

Attorney-Mediators' Forum*

Using Decision Trees In Mediation

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Outline of Presentation

- I. What a decision tree is
 - A. Graphic representation of percentage probabilities of various components of the outcome of a problem having multiple variables.
 - B. A quantitative tool to clarify the anticipated value of choices where only impressionistic (qualitative) explanations are typically available.
 - C. An approach that breaks down a problem into component parts, calculates probabilities for each part and thereby reveals the overall probabilities of the problem.
 - D. A decision tree is a decision support tool that uses a tree-like graph or model of decisions and their possible consequences, including chance event outcomes, resource costs, and utility. [Wikipedia]
 - E. Garbage in—garbage out, i.e., something that lulls you into believing your unreliable impressions of a judgment call by adding them up instead of relying on the “blink” moment.
- II. How to construct a decision tree
 - A. Identify all potential Y/N decisions that make up the problem (e.g., summary judgment, trial liability-no liability finding)
 - B. Identify all the potential variable decisions that make up the problem (e.g., damage range)
 - C. Determine sequence of elements to display
 - D. Map out the decision points in sequence until each reaches a final outcome
 - E. Determine the value of each potential final outcome
 - F. Working left to right, estimate the probabilities for each decision point separately in its sequential context (i.e., the probability of a given damage amount or range being awarded assuming that summary judgment has been denied and the jury has found in favor of the plaintiff)

- G. Working right to left, calculate the weighted values of each decision point (multiply each probability by the value and add the totals for a net value).
 - H. Final total that includes all values is the “expected value.”
- III. What a decision tree tells you
- A. Your own conclusions, without the influence of universal tendency to focus on the most probable outcome, and with reduced influence of affective bias (predicting the *desired* outcome).
 - B. The smaller than expected probability of any given outcome being the ultimate conclusion of the problem.
 - C. The risks of proceeding to get the actual answer to the problem
- IV. What a decision tree does not tell you
- A. The “case value”
 - B. The “prediction” of what will happen
 - C. An objective view of the problem
 - D. This case will be tried once, and if a 5% probability occurs, that will be the 100% probability for this case
- V. How to use a decision tree in mediation
- A. What kind of people like it and what kind of people to not like it
 - B. Secure predictions on elements *before* explaining modeling process
 - C. Question unrealistic probability predictions (resist gaming)
 - D. Predict they may modify percentages when they see what they have predicted
 - E. Keep the model simple
 - F. Check your math carefully—
 - 1. Use a spreadsheet to keep track
 - 2. Recheck what you have calculated at each stage

3. TreeAge software: computer program that does the math and builds the model
- G. Explain what the model shows and does not show

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Mike Leech is a partner in the Chicago-based law firm of Hinshaw & Culbertson and a 1976 graduate of the University of Virginia Law School. He has litigated and tried to jury verdict numerous employment and commercial disputes representing both individual employees and management. He has been a mediator since 1996 and has successfully mediated 200 cases.

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- Contributing author, Lindermann, *Sexual Harassment in Employment Law*
- Initial editor & contributor, IICLE *Handbook on Employment Termination*(all editions)
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- "Top 500 Litigators in the U.S." selected by Lawdragon.com (2005).
- College of Labor & Employment Lawyers liaison to the American Law Institute *Restatement of Employment Law* project