

# **TECHNIQUES IN MEDIATION: A CLOSER LOOK AT DECISION ANALYSIS**

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Mediation is a widely accepted process that encourages settlement between two or more feuding parties. A neutral mediator employs various techniques to help facilitate productive discussions between parties in order to assist them with reaching a mutually agreeable settlement. While it may seem as though society is becoming increasingly litigious, the use of mediation has grown substantially and continues to expand. Recent budget cuts and court closures have caused considerable trial delays at a time when courts were already inundated with exceedingly large caseloads. It is not uncommon for trial dates to be offered one to two years past the date of an initial request. This is where mediation comes into play. The appeal of mediation is in its potential to provide an efficient, effective and economically suitable alternative to resolving disputes as compared to the litigation process.

The distinctive difference between mediation from arbitration or litigation where a decision is made for the parties is that in mediation, the parties are the ones who maintain control over the process as well as the end result. As an entirely voluntary process, the decision to settle and on what terms is decided upon by the parties. The mediation process is extremely fluid; there is no set format or method in place. In fact, mediation lives completely in the grey, and the parties, with the help of their mediator, can design this process to meet any particular constraints they may have to fit the specific needs of their dispute. Disputes can range from seemingly straightforward to immensely complex. Mediators, having extensive experience in both litigation and mediation, are not only skilled in pertinent areas of law, but are also well-versed in working with various psychological factors and personality types that are present among parties in a dispute.

## **What is Decision Analysis?**

Decision analysis is a multifaceted technique that can be applied in a many different ways. Its use and presentation depends on the user's desired goal. Similar to the process of mediation, decision

analysis is a unique and very fluid technique that can be made appropriate for almost any type of situation. At first glance the exact terminology may be unrecognizable to mediators, but decision analysis is commonly practiced to some extent during the mediation process. One of the primary reasons for using this technique is its potential to allow the mediator to convey the importance of accurately assessing the risks of each party's claims and their decisions throughout the negotiation. Often times at the outset of mediation, one or more parties may have an unrealistic valuation of risks with respect to their case. An over or undervalued demand or response from plaintiffs, defense, or both can lead to impasse which could prematurely end settlement negotiations before any significant progress could be made. One way to present a decision analysis is through a visual display of quantifiable numeric values assigned to different decisions that the parties could make. The measures used to determine these values are derived from a mixture of empirical and subjective data to provide credibility to the values. When a decision analysis is presented and understood by its viewers, the information it contains empowers the client and their attorney to become more effective decision makers.

Those familiar with mediation recognize that when dealing with disputing parties, it is not uncommon for parties to reach impasse more than once during the process. Decision analysis assists the parties to either avoid or overcome impasse. Technically stated, it is "a valuation method that applies mathematical calculations of approximated risk to a litigated case's various claims and to the various stages of decision-making in the litigation process . . . to create a risk-assessed value that reflects the impact risk can have on case value."<sup>1</sup> Decision analysis can be computer generated, drawn out, or expressed verbally. Values and probabilities of an event occurring are assigned to different decision nodes to identify the risks involved for each potential decision.

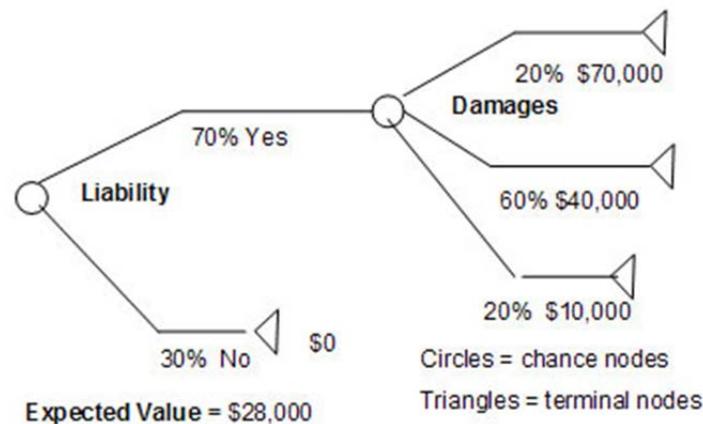
Neutral Eleanor Barr explains decision analysis in three steps: "1. Determine the possible outcomes of the suit and the likelihood of their occurrence, 2. Determine the net cost or net gain with respect to each outcome, and 3. Determine whether nonmonetary factors

