 792 (2004) (citations omitted).

the impact of this bias by probing alternative explanations for conduct in an effort to debias working models, if not actually reduce anger.<sup>166</sup> Without such alternative explanations, we fill in the blanks – and make attribution errors in the process.<sup>167</sup> While apologies offered in mediation have been shown to reduce anger and increase the likelihood that a party will accept a settlement offer,<sup>168</sup> there are potential problems with offering them.<sup>169</sup>

One of the inherent strengths of economic analysis during negotiation is that it focuses the parties on the component parts of the overall dispute. That is not to suggest that there is not an important and cathartic role for emotions and venting in negotiation, even in commercial disputes.<sup>170</sup> There certainly is. But when deciding to pass up an opportunity to negotiate an alternative to litigation because of their emotional reaction to it, a party should objectively evaluate the price they put on those emotions. “[G]ive me liberty or give me death!”<sup>171</sup> clarified the price one patriot was willing to pay for his alternative. While the alternatives to inevitable human conflict<sup>172</sup> are usually less stark, it is important for our analyses to contemplate the attributions we are likely making about our opponent, and the ones they are surely making to us.

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166. See Korobkin, *supra* note 3, at 307-08.

167. See *id.* at 305 n.94.

168. See *id.* at 307.

169. See Sander & Goldberg, *supra* note 87, at 53 (apologies rarely occur in mediation). See generally Richard C. Reuben, *States Starting to Offer Legal Protection for Apology*, DISP. RESOL. MAG., Summer 2000, at 30; Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460 (2003) (finding that “full” apologies increase the likelihood of settlement but “partial” apologies that are mere expressions of sympathy can actually decrease the likelihood of settlement).

170. Sander & Goldberg, *supra* note 87, at 56 (noting the presence of emotions in commercial disputes). James C. Freund, *Anatomy of a Split-Up: Mediating the Business Divorce*, 52 BUS. LAW. 479, 479 (1996) (“Breaking up a business is no cakewalk, though; in fact, few tasks in the commercial world are so challenging. That is really not surprising – if the partners have been unable to communicate and act rationally in connection with their *shared* interest in *promoting* the business vehicle, how can they hope to forge sensible solutions to their sharply *diverging* interest in *splitting up*?”). See generally ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE (2005).

171. Patrick Henry, Speech to Second Virginia Convention (Mar. 23, 1775), in NORINE DICKSON CAMPBELL, PATRICK HENRY: PATRIOT AND STATESMAN 130 (1969).

172. But see ROGER FISHER ET AL., BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT 142 (1994) (“Conflict is inevitable. It will not disappear, nor can it be ignored.”).

E. *Anchoring – Increasingly Perfect Information Lightens Anchor*

A ship in harbor is safe, but that is not what ships are built for.

– William Shedd<sup>173</sup>

As we move from dispute analysis to negotiation planning, we are often faced with the decision to either make the first offer or await one from the other side. That decision turns on a number of variables. Because the car dealer knows its real costs, it posts a sticker price that is intended to begin negotiations well above those costs. With less information than the car dealer, we may await our opponent's move. Their offer may telegraph informational asymmetries or align with our expectations. It may reflect overconfidence borne of ignorance and it might just be a strategic move. As we develop scenarios, though, we must realize that "we are often unduly influenced by the initial figure we encounter when estimating the value of an item."<sup>174</sup>

Psychologists call this first-numbering phenomenon "anchoring" and have studied its influence on opening offers and demands, insurance policy caps, statutory damage caps, negotiator aspirations, and other "first numbers."<sup>175</sup> And while expert training and information symmetry certainly limit the impact of anchors "we have an automatic, unconscious tendency to 'anchor' on the first number we encounter" when estimating the value of an intangible.<sup>176</sup> One commentator argues that anchoring "describes the process by which the human mind does virtually all of its inferential work."<sup>177</sup> Anchors function much like our "gut" reactions to the value of an object or lawsuit – the "thin slice"<sup>178</sup> our subconscious sends our conscious mind to evaluate. The more relevant information our analytical mind has, the less we are swayed by an unreasonable anchor. Mistaken or misguided anchors can increase the odds of impasse and have other unintended consequences.<sup>179</sup>

173. WEISS, *supra* note 1, at 15.

174. Orr & Guthrie, *supra* note 151, at 597 (citations omitted).

175. *Id.* at 598; Lovallo & Kahneman, *supra* note 136, at 60 (noting a significantly positive correlation between respondents' social security numbers and the number of physicians in Manhattan when asked for both).

176. Orr & Guthrie, *supra* note 151, at 600.

177. Daniel T. Gilbert, *Inferential Correction*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 167 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002).

178. GLADWELL, *supra* note 2, at 40.

179. *See, e.g.*, Orr & Guthrie, *supra* note 151, at 606 ("Researchers have also found that statutory damage caps – ironically, a tool policy makers employ to produce more rational damage awards – can anchor juror's awards.").

Information quality and symmetry can have a clear impact on the weight of an anchor. Our hypothetical car buyer is less biased by the dealer's sticker price after pulling Blue Book and comparable sales prices. Rather than negotiating off of the dealer's sticker, she disregards that attempted anchor and offers a lower price in line with her analytical assessment. But even with the information the buyer has marshaled, the dealer still knows its real cost of the car (perfect information) and the buyer does not. The buyer can argue comparables and other available reference points, but one look at the dealer's showroom will tell you who is winning more negotiations. Our legal and economic analyses increase our confidence in our valuations and thus the offers we make. These analyses place us in a better position to influence the negotiations by dropping an anchor or disregarding an unreasonable attempt to anchor by another.

F. *Reactive Devaluation – It's a Trick Because They Offered It*

The greatest lesson in life is to  
know that even fools are right sometimes.

– Winston Churchill<sup>180</sup>

There are certain things that we do not want to hear from our adversaries. The perceived source of a message has a lot to do with our perception of it.<sup>181</sup> We discount whatever the other side offers, even if it's favorable, under the theory that "they wouldn't have offered those terms if those terms strengthened our position relative to theirs."<sup>182</sup> We also tend to reject or devalue whatever is freely available and strive for whatever is denied – the "grass is always greener on the other side of the fence."<sup>183</sup> Role-playing student respondents were offered either cash or authorship credit by a professor writing an article. The students who were offered cash expressed a desire for authorship credit. Those offered authorship credit wanted cash.<sup>184</sup>

A Cold War experiment quantified the magnitude of this reactive devaluation bias. Soviet leader Gorbachev made a proposal to reduce nuclear warheads by one-half, followed by further reductions over time.<sup>185</sup> Researchers attributed the proposal to President Reagan, a

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180. WEISS, *supra* note 1, at 15.

181. Korobkin, *supra* note 3, at 316.

182. Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in BARRIERS TO CONFLICT RESOLUTION, *supra* note 119, at 26, 30.

183. *Id.* at 35.

184. *Id.* at 35-36.

