

**Dispute Resolution
in the
New Age of Law
or
What Senior Partners
Won't Tell You**



Dispute Resolution in the New Age of Law

We are entering a new age of law

- **You can become successful in that new age if you lead your client to early and efficient resolution of disputes.**
- **No matter what your practice area, these tools will distinguish you as a sophisticated counselor and advisor and give you a long term competitive.**

The Previous Age of Law – The Senior Partner Era

“I have more than 20 years of experience,” he said as he retucked his shirt into his bulbous waistband.

- **Long term continuity of firms, businesses, clients, employees and lawyers**
- **Regionalized practice (state and local)**
- **Commercial litigation is king**
- **Billable hour business model**
- **Litigation viewed as a cost of doing business**
- **Lawyers think they know what’s best for the client (without knowing anything about the business)**
- **Lawyers have little regard for efficiency or client costs (scorch the earth, turn over every stone)**

The New Age of Law – The Client Era . . . and Your Clients are not Happy!

- **Law firms and businesses in a constant state of flux**
- **Long time law firm loyalties have disintegrated**
- **National firms eroding regional firms and practices**
- **Recessions (2000 and 2009) turbo charge cost cutting, demands for efficiency, and alternative fee arrangements**
- **Clients interests in conflict with law firm interests**
- **Clients are not well served by their lawyers and are doing something about it.**
- **Clients have little or no tolerance for lawyers and legal costs – a distraction to the goals of the business**
- **Very little “scorch the earth” commercial litigation**
- **Lawyers must be much more competitive, transparent, and innovative – those who are will succeed**

ADR as a Central Tool in the New Era

The most important thing to remember today . . .

- **The Parties Design the ADR Process to Meet the Clients' Needs and Goals**

Examples

- **Neutral background and experience**
- **Timing and procedure**
- **Cost efficiency – narrow the issues and process (discovery, evidence, etc)**
- **Location**
- **Governing law and rules**
- **Confidentiality**
- **Privilege**

What is ADR?

Any party initiated resolution process outside of a judicial trial

- Sabers / Pistols at Dawn
- Settlement Discussions / Parties
- **Mediation** – Neutral Facilitator
- Neutral Evaluation
- **Arbitration** – Private Trial to Arbitrator as Judge / Decision Maker
- Pre Litigation Public Facilitation

Selecting an Arbitrator or Mediator

Expertise

- **Generalist / Specialist**
- **Technical, financial, regulatory**
- **Domestic, employment**

Styles

- **Neutral facilitator**
- **Collaborative**
- **Evaluative / challenging positions**

Perceived Neutral Conflicts

Judicial officers as mediators

Pre Dispute ADR – How to Work the Tools into Your Practice

- **ADR Clauses / Agreements**
 - CPR International Institute for Dispute Prevention and Resolution
 - American Arbitration Association

- **Client Education**

- **Public Facilitation**

Mediation

- **Defined**
 - Formal settlement discussions between the parties facilitated by an outside neutral
- **Values and Benefits**
 - Avoid litigation costs and expanding claims
 - Preserve business relationships
 - Focus on core business goals
- **Styles**
- **Process**
- **Solutions**

Mediation Timing

Damage claims grow as case matures, lawyers get involved, and positions crystallize

- **Pre litigation**
- **Post Complaint**
- **After summary judgment motions filed**
- **On or After Appeal**