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<sup>1</sup> deVries, D. (2014, March 1). Mediation: Decision analysis and risk-assessed value. *Consumer Attorneys of California*, pp. 18-20.

are influencing your client's decision.”<sup>2</sup> Decision trees are particularly useful when working through complex issues that require multiple decisions and subsequent risk evaluations. The decision tree allows the parties to visualize their current position and outline alternatives to help them appropriately value their case in order to determine what move they should make next. A sample decision tree is pictured below:

## Simple Decision Tree



July 28, 2008

Robert H. Logan/Logan Mediation

### Why is Decision Analysis Needed?

When valuing their respective positions, parties tend to be biased towards their own case. The reasons for this occurring can be attributed to one of many different biases including but not limited to: self-serving bias, probability, status quo bias, anchoring, fundamental attribution error and overconfidence.<sup>3</sup> Bias when evaluating cases can be the reason why plaintiffs overvalue their

<sup>2</sup> Barr, E. (2006, April 1). Making Sound Decisions: How to Help Your Client Evaluate Settlement Options. *Alternatives to the High Cost of Litigation*, pp. 72-73.

<sup>3</sup> Philbin Jr., Donald R. "Selected Issues in Dispute Resolution (SIDR): Decision Making Under Conflict." Pepperdine University School of Law, Malibu. 12 June 2014. Lecture

case leading them to an inflated demand. Conversely, bias can also be the reason why defense undervalues plaintiff's claims and proposes a significantly low offer.

An article published in the *Harvard Negotiation Law Review* lists twelve of the most common barriers to settlement between parties, which include: 1) Different predictions about trial outcomes, 2) Asymmetric information, 3) Emotional issues, 4) Constituencies, 5) Different views of the facts, 6) Agency problems, 7) Poor communication, 8) Reactive devaluation, 9) Linkage to other disputes, 10) Unfavorable combinations of risk and loss aversion, 11) Strategic behavior and posturing, and 12) Issues of principle.<sup>4</sup>

All of the above can contribute to disputes escalating and impasse occurring. Decision trees are “a means of structuring the issues in the case, communicating about the dispute to all parties and determining settlement value.”<sup>5</sup> If employed properly and accepted by the parties, decision analysis can effectively overcome the majority of these common barriers to settlement.

Research conducted by Randal Kiser has identified three primary misconceptions about people who are good decision makers. These misconceptions include the belief that “intelligent people are good decision makers, sound decision-making skills are acquired through higher education and extensive experience and effective decision makers follow their intuition.”<sup>6</sup> His research shows that there is no empirical correlation between intelligence and good decision-making. In fact, people with high intelligence are at a higher risk of making decision errors. Those who are of high intelligence are more likely to exhibit overconfidence and consequently tend to be more rigid when it comes to their thought processes. They are less likely to consider competing viewpoints. “Decision making is a distinct skill and is neither an extension nor a by-product of high intelligence.”<sup>7</sup> This same type of reasoning is

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<sup>4</sup>Hoffer, D. (1996, April 1). Decision Analysis as a Mediator's Tool. *Harvard Negotiation Law Review*, pp. 123-127.

<sup>5</sup> Hoffer, D. (1996, April 1). Decision Analysis as a Mediator's Tool. *Harvard Negotiation Law Review*, pp. 114.

<sup>6</sup> Kiser, R. (2010). Obstacles to Becoming an Expert Decision Maker. *Beyond right and wrong the power of effective decision making for attorneys and clients* (295-296). Berlin: Springer.

<sup>7</sup> Id. at 297.

the same for those who have higher education as well. There is a tendency for overconfidence to cloud their decision-making abilities by making it easy for them to justify their positions rather than challenge their opinions. Lastly, following our intuition is the third biggest misconception because contrary to what we may assume, intuition is extremely unreliable in situations where high risk and uncertainty is involved. There is a discrepancy between what we know and what we practice in our actions.