185. *Id.* at 29 ("Respondents were asked to evaluate the terms of a simple but sweeping nuclear disarmament proposal – one calling for the immediate 50% reduction of long-range strategic weapons, to be followed over the next decade and a half by

group of unknown strategists, and to Gorbachev himself.<sup>186</sup> The surprise was not that the group reacted differently to the same proposal depending on its source, but the wide range of difference. When attributed to the U.S. President, 90% reacted favorably. That dropped marginally when attributed to the third-party (80%), but in half (44%) when attributed to the Soviet leader.<sup>187</sup> Similarly, the responsiveness of Israeli student subjects to a proposed peace agreement between Israel and the Palestinians depends on whether they perceive the proposal as emanating from the Israeli government or the Palestinian Authority.<sup>188</sup>

If litigants realize that their proposals could be discounted by half just because of their source, they should consider the source in scenario planning. In the “lemon” claim scenario, the local dealer may still be well thought of and blamed by the plaintiff only for selling the out-of-town manufacturer’s product. To the extent that the manufacturer is indemnifying the dealer for those manufacturing claims, the manufacturer and dealer may decide that the dealer should take a more visible role at the table since it has more credibility with the plaintiff. The lawyers may also divide negotiating postures between a “good cop” and “bad cop.” But many times, it just takes a fresh face that does not carry the manufacturer’s or the bad cop’s position and baggage. The arms control proposal from “unknown strategists” was viewed almost as favorably as the same one coming from the home team – nearly twice as favorably as when it came from the opponent. A mediator can accept and even mirror one side’s demonization of the other party and ultimately redirect the subject back to probability outcomes: “Maybe Mr. X is Darth Vader, and he did this to sabotage your company, but let’s focus on how that affects your choices.”<sup>189</sup> In demonstrating empathy and understanding, while focusing on various alternatives, mediators

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further reduction in both strategic and short-range tactical weapons until, very early in the next century, all such weapons would have disappeared from the two nations’ arsenals. As a matter of history, this proposal had actually been made slightly earlier, with little fanfare or impact, by the Soviet leader Gorbachev.”).

186. *Id.*

187. *Id.* at 31.

188. Korobkin, *supra* note 3, at 317.

189. Marjorie Corman Aaron, *ADR Toolbox: The Highwire Act of Evaluation*, 14 ALTERNATIVES TO HIGH COST LITIG. 62, 62 (1996).

have an opportunity to help parties rise above personality and forge a constructive solution.<sup>190</sup>

### G. *Other Factors – And There Are Always Other Factors*

Do not find fault, find a remedy.

– Henry Ford<sup>191</sup>

Try as we might to capture the variables impacting case valuation, there are always other factors that impact our analyses.<sup>192</sup> One litigant may seek to avoid the market or bankruptcy effects of an adverse verdict, the risk of a no-liability finding, or the distraction of litigation on management.<sup>193</sup> Another may want to set precedent or ward off future claims with a consistent litigation strategy.<sup>194</sup> Other factors include the desire for legislation or appellate decisions that change the long-term alternatives (BATNAs<sup>195</sup>) of their opponents. We all use “rules of thumb” to short-circuit decisions.<sup>196</sup> Sometimes

190. Sander & Goldberg, *supra* note 87, at 52 (“It is only when the client’s primary interests consist of establishing a precedent, being vindicated, or maximizing (or minimizing) recovery that procedures other than mediation are more likely to be satisfactory.”).

191. WEISS, *supra* note 1, at 10.

192. Solomon & Fader, *supra* note 11, at 364. Those factors include:

- Does the expenditure of those resources make sense in relation to the amount realistically at stake?
- Does the client have an ongoing business relationship with the opposing party? Does it wish to preserve that relationship? Will the lawsuit jeopardize it?
- Will prosecuting or defending the claim require the ongoing attention of key personnel whose time would be better devoted to the client’s business?

Is it important to fight, no matter the cost, to establish a reputation as a business that vindicates its position by not settling meritless cases? Will the client really feel the same way in a year or two when the litigation has cost staggering amounts of money and has distracted management?

193. See generally Aaron, *supra* note 9.

194. Solomon & Fader, *supra* note 11, at 388 (“What are the indirect or collateral costs to a litigation that should be accounted for in a case evaluation? Examples abound. How many follow-on cases will there be in any event? How many follow-on cases will there be when the quantum of an early settlement becomes known (or known to the relevant community)? What bridges will the client risk burning with current suppliers or distributors if it proceeds with the case?”).

195. “BATNA” stands for “Best Alternative to a Negotiated Agreement.” ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 100* (Penguin Books 1991) (1981).

196. David B. Lipsky & Ariel C. Avgar, *Online Dispute Resolution Through the Lens of Bargaining and Negotiation Theory: Toward an Integrated Model*, 38 U. TOL. L. REV. 47, 85 n.128 (2006); see also generally GLADWELL, *supra* note 2.

these rules work, but if we overpay for something relative to its objective value, we are perplexed by the “winner’s curse.”<sup>197</sup> And we always perceive whatever we are selling to have a higher value than the buyer appreciates – the endowment effect.<sup>198</sup>

Decision-makers allocate resources based on anticipated returns. Professional repeat players help them evaluate those choices. Once a decision-maker has thoroughly analyzed a case (or series of cases) from different perspectives, she can better decide how much time and money she is willing to spend to make those points or avoid those costs. A hard-fought principal may be at stake – at least until an objective analysis places a dollar price tag on it. The existence of psychological impediments to successful resolution calls for objective models to test party aspirations. Mediators are well-positioned to test for many of these psychological biases as they empathize with parties and return the focus to future outcomes. A mediator’s use of these analyses to keep potential alternatives in full view should increase effectiveness of the process.<sup>199</sup>

#### IV. PLANNING FOR NEGOTIATION – MAPPING OUT THE PATH TO SUCCESS

If you don’t know where you are going,  
any road will get you there.

– The Cheshire Cat<sup>200</sup>

Now that we have conducted a legal and factual analysis, developed and graphed alternatives, assigned probabilities, solved NEVs, and adjusted each for known human bias, are we ready to start chopping down the tree by engaging the other side in active negotiations? Almost. Since we want the tree to fall in the yard rather than on the house, we need to take what we now know and use it to develop a trajectory that will land our negotiations in an acceptable range.

197. Bazerman & Neale, *supra* note 126, at 102-04 (“[N]egotiators act irrationally by failing to incorporate valuable information about their opponents into their analyses and complete transactions but pay too much in the process.”).

198. Kahneman et al., *Endowment Effect*, *supra* note 108, at 194 (“[P]eople often demand much more to give up an object than they would be willing to pay to acquire it.”).

199. Harold I. Abramson, *Problem-Solving Advocacy in Mediations*, DISP. RESOL. J., Aug.-Oct. 2004, at 64; Korobkin, *supra* note 3, at 326-27 (“I believe that a mediator’s active participation, active insertion of himself in the conflict, and active guidance of the parties toward agreement if a bargaining zone exists is critical to overcoming psychological impediments to settlement of cases in which settlement equates with success.”).