Mediation Preparation

Problem: Most Lawyers Undervalue Mediation and are Unprepared

- Treat Mediation as a Step to be Completed Before Getting to Trial

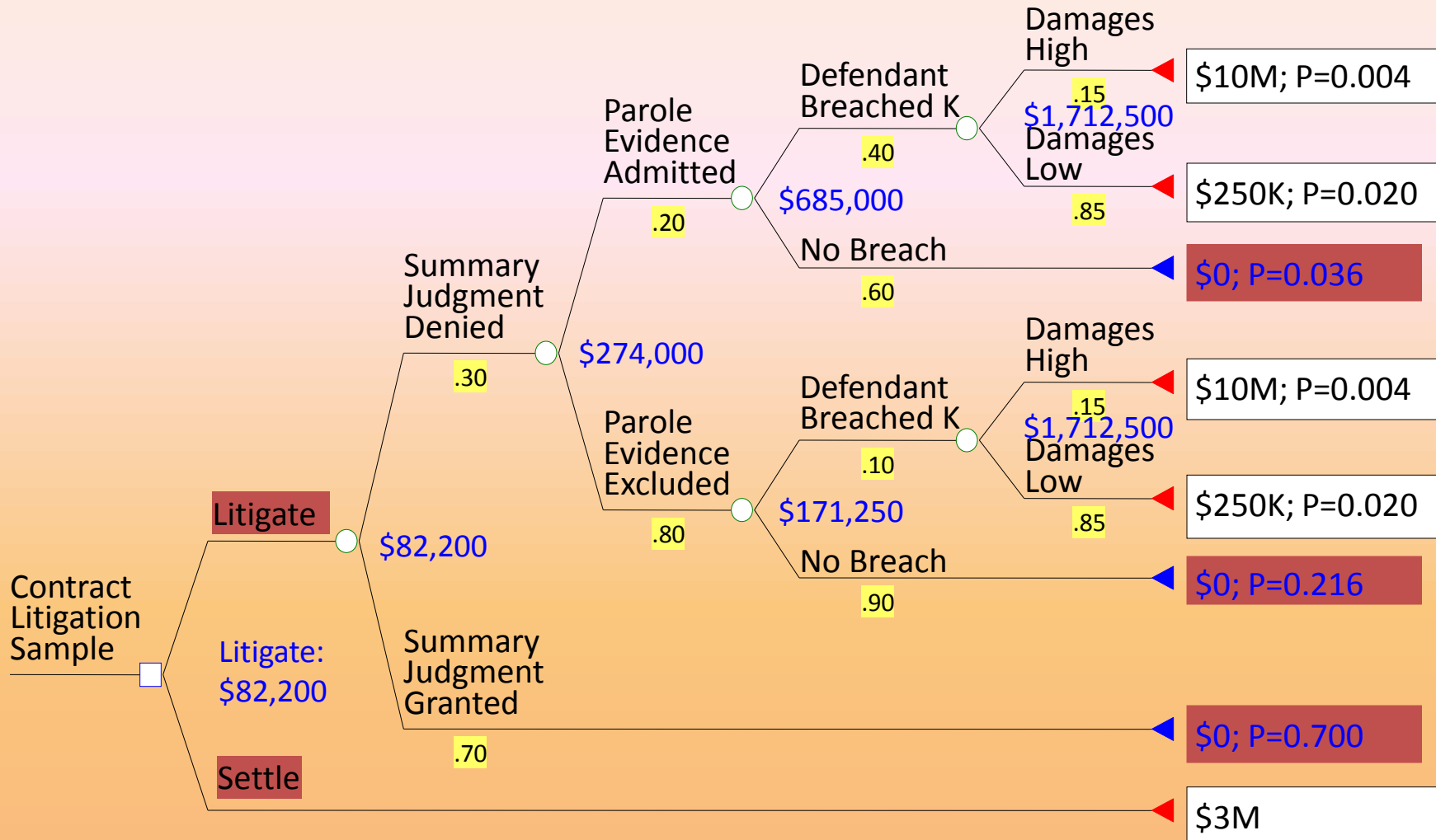
“You’re right, we do better when we are prepared.”

- Client participation – addressing the client’s interests
- Opening Position Papers and Presentations
- Experts
- Negotiation Roles
- Complex Mediation

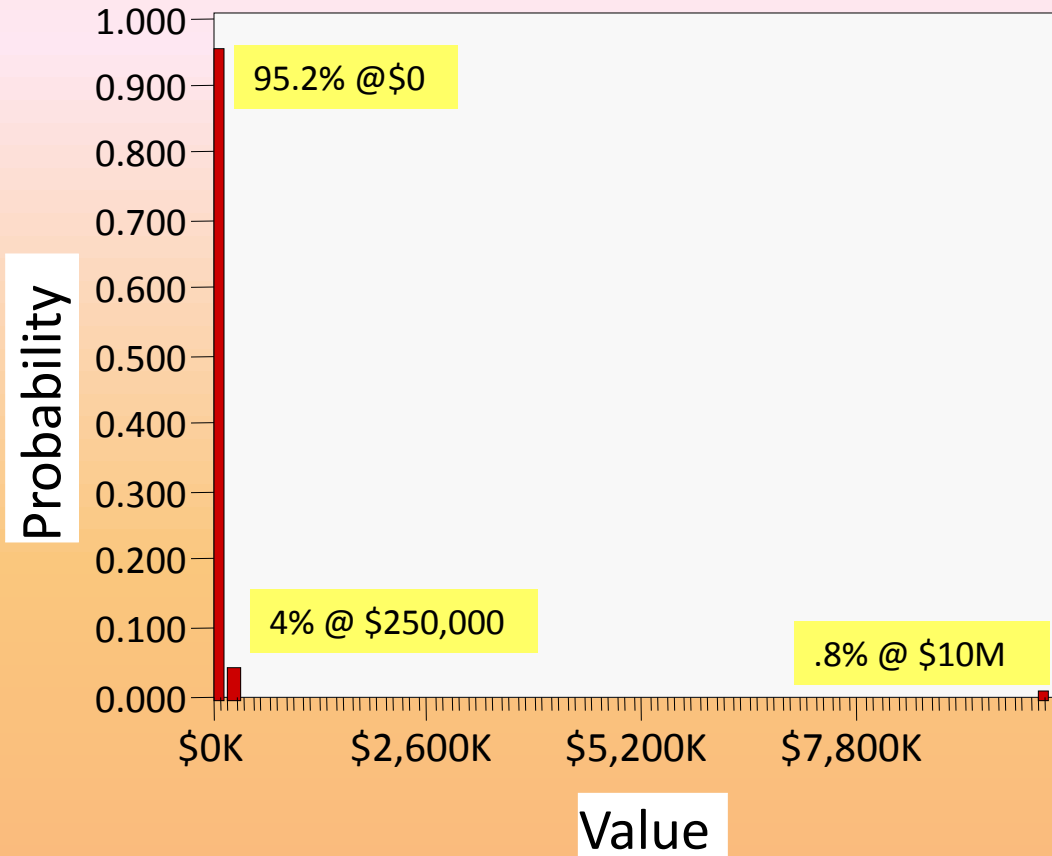
Mediation Preparation -- What's Your Number?