There are two ways in which to process information: **System 1**, wherein we rely on our intuition, or **System 2**, the reflective approach. Ninety percent of our decision-making is attributed to **System 1** processing as our intuition allows us to make quick decisions based on what we know is true. This type of processing can be a detriment to us if we utilize this mode of processing for complex decisions that should be reserved for a more analytically based thought process. **System 2** processing requires careful thought that questions and challenges your intuitive assumptions. By doing so, it provides you with a better-formulated and well-rounded ability to make objective decisions. Statistical thinking stems from **System 2** processing. Since **System 2** thinking is not based on intuition like **System 1** is, it is an approach towards processing that we must practice and learn.<sup>8</sup>

When determining whether to settle conflicts through an alternative dispute resolution process or proceed to litigation, making effective decisions are critical to the overall outcome that will directly affect the parties involved. The general rule of thumb on deciding whether to proceed to trial typically occurs with cases where it is very difficult to tell who should prevail. Therefore, one should assume that either side's odds of prevailing are 50/50. However, out of all cases that actually go forward to trial, in two out of three cases at least one side has unrealistic perceptions of the merits of their case. This reveals a fundamental issue that is common among attorneys, which is a critical revelation considering that "prediction of success is of paramount importance

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<sup>8</sup> Philbin, D. (Director) (2014, June 7). Cognitive Biases and Errors Affecting Decision Making. *SIDR: Decision Making Under Conflict*. Lecture conducted from Pepperdine Straus Institute of Dispute Resolution, Malibu.

in the system for several reasons.”<sup>9</sup> Attorneys need to be able to make relatively accurate assumptions beginning with vetting and selecting which clients and cases to work on, to guiding them through the legal process so as to achieve the best possible result for their client. In a study conducted by Jane Goodman-Delahunty, Par Anders Granhag, Maria Hartwig and Elizabeth F. Loftus, 481 attorneys were examined to determine how accurate they were in assessing their respective cases. The study required attorneys to reveal what their minimum successful trial outcome could be for their case and also had them accompany that estimate with how confident they were in achieving that outcome. The results of this study revealed that there was a preponderance of attorneys who had inflated estimations and overconfidence in those predictions. Furthermore, the study found that there was no correlation between the amounts of experience an attorney had with respect to their success at accurate forecasting.<sup>10</sup>

Earlier studies focused primarily on finding a correlation between the type of case, the amount of the settlement opportunity and the actual amount of the verdict. A thorough study was conducted and explained in the article, *Let's Not Make A Deal*, as the study not only analyzed more recent cases that opted to move forward with litigation over settlement, but also revisited three prior studies regarding decision error which expanded their analysis between the period of 1964-2004. The study defined “decision error ... [which] occurs when either a plaintiff or a defendant decides to reject an adversary’s settlement offer, proceeds to trial, and finds that the result at trial is financially the same as or worse than the rejected settlement offer – the ‘oops’ phenomenon.”<sup>11</sup> The results were derived from 2,054 civil litigation cases obtained from the *Verdict Search California* between 2002 through 2005. The cost incurred by either party is a result of the opportunity cost of forgoing settlement and proceeding to litigation.

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<sup>9</sup> Goodman-Delahunty, J., Granhag, P., Hartwig, M., & Loftus, E. (2010). Insightful or wishful: Lawyers' ability to predict case outcomes. *Psychology, Public Policy, and Law*, 16(2), 133-157

<sup>10</sup> Goodman-Delahunty, J., Granhag, P., Hartwig, M., & Loftus, E. (2010). Insightful or wishful: Lawyers' ability to predict case outcomes. *Psychology, Public Policy, and Law*, 16(2), 133-157.

<sup>11</sup> Asher, M., Kiser, R., & Mcshane, B. B. Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations. *Journal of Empirical Legal Studies*, 563.