200. LEWIS CARROLL, *ALICE IN WONDERLAND AND THROUGH THE LOOKING GLASS* 49 (Bantam Classic 2006) (1923).

BATNAs, walk-aways, and concession intervals become proxies for wind direction and weight distribution of the tree. We are isolating an increasingly objective snapshot of the outcomes we might face, but we still need a map of our anticipated moves on the route to a successful outcome.

Maps bring together what we know about the realities we face and help us visualize a path forward.<sup>201</sup> While causes of action and their associated remedies provide legal vehicles to potential recovery while also bracketing the range of outcomes, decision-makers are often interested in where they are likely to end up financially based on the economic analysis predicated on those legally determined brackets. Picking roads and legal options is easier with improved information, but most clients can only afford to pay so much for a map. On fishing trips, tourists hire guides. In legal disputes, litigants hire advocates. Not only do lawyers help rationalize disputes, they use various decision options strategically in negotiations.<sup>202</sup> “Negotiators who generate multiple options will ‘open doors and produce a range of potential agreements satisfactory to each side.’”<sup>203</sup> The objective, then, is to develop the best alternatives while appreciating the fact that more money might marginally improve the information on which our decision is based. A number of excellent negotiation planning resources are available.<sup>204</sup> Our goal here is to bring key elements of our analytical pyramid together by stacking economic decision analysis atop rigorous legal analysis and capping it with psychological debiasing in preparation for negotiation.

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201. As Charles Kettering put it, “My interest is in the future because I’m going to be spending the rest of my life there.” WEISS, *supra* note 1, at 13.

202. Chris Guthrie, *Panacea or Pandora’s Box?: The Costs of Options in Negotiation*, 88 IOWA L. REV. 601, 601 (2003) (“[T]hree-part argument about the constructive role that lawyers can play for their clients in complex negotiations.”).

203. *Id.* at 607 (quoting FISHER, URY & PATTON, *supra* note 195, at 80).

204. See generally Robert L. King, *Screening Device Determines ADR Suitability*, 15 ALTERNATIVES TO HIGH COST LITIG. 7 (1997); ROGER FISHER & DANNY ERTEL, GETTING READY TO NEGOTIATE: THE GETTING TO YES WORKBOOK (1995); HARVARD BUSINESS ESSENTIALS: NEGOTIATION (2003); Harvard Business Online: Negotiation Worksheets, [www.elearning.hbsp.org/businessstools](http://www.elearning.hbsp.org/businessstools) (last visited Feb. 4, 2008); Straus Inst. for Dispute Resolution, Pepperdine Univ. School of Law, Negotiation Planning Instrument (1997) (adapted from WILLIAM F. LINCOLN ET AL., THE COURSE IN COLLABORATIVE NEGOTIATIONS (1985)).

A. *Recap of Earlier Analyses and Mathematical Projections*

It’s not the will to win, but the will to prepare to win that makes the difference.

– Bear Bryant<sup>205</sup>

Our legal and factual analyses assumed plaintiff’s range of outcomes for her lemon claim (\$0 to \$72,000 in Figure 2). The defendant faced making payouts ranging from \$10,000 to \$101,000 (Figure 8). Using decision trees, we solved NEV for each party under various assumptions. With transaction costs loaded, plaintiff’s net expected value (NEV) fell to \$10,710 (Figure 6) while defendant’s NEV rose to -\$23,563 (Figure 8). Therefore, a theoretical zone of potential agreement (ZOPA) existed between those solved values (Figure 10). For now, we assume that each party’s BATNA is “litigate” and NEV is the price at which each elects that option. We will also hold each party’s walk-away or reserve price at NEV for now, recognizing that parties in negotiation might adjust that parameter. The walk-away price could be higher or lower than the BATNA depending on party preferences. If one could chose vendors, she might prefer a deal with the current negotiating team to a seemingly equal or better alternative. Its walk-away might fall below its BATNA as a result. Of course, preferences might also push a party to take a nearby BATNA over continuing a tough negotiation. In litigated cases, the alternatives are invariably limited to other alternatives since we cannot switch parties like vendors when negotiations are not going well.

FIGURE 17. RECAP OF PART II

	Party 1 (p)	Party 2 (Δ)	Party 3	Party 4
<b>Remedies Range</b>	\$0 to \$72,000	-\$10,000 to -\$101,000		
<b>NEV</b>	\$10,710	-\$23,563		
<b>BATNA</b>	\$10,710	-\$23,563		
<b>Walk Away (Reserve)</b>	\$10,710	-\$23,563		

The “best” and “worst” case scenarios imbedded in the remedies range provide negotiating brackets within which offer patterns can be constructed along a logical trajectory. If the dealer has no other reason to pursue its “litigate” alternative, it may want to settle the matter early for what it would spend repairing the car (\$7,000) plus its budgeted transaction costs (\$10,000). The plaintiff may be equally satisfied with a \$17,000 outcome, as it leaves her with a surplus after

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205. WEISS, *supra* note 1, at 19.

repairing the car and paying her transaction costs. The dilemma is that neither wants to appear weak. And even if both parties had perfect information about the case and were inclined to drop to a bottom line valuation quickly, they probably should not do so immediately at the risk of leaving value on the table.

Negotiators go through a “dance.”<sup>206</sup> That dance includes cathartic relief for the parties, exploration and evaluation of alternatives, a search for creative solutions, and distribution of the largest pie the participants can bake. The distribution itself will likely go through an iterative exchange that allows everyone to vent their frustrations and frame their next move. Since negotiators know that to be a trend, they should not drop to \$17,000 too quickly. That is not to say we need three-years and an imminent trial setting either. But if we start at \$17,000 because that is where the negotiation is likely to end up, one side runs the risk of moving its acceptable outcome curve prematurely while the other side starts “negotiating” from what it perceives to be a new field position based on that move. Anticipating a dance, we generate some predictable roads on the map, even if we do not follow them.

Let us assume a plaintiff begins negotiations with a compelling argument for a “purchase price” refund (\$24,000) plus transaction costs (\$7,000). While she couches her opening offer in the context of legal claims that she values closer to \$72,000, she intonates that she comes to mediation in the spirit of compromise. Let’s further assume that the dealer’s representative is still mad about even having to participate in the mediation. He “graciously agrees” to drop the dealer’s attorney fee claims, but only if the offer is accepted today (translation: ?’s First Offer \$0). So at the end of round one, plaintiff has dropped anchor at \$31,000 and defendant at \$0. Interestingly, the midpoint between their First Offers is \$15,500 and the midpoint between their NEVs is \$17,137. The average simply reveals the proximity of the NEV and First Offer Midpoints.

