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CENTERED COMMUNICATION WITH PICTURES, GRACE, AND RIGOR

As great as the value of analytical rigor required for a competent decision tree, the value of the tree is greater for client communication.[1]

All about the Map, Painted Without Numbers

First, and perhaps most obvious, is that the tree's visual map lays out the twists, turns, and possible paths of a complex litigation. It reveals where various parts fit within the whole, pins down and orders layers of uncertainty, and displays the full array of foreseeable endings to the story. As much as the arithmetic may prove enlightening, often just seeing the complexity of that map is most important and proves sufficient for the client. In one case, after the mediator worked through a particularly complicated, multi-layered tree, the roomful of plaintiffs were sobered to see the many hurdles standing in their way. The large dollar amount sought looked like a "needle in a haystack," just one among so many other less desirable, unpalatable, or untenable results. After the case's uncertainties are mapped onto a tree, the certainty associated with settlement has far greater appeal. Often, once the tree is built, the client is not terribly interested in the math.

Grit and Grace in the Face of Bad News

Unfortunately, we know that some lawyers just don't deliver bad news to their clients for fear of being considered insufficiently zealous or loyal. I like to think that most lawyers do make the effort to convey unwelcome messages. Consider the task of this defense lawyer: the defendant company's chief engineer —the client's key witness—was astoundingly arrogant at deposition, despite coaching. The plaintiff seemed to be the most sincere "boy scout" type. He has drawn the most plaintiff-friendly judge in the district. The defense lawyer can't make a straight face argument that there's no factual dispute. There's no chance this case will be dismissed on summary judgment. He can't make such a motion and remain within the bounds of professional conduct. Surely, he would explain these problems to the company's CEO.

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[1] For a nuanced, thoughtful, and more fully developed discussion of how a mediator, including a settlement conferencing judge, can effectively use risk assessment in talking with lawyers and parties about settlement, see Michaela Keet, "Informed Decision-Making in Judicial Mediation and the Assessment of Litigation," 33 *Ohio State Journal of Dispute Resolution* (2018): 65-83.

Let's imagine that the CEO is somewhat hot-blooded, defensive, and unused to disagreement from those he considers subordinates, and that includes lawyers. It's easy to see how the conversation might not go well. Imagine lawyer and CEO sitting opposite each other, face to face. The CEO asks for an update, pushes for dismissal of this "nuisance" and is not at all happy when the lawyer explains his unwillingness to attempt that. "Well, fine, I get that there are rules, but our engineer is right—his credentials and experience are impeccable, and he will carry the case. The plaintiff was just plain reckless and now he's greedy." When the lawyer challenges these assertions, it feels like just that, a challenge. The dynamics of the conversation—face-to-face disagreement—can become uncomfortable.

The decision tree itself doesn't change the bad news or render the lawyer's analysis any rosier. But now replay the scene in your mind's eye, this time with lawyer and client seated either side by side, or even across the table but with the decision tree between them or up on a projector. (The lawyer might have brought a prepared tree structure, or he might draw it as they discuss the case.) When the lawyer explains the unwelcome developments, he and the client are both looking at the tree. The lawyer might have scribbled or typed factors relevant to his probability assessments on the tree document or on a separate sheet. Their joint task is analytical, as is their language, and it is directed at the decision tree exercise. In effect, the method intervenes; it becomes an inter-mediator. It doesn't change the bad news, but does tend to change their conversational dynamic. Perhaps it is too obvious to say that this is also helpful for official mediators seeking to discuss the merits with parties and counsel, without compromising perceived neutrality.

A Place to Offer the Lead or Piggyback Part Way

We all know that people prefer to reach their own conclusions. They more readily accept the need to act on their own conclusions than those of others. Thus, to the extent that the client has generated or readily agreed with the tree's logic, structure, probabilities, and payoffs, that client is more likely to pay attention to the picture it paints and to its mathematical results. Unlike the last scenario described, the client may see summary judgment as impossible or a long shot where they understand the legal standard. He may see some of the risks on liability, if not as strongly as the lawyer or mediator. In other words, perhaps after some discussion, the client's views on most, if not all, issues may not be significantly different from that of his tree-builder lawyer or the mediator. If so, consider creating a tree with the client's preferred probabilities and estimated outcomes. Then just do the math to get the EMV and probabilities for each outcome.

Assuming the client's comfort with the method's logic, it's hard for him to reject the results of an analysis that was based on inputs he generated or agreed were sound. Imagine that the analysis reveals an EMV of $375,000, a 40% chance of escaping liability, costs of $75,000, and a range of net payoffs between $200,000 and $1,000,000 (including statutory costs and fees). Let's say that approximately 20% of the outcomes involve net payoffs higher than $600,000. Even if the client was previously unwilling to settle for more than $50,000, he may be willing to reconsider. Maybe he'll get to the $250,000 or $300,000 range, signaled as doable by plaintiff's counsel. When we own the input, it's harder for us to disavow the output.