The results retrieved between the 38-month period between 2002-2004 were then compared against the prior studies done by Samuel Gross, Kent Syverud and Jeffrey Rachlinski, which analyzed decisions between 1964-2004. Gross and Syverud conducted the first two studies, wherein they analyzed 529 cases between the years 1985-1986 and 359 cases between 1990-1991. In the third study, Rachlinski examined 656 cases. The results of their analyses, separately and when compared with Randall L. Kiser, Martin A. Asher and Blakeley B. McShane's research had findings that were consistent with each other. Their results show that 61.2% of the analyzed cases resulted in plaintiff decision error with an average cost of \$43,100 to plaintiffs. Defendant decision error in that same pool of cases was 24.3% with an average cost of \$1,140,000 to defense. Approximately 15% of cases were free of decision errors.<sup>12</sup> These findings were consistent with the results from the previous 3 studies. In fact, Kiser, et al.'s research showed that plaintiff's decision errors slightly increased from when the previous studies were conducted. The percentage rate of decision error by defense remained relatively consistent, but the cost of their decision error increased significantly. Defense's costs more than trebled from an average of \$354,900 to \$1,140,000. Regardless of which side was responsible for making the wrong decision, the results derived from these studies confirmed that the cost of decision error is high. Good decision-making would have prevented the parties from incurring unnecessary costs, which is why it is essential for parties to practice techniques that can improve decision-making.

A more recent study was conducted in June of 2014 to determine the extent to which decision analysis is utilized by mediators and to understand its perceived effectiveness. The survey was comprised of ten questions designed to identify key elements with regards to this technique. The questions were directed towards practicing mediators. The questions addressed the desired goal when using this technique, which cases this technique can be most helpful in achieving their goal, frequency of use, effectiveness given in a percentage value, their perceived limitations of the technique, timing of use and finally types of cases they mediate the

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<sup>12</sup> Id. at 567.

most to get a sense of what types of cases their responses are most applicable to.

This decision analysis survey was distributed to a total of 180 mediators who were either with a provider including companies such as ADR Services, Alternative Resolution Center (ARC), Judicial Arbitration and Mediation Services (JAMS, Inc.), Judicate West, PMA Dispute Resolution, or mediators who maintained their own independent mediation practices. A total of 60 completed surveys were received for an overall response rate of 33.33%. The complete survey responses are available for review at <https://gsbmstrategy.wufoo.com/reports/decision-analysis-survey-results/>. Of the sample size, 75% of the neutrals agreed that the goal when utilizing decision analysis is to illustrate the risk and probabilities associated with one or both parties' claims in order to help them reach a monetary demand or offer that is more realistic given the facts of their case.

### **Variations of Decision Analysis**

Similar to the process of mediation, the ways in which decision analysis is used can vary greatly on a case-by-case basis. There is no specific decision analysis approach that is suitable for all cases that go to mediation. As such this technique must also be adjusted to work with the audience and situation appropriately. Two examples of decision analysis variations used by mediators are described below:

#### **The Worm**

Hon. John Leo Wagner, (Ret.), a current full-time mediator and arbitrator uses decision analysis during mediation and also in post-mediation follow-up efforts. This technique, which has been coined the "worm," is in essence a carefully written mediator's proposal that provides the parties with a detailed analysis of the mediator's evaluation of the facts and his/her risk assessment for a particular case. The risk assessment is supported by previous knowledge and historical data that he compiled from experience. One of the worm's important functions is its ability to reach various levels of decision makers efficiently and effectively. A worm is typically typed out and sent directly from the mediator's

email address for two reasons: to provide creditability to the worm while also making it easy to forward to the appropriate persons. Due to the level of detail in this analysis, the worm is very time-intensive, and on average requires an investment of 8 hours to adequately craft and articulate. A worm includes legal observations and analyses in order to provide one or both parties with a realistic idea of what their best possible outcome is given the circumstances in order to encourage the parties to reach a settlement. The worm also incorporates information that occurred or was discovered during the mediation so as to tie in current data. It is not uncommon for a worm to be 12-20 pages in length. Judge Wagner has been utilizing the worm approach for over fifteen years now, and has drafted approximately one hundred worms, with an overall estimated success rate of 90%. Due to the various levels of authority that could be involved in reaching settlement, a worm analysis is particularly useful in cases involving a government entity, large corporation or insurance company. Each party may receive the same worm, or when appropriate, independent worms with different analyses will be sent out to each party. Despite the varying levels of complexity involved when using this particular approach, one worm does not fill all cases.<sup>13</sup> Each decision in a worm is backed up by an explanation and detailed footnote. The analysis provided to the parties contains results accumulated over a 10-year period of research that Judge Wagner conducted while serving as a US Magistrate Judge in Oklahoma.