While every case is unique and negotiators certainly do not want to be completely predictable even if well armed with rational models, the first round of “reasonable” offers will influence the final outcomes.<sup>207</sup> Without committing to follow a mathematical pattern, negotiators may improve their positions by comparing actual bidding with mathematical projections.

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206. L. RANDOLPH LOWRY, PEPP. U. INST. FOR DISP. RESOL., NEGOTIATION AND SETTLEMENT ADVOCACY NOTEBOOK 2:3-4 (1995)

207. *Id.* at 2:3; see also the anchoring discussion *infra* Part III.E.

FIGURE 18. RECAP INCLUDING MIDPOINTS

	<b>Party 1</b>	<b>Party 2</b>	<b>Party 3</b>	<b>Party 4</b>
<b>Remedies Range</b>	\$0 to \$72,000	-\$10,000 to -\$101,000		
<b>NEV</b>	\$10,710	-\$23,563		
<b>BATNA</b>	\$10,710	-\$23,563		
<b>Walk Away (Reserve)</b>	\$10,710	-\$23,563		
<b>First Offer</b>	\$31,000	\$0		
<b>NEV Midpoint</b>	\$17,137	\$17,137		
<b>First Offer Midpoint</b>	\$15,500	\$15,500		
<b>Average Midpoint</b>	\$16,318	\$16,318		

Negotiators may also want to plot other negotiators’ moves against a heuristic hypothesizing that subsequent concessions are roughly half that of the previous concession, and may take twice as long to receive.<sup>208</sup> Like other rules of thumb, results will vary but it is often helpful to track progress against normative indicators. With that background and the First Offer data we now have, we can do some basic math. Taking the distance between the First Offers and assuming two more rounds of offers, we extrapolate the First Offer Interval. Using that interval, we calculate subsequent offers following the “cut in half and take twice as long” rule of thumb.<sup>209</sup> Adding each reduced concession to the previous offer gives us another hypothetical offer that is keyed off of the First Offer Midpoint above, using a declining multiple of the First Offer Interval.

The result may be a “meet in the middle” outcome of \$15,000, but the path to that outcome is backed by analysis and planning. Had we not run scenarios and calculated NEV, how would advocates argue the legal outcome brackets and the more likely scenarios contained within them? They would likely use a gut instinct that would be met by the gut instinct of another talented advocate who just happens to be in a different position. Had we not taken the accumulated data points and used them to extrapolate the negotiation “dance,” how would parties have chosen seemingly precise offers like \$17,714 and \$13,286 to convey the fact that they were serious? Precise numbers are often more effective, particularly if the offering party has a cogent explanation for the offer.

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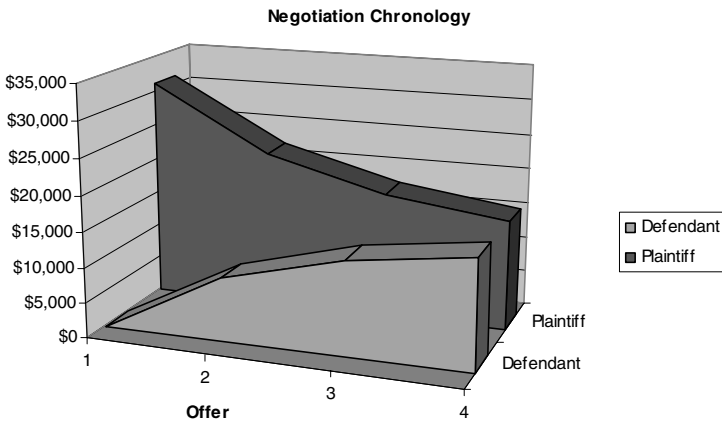
208. *Id.*

209. *Id.*

FIGURE 19. NEGOTIATION SUMMARY WITH CALCULATED INTERVALS

	Party 1	Party 2	Party 3	Party 4
<b>Remedies Range</b>	\$0 to \$72,000	-\$10,000 to -\$101,000		
<b>NEV</b>	\$10,710	-\$23,563		
<b>BATNA</b>	\$10,710	-\$23,563		
<b>Walk Away (Reserve)</b>	\$10,710	-\$23,563		
<b>First Offer</b>	\$31,000	\$0		
<b>NEV Midpoint</b>	\$17,137	\$17,137		
<b>First Offer Midpoint</b>	\$15,500	\$15,500		
<b>Average Midpoint</b>	\$16,318	\$16,318		
<b>First Offer (restated)</b>	<b>\$31,000</b>	<b>\$0</b>		
<b>First Offer Interval</b>	\$738	\$738		
<b>Concession 1</b>	\$8,857	\$8,857		
<b>Second Offer</b>	<b>\$22,143</b>	<b>\$8,857</b>		
<b>Concession 2 (1/2)</b>	\$4,429	\$4,429		
<b>Third Offer</b>	<b>\$17,714</b>	<b>\$13,286</b>		
<b>Concession 3 (1/2)</b>	2,214	2,214		
<b>Final</b>	<b>15,500</b>	<b>15,500</b>		

FIGURE 20. PLOTTED NEGOTIATION TRAJECTORIES



Since we know the plaintiff will likely not accept the defendant's First Offer, let's further assume that plaintiff threatens to leave after she hears it. Already unhappy with the dealer and its product, she finds the take-nothing/pay-nothing offer to be totally unreasonable.

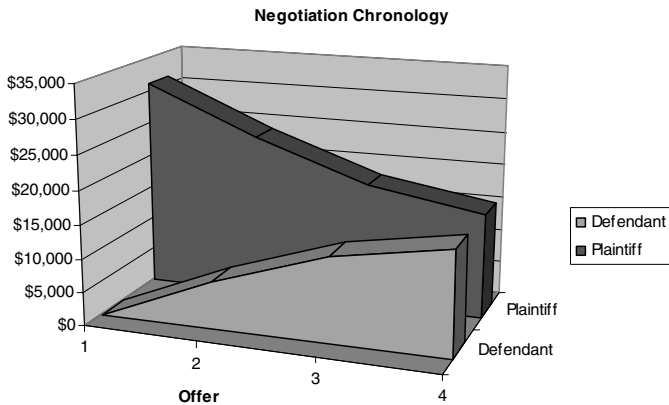
Her reaction is to terminate the mediation. With the benefit of a more rounded view of the case by this point, the mediator returns to the available outcomes and some negotiation theory. After patiently listening to the similarities between the defendant's First Offer and the way the plaintiff has been treated by the dealer from the outset of problems with her car, the mediator explores tightened negotiating brackets. Hypothetically, the mediator asks the plaintiff if she would lower her negotiating bracket to the \$24,000 purchase price if the defendant simultaneously raised its bracket to the \$7,000 cost of repairs. The dealer now has money on the table and the plaintiff faces a gain. Notice what happens to the trajectories if both parties go along with the mediator's suggested brackets.