Often, the tree-builder lawyer or mediator can "piggy-back" on select issues. In other words, seek and use the client's input or agreement on many issues; avoid quibbling over small stuff.[2] (Note however, at least for the lawyer, it is important to communicate your very different views on major issues.[3]) Imagine a negligence case in which you agree that the company's expert is strong, as are the documents, and there's a decent chance of escaping liability. But, let's also assume that, as a legal matter, you see a possibility of finding malice, willfulness, or recklessness and that will lead to double or treble damages. The client grudgingly acknowledges that this is technically possible, so it has to be on the tree. But he would assign it negligible probability—5%.

As the lawyer, you respectfully disagree. You acknowledge none of the company's engineers were actually willful or reckless, but experience tells you the jury that finds liability may be an angry jury. This will depend on the engineers' presentations, a disgruntled employee's credibility, and the plaintiff's likeability. Unfortunately, the disgruntled employee was quite convincing and likeable at deposition, as was the plaintiff. The company's engineers could charitably be described as wooden and confusing. Thus, if liability is found, you think there's at least a 30% chance the damages will be multiplied. You can explain how you see it, and adjust the percentage. When you roll it back and review the outcome distributions, it's still difficult for your client to reject the entirety.

With some clients, one real benefit of working through the tree and its numerical estimates is that it may be unnecessary to challenge or disagree directly or immediately. Instead, you can gracefully suggest playing "what if?" for various uncertainties. Where the client insists that a probability is low, say 5%, you can suggest: "Just in case we draw a problem jury, let's start with your 5% and ask, what if it were 10%, or 20%, or 30%, what impact would that have? What would that tree look like?" You can change the percentages and roll it back each time. It can be persuasive to see an array of trees, various compromises from the lawyer's initial and unwelcome view, but still problematic.

One option is to display the range of results in a formal sensitivity analysis. Or, when particular questions are just too uncertain or prickly to discuss, it's helpful to suggest, "What if we just go with 50/50 on these—what if we really leave it to chance? After all, it has to be one way or the other." Again, the dialog has shifted from tug of war or ego to curiosity and a coin toss game.

There It Is; and Its In There

In some cases, a client's or lawyer's assertions about issues that underlie a prediction or settlement position seem to shift, a bit like a shell game, as the discussion proceeds. "Yes," acknowledges the business executive, "We said our suspicions about fraud were raised by the loss in income, but really it was all about the discrepancy in expenses." Or, "I see your point on that issue, but our case valuation really rests on our strength on this more important issue."

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[2] Whether or not the mediator should or will do so is a matter of some dispute in the field. This depends both upon the mediator's practice and competence, the client's and attorney's expectations, as well as mediation philosophies and constraints of provider expectations and governing law or court rule.

[3] Considerations of tact aside, the lawyer may be obligated to provide his own assessments at some point—assuming client wants to know them. In any event, the lawyer cannot mislead regarding those assessments.

When mapped on a tree, each issue is put in its place. It becomes apparent which issues have stronger and weaker impact on the analysis. For less important issues, the decision tree builder may be able to demonstrate that, even if that uncertainty is, in essence, taken off the table, or the damages argument in contention is granted, the overall results don't change much at all. Or, where an issue is indeed significant, it becomes clear that, if that issue is lost, the other issues under discussion just cannot outweigh it.

In other instances, the client will take comfort and put more stock in the decision tree where you can clearly point to where on that tree an important value has been placed. This brings to mind a terrible wrongful death case, in which the deceased had suffered for six months in a halo cast before succumbing to her injuries from a fall. Proving liability would have been fraught with legal and factual hurdles, which led to a relatively low estimated monetary value (EMV) when the case's tree was rolled back. The deceased's widower had initially felt that accepting settlement in the range of this dollar value meant disloyalty to his wife, as if he agreed her life was worth only that. For the widower, it was helpful to be able to point to the damages number on the tree in the millions of dollars, and to say, "First, there's no value high enough to measure your wife's life. Please know that for the purposes of this decision tree, we've assumed that if liability were found, a jury would find damages of at least $2 million and up to $5 million or more. And you can see those values—here they are—on the tree. It's the legal uncertainties and the math that operate to give us the other number." In fact, that mattered to the widower. He was able to feel that he had been loyal to his wife's memory, because the high values were visible "right in there."

Subtle, Strong, and Welcome Powers

As discussed, both lawyer and client benefit tremendously from thinking through the questions and analysis necessary to build the tree and assign probabilities and payoffs. The lawyer is forced to think carefully. The client understands where things stand when visible on a map. Hand waving, fuzziness, and confusion are reduced when lawyer and client view the branches, probabilities, and award estimates together. When questioning or discussing a particular legal or factual issue, it's helpful for the client to know where it sits, how it fits.