*Baseball Diamond:*

Mediator, Robert Tessier, utilizes a baseball diamond method to assist the parties with reevaluating their case in an effort to reach a reasonable settlement amount that is acceptable to both sides. The baseball analogy aids in making decision analysis seem less mathematically focused. It is simpler and typically attracts more attention when used as a majority of people understand the concept of baseball and can apply this type of decision analysis to their case. Drawing out the baseball diamond when applying this method acts as a helpful visual aid.

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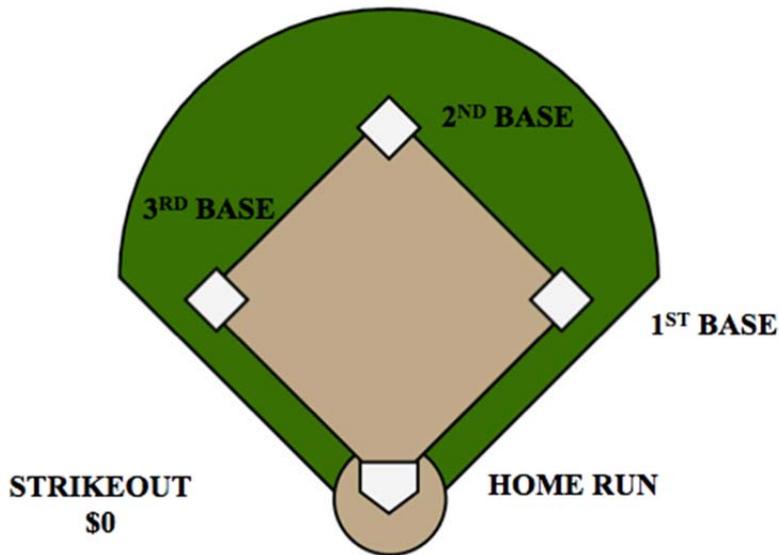
<sup>13</sup> Wagner, J.L. (2014, June 22). Interview by M.C.W. [Personal Interview]. Interview with Wagner, J.L.

The baseball diamond will be drawn out with all four bases displayed accompanied by a chart. The mediator will ask a party what value they would assign as their “home run,” i.e. their best possible result if they prevailed on each of their claims in court. That amount is recorded on the chart, and for the purpose of this example, let us assume that this home-run amount is \$500,000. The party is next asked to determine what they perceive the probability to be of achieving that home-run amount should they proceed to litigation and win. For this example, we will assign a 15% chance of achieving a \$500,000 “home run” award. Then, the mediator will ask what amount the party expects to receive if they reached first, second and third bases, respectively, and will also ask them to assign a percentage rate of occurrence for each. A strikeout in this analogy is associated with a return of zero dollars and a percentage rate for a strikeout must also be assigned. In this example, when assessing the probability for the home-run value, 15% of the \$500,000 settlement will yield an expected settlement value of \$75,000, and so on. Once all the expected settlement values have been calculated for each potential outcome, the added total provides a final number suggesting the appropriate settlement amount.<sup>14</sup> This is a number that factors in the cumulative risks involved with going to trial and the various outcomes associated with that particular case. The baseball diamond example is illustrated below:

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<sup>14</sup> Tessier, R. (2014, June 11). Interview by M.C.W. [Personal Interview]. Interview with Tessier, R.

## BASEBALL METHOD



RESULT	ESTIMATED VALUE		PROBABILITY OF OCCURRENCE		EXPECTED SETTLEMENT VALUE
HOME RUN	\$500,000	x	15%	=	\$75,000
1 <sup>st</sup> BASE	\$100,000	x	25%	=	\$25,000
2 <sup>nd</sup> BASE	\$225,000	x	30%	=	\$67,500
3 <sup>rd</sup> BASE	\$375,000	x	20%	=	\$75,000
STRIKEOUT	\$0	x	10%	=	\$0
			<b>100%</b>		<b>\$242,500</b>

This approach is not used on every case, and if appropriate, Tessier will introduce this option to the parties to determine if they would be amenable to using it. The baseball approach presents decision analysis in a comprehensible way that is less intimidating than more traditional forms of decision analysis. Based on Tessier's experience with using this method, he has found that not only is it typically welcomed by parties, but also the results derived from using this has the parties seriously considering the recommended

settlement value. At the very least, it has them more receptive to reevaluating their case.