FIGURE 21. NEGOTIATION SUMMARY WITH OFFERS ADJUSTED FOR BRACKETS

	Party 1	Party 2	Party 3	Party 4
<b>Remedies Range</b>	\$0 to \$72,000	-\$10,000 to -\$101,000		
<b>NEV</b>	\$10,710	-\$23,563		
<b>BATNA</b>	\$10,710	-\$23,563		
<b>Walk Away (Reserve)</b>	\$10,710	-\$23,563		
<b>First Offer</b>	\$31,000	\$0		
<b>NEV Midpoint</b>	\$17,137	\$17,137		
<b>First Offer Midpoint</b>	\$15,500	\$15,500		
<b>Average Midpoint</b>	\$16,318	\$16,318		
<b>First Offer (restated)</b>	<b>\$31,000</b>	<b>\$0</b>		
<b>First Offer Interval</b>	\$738	\$738		
<b>Concession 1</b>	\$8,857	\$8,857		
<b>Second Offer</b>	<b>\$24,000</b>	<b>\$7,000</b>		
<b>Second Offer Interval</b>	\$2,833	\$2,833		
<b>Concession 2 (1/2)</b>	\$5,667	\$5,667		
<b>Third Offer</b>	<b>\$18,333</b>	<b>\$12,667</b>		
<b>Concession 3 (1/2)</b>	2,833	2,833		
<b>Final</b>	<b>15,500</b>	<b>15,500</b>		

Bracketed between repairs and purchase price, the parties are still headed toward a similar outcome but the plaintiff now feels like she is being heard even if the dealer is not agreeing with her position. The pace of movement predictably slows but continues.

FIGURE 22. BRACKETED NEGOTIATION TRAJECTORIES



By threading these decisions through previously developed legal, economic, and psychological analyses, a common project begins to replace a potentially explosive problem. And if negotiators get bogged down on a particular point, they can focus tightly on that issue before dredging the oceans to reduce informational uncertainty beyond what is economic.

#### B. *Identify Party Preferences and Rank Alternatives*

The difference between the right word and the almost right word  
is the difference between lightening and a lightening bug.

– Mark Twain<sup>210</sup>

At this point, we have some well-developed scenarios. Even if they neatly sum to the same price, that does not mean litigants will be equally happy with each outcome. For example, reasonable people choose different lottery payoffs that are intended to be equal (lump sum or 30-annual payments) for a variety of reasons ranging from optimistic investment outlooks to visions of the dreams that come with a front-loaded cash payment. Each is based on different personal preferences. To account for such preferences, negotiators must anticipate others' preferences just as we identify our own. Ranking options "is the stuff of experience and judgment"<sup>211</sup> and the more complicated the decision, the more likely we are to rely on experts.<sup>212</sup>

210. WEISS, *supra* note 1, at 35.

211. Solomon & Fader, *supra* note 11, at 369.

212. Guthrie, *supra* note 202, at 640 (quoting ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 9 n.5 (4th ed. 2001)).

Our hypothetical car dealer presumably wants to sell its inventory. The dealer would rather have a sale today than hold out for a potentially better price tomorrow. Our hypothetical car buyer may prefer to have a new car and to buy it from a local dealer where it may later be serviced over Crazy Eddie's. The buyer is more likely to go with her "gut" in this situation than the dealer who makes several dozen similar trades per week. In the "lemon" claim, both parties will likely be represented by expert repeat player lawyers. Those advocates will help them weed out irrelevant information while focusing on their legal claims in much the same way the car buyer looked past the shiny showroom and talented sales people to focus on criteria like price and warranty that she could normalize across prospective dealers. Of course, preferences are imbedded in these tradeoffs. Negotiators who incorporate such preferences into their offers are more likely to be successful. By offering the other side the option of taking either of two offers (like the lottery cash or payment options), the negotiator increases the likelihood of her offer being accepted. Not only is one offer more likely to fit the other's preferences, the recipient may value one offer against the other. While recipients may weigh payments versus lump sum payoffs, humans more rationally evaluate two-option problems than problems involving six to twelve options.<sup>213</sup>

The fact that our buyer seeks to replace this car may mean several things. Perhaps she has had such a bad experience that she will never be happy with the car – even if it is completely repaired. She may even never want to own that brand again. But if she intends to drive another car, she may be motivated to make a reasonable deal for a replacement product. That preference may reveal options for the dealer in subsequent negotiating rounds. The manufacturer may own other automobile lines and the dealer may sell still more brands. Replacing the car with another brand may allow the dealer to offer more value to the buyer than if she were paid solely in cash. Other considerations may impact the structure of the deal and the ranked preferences. For example, the dealer may not want to set a bad precedent by paying enough in cash for the buyer to do her own trade. But a combination settlement – enough cash to cover transaction costs coupled with a new and different car in trade – may allow both sides to save face and realize their preferred outcomes.

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213. Guthrie, *supra* note 202, at 628 n.140 (citing John W. Payne, *Task Complexity and Contingent Processing in Decision Making: An Information Search and Protocol Analysis*, 16 *ORG. BEHAV. & HUM. PERFORMANCE* 366, 384 (1976)).

### C. *Creative Options May Avert Impasse*

Never cut what you can untie.

— Joseph Joubert<sup>214</sup>

Computer programs can help us write up, graph out, and calculate different scenarios, but they are mere aids to human innovation. Professors Fisher and Ury paint a descriptive picture of two children fighting over an orange in their best-selling book *Getting to YES*.<sup>215</sup> Called to make a quick evaluation, their mother halves the orange and distributes one piece to each child. Only then does she discover that her children had different interests – one wanted the pulp for juice and the other the rind for cooking. The example illustrates how options help negotiators test preferences that may lead to a potential deal. It also assumes that all participants have narrowed their focus to a single commodity product. Many disputes call for exploratory work just to isolate the orange, let alone develop a sense of its value or replacement cost prior to distribution. The orange fight may simply be a proxy for a larger rivalry. One or both children may just want to have their accumulated grievances against the other heard; going to an authority over the orange is then part of the outcome itself. Open ended questions begin to bracket the dispute. Hard analysis of the alternatives may narrow those choices. If creative, the mediator may help the children satisfy each of their interests through a fair process.

### D. *Offer Alternatives when Possible*

In the middle of every difficulty lies opportunity.

— Albert Einstein<sup>216</sup>

Negotiations are often anchored by the last offer and it is often easier to pick between options than to accept or reject a single offer when no alternative is available. “The presence of a second alternative frames and anchors the entire decision process; the decision maker simply enacts it.”<sup>217</sup> Survey respondents’ selections materially varied depending on whether they were presented with one or more alternatives. When evaluating offers individually, most survey respondents tasked with settling a land use dispute chose the Fair Option that provided equal payments to each neighbor. But when they were presented with both offers simultaneously, they chose the

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214. WEISS, *supra* note 1, at 25.

215. FISHER, URY & PATTON, *supra* note 195, at 57.

216. WEISS, *supra* note 1, at 15.

217. Bazerman et al., *supra* note 45, at 54.

Money Option that improved their position by \$100, even if added \$300 for their neighbor. The Fair Option looked different and was evaluated differently against the alternative offer.