- **Liability v. Damages**
- **Calculating Exposure**
- **Soft v. Hard Damages**
- **Decision Trees – Handicapping Your Case**

Litigation Risk Evaluation Case Study



Probability Distribution at Contract Litigation Sample



The Mediation Process

- **Opening statements**
- **Joint Sessions**
- **Individual Party Sessions**
- **Mediator tactics**
- **Experts**
- **Impact on Clients**

Mediation Solutions

- **Possible Solutions**
 - Settlement
 - Narrowing of issues for arbitration
 - Business Solutions
 - Getting by the specific tech/legal issues
- **When**
 - At Mediation
 - After Mediation
- **Finalization**
 - Documenting the agreement
- **Complex mediations**
 - Phases
 - Bundling Issues
 - Agreeing on Resolution Process

Mediation Myths

- **Waste of Time**
- **Gives Opponent Early Look at Case**
 - **Facts**
 - **Legal Positions**
- **Suggesting Mediation a Sign of Weakness, Lack of Confidence in Case**

Arbitration

Defined

- A private judicial or tribunal process designed and agreed to by the parties in which one or more arbitrators will issue a judgment or award.

Types

- Binding
- Non Binding
- Blended -- Penalty

Makeup of Panel

- Single Arbitrator
- Multiple Arbitrators
- Non Lawyers as Arbitrators

Designing the Arbitration

- **By agreement**
- **CPR or AAA Rules**
- **Administered / Non Administered**
- **With help of arbitrator**
- **The focused efficient arbitration**
- **Attorneys as impediment to efficiency**
- **Narrow**
 - **Issues**
 - **Discovery**
 - **Evidence**
 - **Witnesses**
 - **Time (Chess Clock)**

The Award

Types of Awards

- Reasoned Award / Opinion
- Answers to submitted questions
- Bracketed Awards – High / Low
- Bare judgment without explanation

The Strategy of the Award

- Provide parties with neutral opinion and closure
- Preserve confidentiality
- Avoid admissions and collateral litigation (i.e. insurance and patent)
- Implement confidential agreements of the parties (i.e., test case)

When Arbitration Goes Wrong

- **As complex and expensive as full litigation to a court**
 - **Litigator Tendencies to Expand Arbitration**
 - **Client must be willing to accept risk and control counsel**

- **Arbitrators “didn’t understand the case”**
 - **And a court would?**
 - **Was counsel speaking to her audience?**
 - **Tutorials**

Where we began . . .

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Resources

American Arbitration Association

- www.adr.org

CPR International Institute for Dispute Prevention and Resolution

- www.cpradr.org

RF Copple Website

- www.Copplelaw.com

RF Cople ADR Articles

- CPR Patent Commission Chair, Patent Mediation Deskbook: Better Solutions for Business, CPR International Commission on Patent Disputes (2005).
- Discover New E-worlds, Legal Times, (April 21, 2008).
- eDiscovery: It's All About the Information, Arizona ADR Forum, (Fall 2007).
- Bulldozing Barriers To Patent Case ADR Use, National Law Journal (April 11, 2005).
- Long Before Those Tempers Flare, Legal Times (August 16, 2004).
- Alternatives to Litigation, Arizona Republic, (June 27, 2004).