### **Limitations & Ethical Concerns:**

Based on the responses obtained from the survey, 31% of the neutrals stated that one of the difficulties they have with decision analysis is acceptance of its use by the parties. Reservations about the use of this method can be attributed to one of the following: the attorney and/or their client's aversion to mathematical presentations, one or both parties already conducted their own decision analysis and are attached to their values, the appearance of the data being too formulaic, or disinterest in this technique altogether. Ultimately, in mediation, the parties have control over the process and have full authority to determine both the value of settlement and whether or not settlement is even possible. The mediator cannot force any technique or decision onto the parties.

Furthermore, in decision analysis, the values and probabilities assigned to each decision node are all assumptions. No one can predict with absolute certainty what the actual outcome would be for each decision node, making it challenging to assign a numeric value for each event. When it comes to making educated assumptions that are shared with the parties, there is a chance that one or both sides may disagree with some or all of the mediator's valuations. The potential risk of losing credibility with the parties is at stake for the mediator if they cannot achieve buy-in with their analysis. Additionally, mediators who prefer a facilitative versus an evaluative approach towards mediation will often shy away from obvious forms of decision analysis in mediations. They are concerned with their decision analysis being too much of a focal point of the negotiation discussions and they certainly do not want to overstep their boundaries and risk being perceived as biased.

Most mediators will introduce decision analysis to the parties before using it in order to assess whether such a technique is welcomed in the mediation process at all. Commonly, if a decision analysis is constructed prior to the mediation hearing, the suggestion of whether or not to use it will often arise during a pre-mediation conference call. Tessier explained that he has had clients who were adamantly against using decision analysis at the time it

was suggested during mediation. Merely suggesting this technique did not put him at risk of overstepping any boundaries.<sup>15</sup>

The results from the decision analysis survey show that there is consensus among mediators that decision analysis is less likely to be effective in cases where emotions are the primary drivers of the dispute. For cases that are highly emotional, logic and pragmatic monetary values are not enough to persuade some parties to reach a settlement. Parties involved in these types of cases could potentially be seeking non-monetary returns or quite possibly could even be looking to salvage a severed working relationship. Moreover, when parties have already completed their own decision analysis there is a tendency for them to become fixated on their own values, thereby decreasing their ability to consider competing values or information. In cases where insurance carriers are involved, a detailed risk analysis is usually conducted prior to arriving at the mediation. This completed risk analysis will determine the level of bargaining power that an insurance adjuster has to settle any given case. Competing values derived from a mediator's decision analysis could possibly result in a supplementary analysis by the insurance company that could later modify the amount of settlement authority that the insurance adjuster has. If a new settlement limit is not authorized during the mediation, negotiations can always continue in the form of post-mediation follow-up discussions.

### **Overcoming Limitations to Decision Analysis**

When taking into account that decision analysis is primarily based off of assumptions, it is important to highlight that these values are not merely selected completely at random. Judge Wagner says that although he does use decision analysis quite often, he modifies the way that he uses this technique for each case, especially when there are repeat clients so as to avoid looking predictable in his mediation style.<sup>16</sup> The mediation process must be adjusted based on the parties and the issues in the dispute. Whether or not decision analysis at any capacity is an appropriate technique to use in mediation is left up to the mediator's discretion once they've had

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<sup>15</sup> Tessier, R. (2014, June 11). Interview by M.C.W. [Personal Interview]. Interview with Tessier, R.

<sup>16</sup> Wagner, J.L. (2014, June 22). Interview by M.C.W. [Personal Interview]. Interview with Wagner, J.L.

enough time to evaluate the facts and meet with each of the parties to get a sense of how effective it could be.