Money Option:	\$600 for self and \$800 for neighbor
Fair Option:	\$500 for self and \$500 for neighbor

When both options were presented simultaneously, 75% of participants chose the higher Money Option. When presented separately, 71% chose the Fair Option.<sup>218</sup> Norm theory suggests that “when individuals are presented with a single item to evaluate, they struggle to make sense of it.”<sup>219</sup> When presented with more than one alternative, “the alternatives themselves provide the comparison set for evaluation.”<sup>220</sup> Utilizing what we know about anchoring and comparative evaluation, it makes sense to offer alternatives when possible – but not more than two or potentially three. Recall that the human brain is better able to process two-variable problems.

#### V. FIT THE FORUM TO THE FUSS<sup>221</sup>

Tell me and I'll forget.  
 Show me, and I may not remember.  
 Involve me, and I'll understand.

– Native American Proverb<sup>222</sup>

Our planning would not be complete without returning to the process design options touched upon in Part III.C. Trial lawyers are typically cast in the role of generals preparing for battle. Among their options is where to engage opponents. The default procedure is often a jury trial. And there is no more effective way to uncover truth and test witness veracity than with the liberal discovery and live jury trials that are uniquely American.

Having said that, trials are not any more of a one-sized-fit-all solution than conventional warfare. For some battles, there is no substitute to trial. For others, there are several.<sup>223</sup> Hard-fought trials make friends and business partners like heat seeking missiles. Their cost may also exceed the prize. But even under threat of war, peace often becomes the preferred alternative after analyzing the costs of other potential outcomes. Diplomatic activity often reaches

218. *Id.* at 42.

219. *Id.* at 48.

220. *Id.*

221. Sander & Goldberg, *supra* note 87.

222. WEISS, *supra* note 1, at 21.

223. Samuel Issacharoff, *The Content of Our Casebooks: Why Do Cases Get Ligated?*, 29 FLA. ST. U. L. REV. 1265, 1287 (2002).

fever-pitch in the run-up to war, but the conversations are rarely conducted directly between the generals assigned the task of conducting the war if other options do not materialize. Other countries or world organizations are often called in to help avert a costly fight. The same concepts appear in litigation. NEV calculations illustrate the impact of alternatives and transaction costs. Psychological debiasing recognizes that the source of an offer makes a big difference – indeed, a doubling effect in the Gorbachev arms reduction scenario. So our planning returns again to developing alternatives that may range from direct or mediated negotiation where parties retain control of the outcomes to trials that necessarily turn that decision over to others to impose their own.

Professors Sander and Goldberg wrote the classic article *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*<sup>224</sup> in 1994. It methodically rolls through various scenarios focusing on (1) the disputants' *goals* in making a forum choice and (2) *obstacles* that the choice might overcome.<sup>225</sup> Professor Leonard Riskin also published his "grid" describing mediators' approaches to mediation in 1994.<sup>226</sup> Riskin's article categorized the fact that not all mediation styles are ubiquitous and graphed styles along a two-dimensional "grid." Ironically, the "grid" itself has kept dispute resolutionists busy with their own "debate" for a decade.<sup>227</sup> A helpful "style index" followed.<sup>228</sup> Later articles and Riskin's revisions to his own thesis acknowledged the fact that effective mediators roam from one

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224. Sander & Goldberg, *supra* note 87.

225. *Id.* at 66; Peter Robinson, *Contending with Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 BAYLOR L. REV. 963, 964 (1998).

226. Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COST LITIG. 111, 114 (1994); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).

227. See generally Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997); Lela P. Love & Kimberlee K. Kovach, *ADR: An Eclectic Array of Processes, Rather than One Eclectic Process*, 2000 J. DISP. RESOL. 295 (2000); Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71 (1998); Kimberlee K. Kovach & Lela P. Love, "Evaluative" Mediation is an Oxymoron, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996); L. Randolph Lowry, *To Evaluate or Not: That is Not the Question!*, 38 FAM. & CONCILIATION CTS. REV. 48 (2000); Barbara McAdoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyer's Philosophical Map?*, 18 HAMLINE J. PUB. L. & POL'Y 376 (1997).

228. Jeffery Krivis & Barbara McAdoo, *A Style Index for Mediators*, 15 ALTERNATIVES TO HIGH COST LITIG. 157, 157 (1997).

stylistic quadrant of the grid to another depending on circumstance.<sup>229</sup> They do not camp in just one of its quadrants.<sup>230</sup>

### A. *The Rule of Presumptive Mediation*

Sander and Goldberg focus on process design. Realizing client goals and obstacles to resolution, they ask “how can I design a procedure that provides that kind of help?”<sup>231</sup> Detailing many options, they favor a rule of presumptive mediation,<sup>232</sup> but not mediation simply as a prerequisite to a trial date or for another externally imposed reason. Mediation as a considered process design element intended to satisfy party goals while reducing obstacles to efficient deals. The mediator works toward:

1. Gaining a clearer sense of the parties’ goals and the obstacles to settlement using “customary mediation techniques”; and
2. If mediation were not initially successful, “the mediator could then make an informed recommendation for a different procedure” that could be utilized to narrow the disputed issues before “looping-back” to mediation with that more perfect information in an effort to break impasse.<sup>233</sup>

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229. Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid*, 79 NOTRE DAME L. REV. 1, 14 (2003) (“[M]ediators often evaluate on some issues and facilitate on others, all within the same time block, and they typically decide on their moves at least partially in response to the personalities and conduct of the other participants.”); Krivis & McAdoo, *supra* note 228, at 165 (“Where you are on the grid provides a snapshot of your natural tendencies as a mediator. It does not necessarily limit your ability to move around the grid by using different strategies and techniques depending upon the circumstances of the case.”).

230. Cris M. Currie, *Mediating off the Grid*, DISP. RESOL. J., May-July 2004, at 9, 11 (“Most mediators resist defining themselves in terms of Riskin’s four styles. The best mediators will draw from all available mediation techniques, depending on the situation.”); Jones & Yarn, *supra* note 44, at 429 (“Much of the practitioner literature that advises participants on choosing a mediator recognizes the ability to use both styles effectively as vital to mediation success.”); *See generally* Peter J. Comodeca, *Ready . . . Set . . . Mediate*, DISP. RESOL. J., Nov. 2001-Jan. 2002, at 32 (effective mediators use both evaluative and facilitative techniques); Karin S. Hobbs, *Attention Attorneys!: How to Achieve the Best Results in Mediation*, DISP. RESOL. J., Nov. 1999, at 43.

231. Sander & Goldberg, *supra* note 87, at 66.

232. *Id.* at 52; Catherine Cronin-Harris & Peter H. Kaskell, *How ADR Finds a Home in Corporate Law Departments*, 15 ALTERNATIVES TO HIGH COST LITIG. 158, 158 (1997) (noting that the majority of corporate respondents have adopted the CPR Corporate Policy Statement on Alternatives to Litigation and pursue ADR before litigation).

