# Resolving a Dispute by Getting a Neutral To Provide Probability Assessments

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Many readers are aware of the use of decision-tree analysis for valuing a lawsuit, and probably have performed such "expected-value" analyses as part of advising business clients on litigation and settlement strategy.

But there is always the concern over how realistic probability assessments really are. How much of the disagreement between your valuation and your opponent's is really due to the other side being unrealistic . . . rather than to your being unrealistic?

How often can it be true that, when it comes to determining case value, "We're right and you're wrong"?

When faced with a situation where you would be happy to settle at an amount between "all" or "nothing," but you and your opponent are far apart on what would be a "fair" amount—i.e., one that realistically reflects what would happen, on average, if the case were tried multiple times—have you ever considered asking a third-party neutral to provide the probabilities for your decision tree?

That is, rather than asking the neutral to give his or her opinion of who would win at trial and what the damage award would be if the plaintiff were to prevail, instead asking the neutral to opine on the *probability* of the judge and jury resolving each issue for plaintiff versus for defendant?

## A PANEL OF NEUTRALS

This can be an excellent way to resolve a case . . . to both clients' satisfaction. One dispute in which the author participated with this type of process was a case on appeal. My client hired a dispute resolution provider to recommend three neutrals:

(1) To review each sides' briefs,

(2) To review—and either bless or correct—the decision tree I had prepared that captured our understanding of how various appellate rulings would result in affirmance of the $100 million trial verdict, reversal and remand for a new trial, reversal with judgment entered for a specific but lower dollar amount, or reversal with judgment entered for the defendant, and

(3) To provide their probability assessments on each issue.

While the dispute resolution organization knew which side had hired it, the neutrals selected did not. The specific neutrals were chosen because each was a retired judge from the same appellate court that would be hearing the actual appeal if the case could not be settled.

After each neutral individually read the briefs and agreed that the decision tree reflected the questions the appellate court would have to consider, as well as the bottom-line conclusions it would have to reach depending on how it ruled on the various issues, each filled out the tree with his or her issue-by-issue probabilities.

I then "solved" the tree separately for each neutral's results, and also once using the average of the three assessments that had been provided on each issue.

The three cases values were relatively close to each other—within about 15%. Not surprisingly, the valuations were not quite as favorable as my client's attorneys had surmised.

But it was hard for them to disagree with three respected "neutrals." And they knew when it was presented to the other side that it would be equally difficult for their opponent to contend that this was *not* a fair value.

Although this could have been done with just one neutral, my client thought it would be more persuasive to the other side if three sets of neutral opinions had been obtained. In fact, the case settled quickly after the assessments and results were presented to the other side's board of directors.

**NARROWING THE DISPUTE**

A variation of this process worked equally well in a couple of large disputes that were sent to mediation before the start of jury trials. In one, after listening to each side discuss its evidence and arguments, the mediator assessed probabilities, and got the parties to agree with his assessments—on all but one issue.

That issue was not dispositive for either side. But depending on how it was decided, the issue would swing the settlement value by about $50 million.

The parties agreed they would

(1) ask the judge to rule on this one issue,

(2) then drop the result into our mediation decision tree (with a probability of 100% or 0% depending on which side the judge had ruled in favor of), and

(3) settle at the case value implied by the combination of the mediator's probability assessments and the judge's one ruling.

They made their arguments to the judge, I calculated the case expected value upon receiving the court's ruling, and the settlement was finalized at that value.

**GAINING COURT APPROVAL**

In another situation, a mediator was asked by the parties to listen to their evidence and arguments, and try to arrive at a set of probability assessments on issues of class certification, liability and damages that the parties could be persuaded to agree to. Then, I was assigned to capture the issues in a decision tree and calculate the expected value.

The parties took this approach in part because of Circuit Judge Richard Posner's opinion in *Reynolds v. Beneficial National Bank,* where he had rejected a trial court's approval of a $25 million class action settlement because:

> … [T]he judge should have made a greater effort (he made none) to quantify the net expected value of continued litigation to the class, since a settlement for less than that value would not be adequate. Determining

> that value would require estimating the range of possible outcomes and ascribing a probability to each point on the range.
>
> … [O]ur 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.

*Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277, 284–285 (7th Cir.2002); accord *Synfuel Technologies Inc. v. DHL Express (USA) Inc.* 463 F.3rd 646 (7th Cir.2006); *Williams v. Rohm and Haas Pension Plans*, 658 F.3rd 629 (7th Cir.2011).

With billions of dollars potentially at stake, the mediator had to be forceful in deciding on the probabilities he felt were most realistic—probabilities that could be argued convincingly when the settlement value had to be approved by the court . . . which it was.

Hopefully, these three situations provide some new ideas on resolving disputes short of trial and all its costs, and to the increased satisfaction of clients.

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