Although not completely foolproof, there are ways in which neutrals can increase their confidence levels with respect to their computed values when presenting decision analysis to each party. Neutrals who have extensive experience working in specific areas of law as an attorney are subsequently exposed to similar types of cases on a regular basis as a mediator. As a result, they have a wealth of knowledge available to assist them with their value assessment of the risks for the cases that they mediate. That type of tacit knowledge is invaluable and helps to build their credibility with the parties when making assumptions of risk. Retired judges who spent years on the bench witnessed a constant influx of cases and have been equipped with verdicts on hundreds, if not thousands of cases throughout the course of their judicial career.

During the time that he was a US Magistrate Judge, Judge Wagner conducted a very interesting study over the course of 10 years while on the bench. Despite the fact that these results have never been published, this research continues to provide Judge Wagner with statistics and valuable information used to justify their decision analyses in mediation. Between the years 1985-1995, Judge Wagner had access to the results of all 50 mediators' endnotes that explained why a case did not settle in mediation. Each of those endnotes was compared to all jury verdicts for those same cases that were heard in their courthouse. Judge Wagner estimates that their team reviewed hundreds, if not thousands of cases as part of this research endeavor.

The endnotes revealed one of three conclusions to explain why settlement was not reached at mediation: 1) Defendant was unreasonable 2) Plaintiff was unreasonable 3) Both parties were unreasonable. The results of this comparison showed that when the endnote revealed the mediator found defense was unreasonable, plaintiff received the verdict when the case went to trial. Conversely, when the plaintiff was unreasonable, defense received the verdict. When both parties were unreasonable, the plaintiff received the verdict, but only by a small amount. Interestingly enough, the results of this data compilation were beyond statistically significant. Not one single case that was inspected

deviated from this particular pattern. Due to the profound statistical correlation, the results concluded that juries were incredibly perceptive at being able to determine which party was behaving unreasonably and used that finding to determine which party to find in favor of.

Another study that Judge Wagner conducted during that same ten-year span was determining parties' expected value of verdicts compared with actual verdict amounts. Judge Wagner's trial court required attorneys to provide the court with their estimates of attorney's fees and court cost estimates at the time of the filing of the case. Incorporated into those estimates included the billable hours for attorneys, costs to file motions, take depositions, complete further discovery, hire expert witnesses, and anything else related to trial preparation. Those initial fee estimates in the application were pulled and compared to what the actual attorney's fees and court costs were for those cases until trial concluded.

The results conveyed that after litigation, the actual costs to litigate ended up being three to five times more than what attorneys originally estimated their costs to be. It is important for attorneys and their clients to be aware of the grossly large potential that litigation costs have in order to make informed decisions during settlement negotiations. What makes ADR so attractive to litigation is the ability to significantly reduce the amount of time and costs required to settle a case.

Studies such as the ones mentioned above are particularly useful when parties either have an unreasonable amount of faith in the jury trial process or are overconfident in their case. A significant amount of mediations involve analyzing each side's positions while also providing a reality check of the undeniable risks that are involved with each decision that is being considered. Parties in the mediation process must be cognizant of all possibilities and consequences of their choices. Parties should be utilizing their **System 2** processing and be thinking analytically, objectively, and be able to challenge and reconsider their own positions in order to increase their chances of making well-informed and logical decisions.

A third statistic that Judge Wagner provides the parties with is the caseload per judge statistic. In any given federal court, each judge hears approximately 400-450 cases at any given time. A common misconception that clients have is that they tend to believe that their case is viewed as a high priority. In reality, because settlement judges have such a sizeable caseload with an increasing numbers of cases being heard in front of them that by the time the parties leave their courtroom, those judges are already working on their next case.

While on the bench Judge Wagner mediated well over 2,000 cases. Since his departure and transition to a full time mediator, that number increased to well over 5,000 mediations. The research that was conducted was never published when Judge Wagner left the bench in 1997, and at that time he no longer had access to the data files containing the research.<sup>17</sup> The parties that he mediates with will benefit from the tacit knowledge that he has gained as a result.