More subtle and just as powerful are the language of decision analysis and its ability to mediate and preserve the lawyer-client relationship.

The language of decision analysis is not emotional; it is rational and analytical. It requires serial acts of translation, from the more charged "great chance of beating those fools!" to "75%", or from "their CEO's arrogance can't hide!" to "40% chance of defense verdict." Indeed, it is fair to say that a client's willingness to entertain tree branches, percentages, and math indicates that he is at least tentatively adopting a "business judgment" approach. We know that businesses operate by assessing risk, cost, net profit, and loss; businesses sometimes cut losses, change course, or make other tough decisions in light of market experience, research, or educated projections. Business leaders generally opt against decisions that carry strong risks of cutting payroll or losing profit share.

The tree becomes a tangible representation of the "business judgment" perspective. Imagine a case with a simple decision tree that rolls back to an EMV between $250,000 and $155,000 (where the tree shows high possible exposure and uses probability estimates far more optimistic than the lawyer suggests). Yet, the plaintiff's final, bottom line demand is $100,000. No matter how angry the executive, it's harder to justify spending the company's money to roll this dice at trial. Seeing the case mapped

on a tree literally separates the analytical from the emotional. The executive's avowed fealty to business considerations may enable the analytical to govern his settlement decision.

More broadly, and more accurately, the tree becomes a visual representation of "rationality" for a client struggling to make a decision. Even where the tree is very, very simple—win vs. lose in arbitration—I have seen it help the plaintiff separate his feelings from what he understands to be a "rational" look at the legal case. That facilitates his discussion about those feelings, and also enables him to see more clearly why a settlement number might be in his own best interest. While I can't speak from direct experience, I am told that a decision tree can have the same effect in the most emotional cases of all—divorce! Shortly after being introduced to the method, a lawyer reported using it with her divorce clients. Just seeing the decision tree's map of the stages, uncertainties, and possible outcomes in divorce litigation enabled some clients to better understand it and, having seen it, to follow its more rational path.[4] In fact, in my experience, there's no predicting who will be receptive to a decision tree and who will not. I've seen corporate executives reject it out of hand, and the "artiste" or theoretically unsophisticated clients fully embrace the force of its logic.

Reality as Seeable, Touchable, and Evolving

The ability to see the decision tree's map of the case's possible twists and turns makes it invaluable not only for discussion with those in the room or on teleconference, but also for decision-makers who are not present. It eases a concern that the client representative will fail to convey a full message to a committee, to the boss, to the company's chief financial officer. If the client representative has the decision tree in hand or even better, distributed it prior to their meeting, we have greater confidence that the full analysis will be presented. Or, the tree will prompt the ultimate committee or CFO decision maker to raise questions and seek more complete explanations tied to the analysis.

In many instances, the lawyer or mediator will have presented quite a convincing analysis to the client representative. She understands why it makes sense to settle a case at an unexpected amount, or even why it makes sense to reject an offer. Her challenge is to avoid higher ups' accusations that she "caved too easily" or "missed out." The decision tree document is solid back up. It allows the representative to present a decision tree with a significant risk of a $900,000 loss and an EMV of $250,000 as back up for a lower settlement and evidence of her negotiation skills.

Thus, the tree brings reality to uncertainty and prompts consideration of the impact of consequences that may indeed become real.

Finally, the End of All Branches

With full apologies to Mr. Shakespeare and real poets everywhere, I offer this final ode to decision tree analysis for legal practice.

To use a decision tree or not to use a decision tree? That is the question:

Whether 'tis wiser to draw a tree and map all that uncertainty

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[4] Reported to the author by Elayne Greenberg, then a divorce lawyer in New Jersey, now a Professor and Director of the Hugh L. Carey Center for Dispute Resolution at St. John's University School of Law.

Or skip the math and counsel through prose entirely.

Surely, Solomon, Portia and scions of our legal tradition,
Did muddle through on judgment and intuition.

Yet, decision analysis is a rubric for structure and rigor,
In cases requiring intellectual vigor.

Exposure in a case may be great,
And winning and losing issues hard to rate.

Parties and motions may be in odd array, or many
Damages theories set in the way.

Decision analysis isn't about dry calculation.
It's about structuring from speculation.

Thinking through uncertainty,
As you build a decision tree.

Often a case is a legal mess,
Settlement value's an uneasy guess.

Working through a decision tree can check or confirm intuition,
Providing logic and structure for your client's decision.

Decision analysis helps create a sense of separation,
Calming emotion to see reality as consideration.

It helps lawyer client communication be clearly made,
And strengthens the power of analysis to persuade.