233. Sander & Goldberg, *supra* note 87, at 59.

At first, the parties' psychological lenses may color the disputed orange. As a result, they may not agree that their fight is even limited to the orange, much less the value of the orange or the probabilities associated with recovering some multiple of that price. Of course, the informational asymmetry created by different preferences may be further complicated by the fact that one side does not like or trust anything coming from the other side.<sup>234</sup> In an effort to break down barriers, a mediator must draw the parties out, let them vent, and ferret out underlying interests. The mediator may iteratively work through decision trees and other analyses with each party, which has the effect of testing case views based in analysis of existing information while returning their focus to future options rather than past grievances.<sup>235</sup> Despite these efforts, the session may legitimately get bogged down over a single issue. As we saw above, wide disagreement over a particular outcome probability increases the likelihood of impasse. By reducing broad disputes to narrower issues on which the parties have differing outcome perceptions, the parties become better positioned to take a problem-solving approach to that variable. They can weigh the value of improved information and, while formal discovery may provide a means by which to accumulate more information, the mediator may have other recommendations based on her rounded view of the case. Having spent time with both sides, it may become clear to the mediator that the parties' divergent analyses are more a function of how their case theories will be received by a fact finder than the additive value of more information on those theories. The mediator may suggest a quick procedure for obtaining outside reactions to those theories under the confidentiality of mediation. Like the Gorbachev arms reduction proposal, the same process suggestion made by opposing counsel may be perceived as calculated.<sup>236</sup> In the context of a neutral search for objective answers, the mediator's process suggestions become part of a reasoned process focused on outcome scenarios.

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234. *Id.* at 54 ("Neither party believes the other, and each searches for hidden daggers in all proposals put forth by the other.").

235. Scott R. Peppet, *Contract Formation in Imperfect Markets: Should We Use Mediators in Deals?*, 19 OHIO ST. J. ON DISP. RESOL. 283, 291 n.23 (2004).

236. Sander & Goldberg, *supra* note 87, at 59.

B. “Mediation” Means Different Things to Different People

If you wish to make a man your enemy, tell him simply,  
 “You are wrong.” This method works every time.

– Henry Link<sup>237</sup>

Even if mediators “roam the grid” in an adaptive way, Riskin’s original observation that mediators employ different styles holds true. Those styles range from facilitating dispute-focused conversations to offering conclusory case evaluations. Some scholars caution mediators against making evaluations<sup>238</sup> and many parties are sorry they asked for one after they get it.<sup>239</sup> But parties will not settle lawsuits unless they believe prospective settlement terms are preferable to trial.<sup>240</sup> “Absent an analytical structure for understanding a complex case, the parties have no mechanism with which to consider how the mediator’s feedback on individual issues, if accepted, will affect their case’s value.”<sup>241</sup> The irony is that the party who most needs an evaluation may be the least receptive to it. Mediators elicit potential payoffs and probabilities from the parties and objectively build and test outcomes “before their very eyes.”<sup>242</sup> That is easier to work through than simply telling them that they are wrong. Testing outcome scenarios with their own data and assumptions often leads to the same endpoint through entirely different paths. Notice the difference between:

1. If this suit gets tried 100 times, how many times do you think the outcome will be \$72,000 [gesturing to the right side of a drawn curve while moving leftward]? What about \$24,000? \$7,000? And \$0?
2. You will never get \$72,000 for this claim.

The result is the same in that both test the asserted claims.<sup>243</sup> Without thoughtful analysis and reasoning, however, a party may be left

237. WEISS, *supra* note 1, at 35.

238. Mediator evaluations come in three primary forms: (1) “gestalt evaluation” (overall reaction without detailed feedback); (2) detailed feedback with or without “gestalt”; and (3) decision analytic approach. Aaron, *supra* note 49, at 124; *see generally* Laurence D. Connor, *How to Combine Facilitation with Evaluation*, 14 ALTERNATIVES TO HIGH COST LITIG. 15 (1996); Dwight Golann, *Benefits and Dangers of Mediation Evaluation*, 15 ALTERNATIVES TO HIGH COST LITIG. 35 (1997); Dwight Golann, *Planning for Mediation Evaluation*, 15 ALTERNATIVES TO HIGH COST LITIG. 49 (1997).

239. Aaron, *supra* note 49, at 124-25; Aaron, *supra* note 9, at 21.

240. Aaron, *supra* note 49, at 125.

241. *Id.*

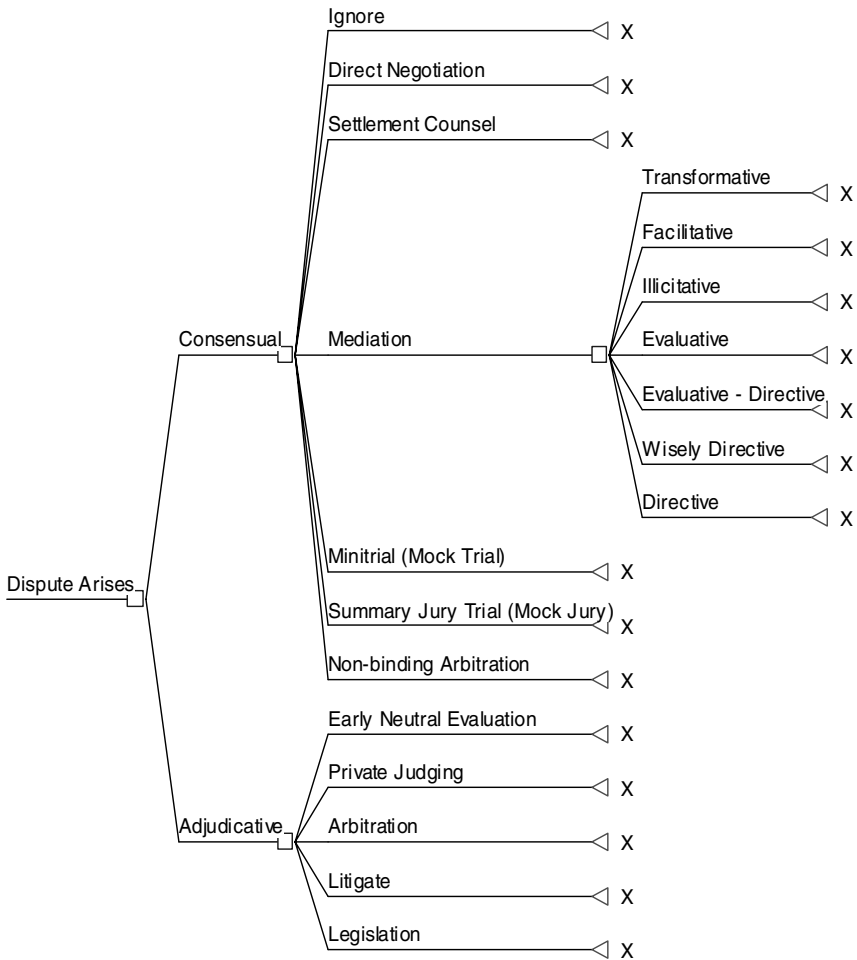
242. *Id.* at 129 (“The step-by-step process of building the tree and inserting probabilities and values also eliminates the particular credibility problem created when a mediator’s evaluation falls toward the middle of the negotiation gap.”).