### **Extent of Use**

Empirical data relating to the effectiveness of decision analysis in mediation is extremely limited. There are articles that have been published regarding this technique, but none that provides any quantitative data to show how effective this method is in achieving its desired goal or what percentage of neutrals use decision analysis in mediation. Based on the decision analysis survey results, 95% of the responses mediators utilize some degree of decision analysis in mediation and 5% claim they do not use this technique at all. The challenge with collecting data on decision analysis is that there is no singularly defined way that it is used, thereby making it difficult to accurately pinpoint its effectiveness. The survey revealed that 18.5% of neutrals who claim to use decision analysis use it less than 25% of the time, 24% use this technique in 25%-50% of their mediations, 24% use it in 50-75% of their mediations and 33.3% use decision analysis in 75%-100% of their mediations.<sup>18</sup>

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<sup>17</sup> Wagner, J.L. (2014, June 22). Interview by M.C.W. [Personal Interview]. Interview with Wagner, J.L.

<sup>18</sup> Wai, M. (2014, June 7). Survey: Decision Analysis as a Mediation Technique. Retrieved from <https://gsbmstrategy.wufoo.com/reports/decision-analysis-survey-results/>

The general consensus among mediators who completed the decision analysis survey claimed that decision analysis is rarely used at the beginning of mediation. Rather, it is more effective when used during the latter part of the mediation or even during follow-up negotiation discussions. Mediator, Martin Handweiler, explained that his reason for using decision analysis later in the mediation process is because at the beginning there is still a significant amount of uncovered information that is not available to the mediator until after the preliminary caucusing sessions with each party.<sup>19</sup> The more information that the mediator has regarding the case and any new information that is discovered will change the values of the decision analysis. Providing this assessment to the parties later on will also reinforce the mediator's credibility and the parties' confidence in their decision analysis.

### **Decision Analysis Going Forward:**

Decision analysis will continue to play an essential role in aiding with negotiation discussions. As this technique is progressively used in mediations, it will continue to evolve and develop in such a way that more people will become familiar and comfortable with its use. In turn, its effectiveness and rate of success will increase. With additional use, more mediators will be able to identify situations and clients where this technique has the most potential to increase the likelihood of settlement. This is not to say that parties who become experienced with decision analysis will no longer require the use of mediators to assist them with settlement. Mediators provide parties with an unbiased and fresh view of their case while assisting them with appropriately evaluating the risks and facilitating a settlement to end their dispute.

An increase in empirical data regarding failed settlement offers compared to actual verdicts in litigation for the same case will continue to provide rich information to support the values used in decision analysis. The more data that is available will lead to improved risk estimates for various decisions. As long as the use of decision analysis is received positively, it will continue to be an acceptable technique that will be allowed in mediations.

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<sup>19</sup> Handweiler, M. (2014, July 2). Interview by M.C.W. [Personal Interview]. Interview with Handweiler, M.

There is a potential for misuse and aversion to use of this technique if decision analysis is not properly employed. If the neutral oversteps his or her boundaries by imposing this technique onto the parties or is grossly incorrect in their decision analysis evaluation, there is a high risk that attorneys can disallow its use for their future cases. Over time, consistent disparagement of this technique would lead to infrequent use of it during the negotiation process.

### **Key Takeaways:**

A widely believed presumption was that a person's ability to make good decisions was on some level correlated with their level of intelligence, their education and the extent of their professional and personal experience. Kiser, et al.'s research provided quantitative data that disputed this belief and in turn raised awareness of the need for people to reevaluate their thought process with regards to making effective decisions. Even the most skilled and educated attorneys are susceptible to inaccurately valuing their case and putting themselves and their client at risk for making decision errors.

If people possessed the ability to be more cognizant of which processing system (**System 1** or **System 2**) that they are utilizing when making decisions, and making subsequent adjustments to their thought process when necessary, perhaps fewer decision errors would be made. Unfortunately, due to the insurmountable variables and factors that can contribute to the rationale that people use when making decisions, it is not that simple.

Even the most educated and experienced of individuals need to be cautious of being overconfident in their thoughts and beliefs. There is a time and a place for each type of processing system. It is up to each of us to review, analyze and constantly question not only our own rationale, but also the rationale of those around us. There will be times where we may need some additional guidance or perspective. Decision analysis can offer a different, and potentially more realistic alternative to help lead us to find and accept a favorable decision.