243. Riskin, *supra* note 229, at 16.

wondering if the mediator “just tells both sides that their case is lousy.”<sup>244</sup> “A mediator can address this suspicion head-on by assuring the parties that the mediator is providing consistent numerical analysis to both sides.”<sup>245</sup>

Whether the question of dispute resolution processes comes up after a dispute arises or whether we have the luxury of thinking them through before the euphoria rubs off of the new deal we are drafting, parties have options. And decision trees help us visualize these strategic decisions.

FIGURE 23. DISPUTE RESOLUTION OPTIONS



244. Aaron, *supra* note 189, at 62.

245. *Id.*

At one extreme, parties can simply ignore the problem and see what happens. It may get worse, but it may also go away. Moving through other choices, parties may decide to resolve the dispute the same way they got into their deal – through direct party-to-party negotiations. That is “[t]he most common form of dispute resolution.”<sup>246</sup> In direct negotiation, parties retain complete control of process and solution. Either or both parties may decide to use settlement counsel. This is an increasingly popular means of formally assigning the dispute resolution task to settlement counsel while keeping the trial team focused on the march to war if that alternative becomes necessary.<sup>247</sup> Both are complimentary. Trial counsel’s efforts may make peace a more acceptable outcome. Routinely assigning settlement counsel reduces any perceived weakness telegraphed by trial counsel opening a dialogue. Settlement counsel and trial counsel are simply playing their assigned role while closely coordinating each move.

If the parties do not each want to hire settlement counsel, they could agree to hire a neutral mediator early in the case that would confidentially work through analyses with both sides in caucus and recommend processes to reduce uncertainty. By retaining control over the outcomes, parties have more say in how this process evolves than if they turned it over to others through a binding decision process. Sophisticated former business partners may want to decide their own destiny, but may need some outside help to do so. That help may range from keeping them focused on outcomes and improving the lines of communication, to testing hypothetical outcomes and gauging their probabilities. Ignoring a problem is almost entirely within our control; legislation rarely is. Even near the middle of the graph (non-binding arbitration), parties surrender some control over specific deal terms while retaining the ultimate the right to agree or

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246. Sander & Goldberg, *supra* note 87, at 50 (emphasis omitted).

247. Roger Fisher, *He Who Pays the Piper*, HARV. BUS. REV., Mar.-Apr. 1985, at 150, 156 (“Perhaps we, as a corporation, would reach a wiser decision if we had one lawyer develop the case for litigation and a different lawyer press on us the case for settlement.”); Casey, *supra* note 104, at 10-11; William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 OHIO ST. J. ON DISP. RESOL. 367, 367 (1999) (comparing the United Kingdom’s division of tasks between solicitors and barristers, Coyne observes that, “I saw that lawyers in the United States could achieve that same one-mindedness if a lawyer other than the trial lawyer – i.e., separate settlement counsel – were given the task of handling settlement discussions, either before litigation starts, or as it proceeds.”); Donald Lee Rome, *Resolving Business Disputes: Fact-Finding and Impasse*, DISP. RESOL. J., Jan. 2001, at 8, 15 (“Some companies have employed settlement counsel as well as trial counsel, each performing their respective functions, in order to separate the mediation effort from the necessary pre-trial activity.”).

disagree with the result. Some would argue that one has less control in arbitration than in court due to very limited appellate review.

If the parties cannot or do not agree to a consensual process, law and contracts provide default procedures. Those can range from early evaluation and private judging to precedent setting litigation or even trying to adjust the BATNA for entire groups through legislation.

### C. *Goal is a Tailored Process Through Information*

Information is a negotiator's greatest weapon.

– Victor Kiam<sup>248</sup>

Lawyers are used to fitting specific facts to general rules. Sander and Goldberg roll through several fact patterns in formulating the relative weightings they assign to different dispute resolution processes. While helpful, the end product *depends* on client goals and objectives. And while mediation is the statistical favorite because it has the highest probability of satisfying party goals and reducing barriers to a negotiated outcome, it is more difficult to resolve law changing cases like *Brown v. Board of Education* in mediation. Riskin's "grid" is also a helpful starting point for mediation *process* decisions. Casting the right players in the right process roles offers opportunities to marry case nuances to party expectations. If the parties want an evaluation, that is what they should get. If they need to be drawn to uncomfortable places, a quick evaluation may instinctively force them into a defensive position that increases the likelihood of impasse. A neutral mediator may elicit "best" and "worst" outcomes and lead parties through NEV calculations, psychological debiasing, and other analyses to reach a similar result with lower barriers.

## VI. CONCLUSION

Preparation sharpens the metaphorical ax. Planning increases our chances of dropping the tree in the yard, not on the house. Professor Bazerman points to the Oakland Athletics' rise in the American League from eleventh place to first in wins in three years as the "most well-known story of an effective decision-changing process."<sup>249</sup> With a payroll less than a third of the Yankees, Manager Billy Beane and a recent economics graduate "found that expert intuition in baseball systematically overweighted some variables and underweighted

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248. WEISS, *supra* note 1, at 26.

249. BAZERMAN, *supra* note 98, at 189-91 (citing MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2004)).

other variables.”<sup>250</sup> By replacing “‘experts’ with nerds who know how to run regression equations,”<sup>251</sup> Bazerman maintains that Beane changed the game.

Litigation is certainly different from baseball. Lawyers play critical roles in evaluating cases and are *always* cast as their clients’ advocates. In planning their next win, however, those advocates would do well to take Lincoln’s advice and spend part of their time planning outcome strategies that match the right people to the best dispute resolution process. Nearly 99% of filed cases are resolved without evidentiary rules at trial, yet far less time is generally spent designing dispute resolution processes and preparing for negotiation. Comparatively small amounts of time in negotiation preparation increase the prospects of a satisfactory deal. That preparation may be staged. Formal legal analyses outline the range of remedies based upon legal causes of action. Economic analyses help parties value the probabilities of various outcomes in an iterative way. Psychologists help us understand how different people process the same data differently, often in an irrational manner. Together, these disciplines help us better prepare for negotiations, whether that means purchasing a new car or resolving a litigated case. In most instances, that preparation includes designing a dispute resolution process. That design may include casting others in a neutral role we could play ourselves if not cast in another part. When mediation is that process, economic analysis may turn the parties to hard decisions about the future without unnecessarily raising their instinctive defenses.

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250. *Id.* at 190.

251. *Id.*

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