# Kluwer Mediation Blog

## Can a Mediator Bet the Parties $100 That They Will Fail in Court?

Martin Svatoš (FORARB/Charles University) · Friday, January 22nd, 2016



*"Three-to-one that we will smash you in the court…" said a lawyer self-confidently. He was sitting in my mediation room and his client, a party to a neighborhood mediation, was obviously happy with having him chosen. The conservatively dressed young lady representing the counter-party hit back at him: "You must be kidding me! You will definitely not…all the facts, as well as the legal arguments are in our favor…we have surely better chances". When I asked the later whether she was able to express their chances in percentage terms, she answered: "Surely more than 80%".*

**How to deal with overconfident parties**

Something was obviously wrong: At least one of the lawyers and most probably both of them were overestimating their chances to win. This can be explained by the fact that objective probability estimation varies significantly from subjective probability estimation. Whereas the first one might be described as the probability counted by means of objective and empiric criteria, the later one is an outcome of subjective cognitive process only mirroring parties chances of success.

The difference between objective and subjective probability estimation might be considered as natural outcome of one's observation, thinking and judging skills. In other words, we are not computers and our thinking is far of being objective and empiric, especially once dealing with disputes and other sensitive issues. So far, so good…

**Lack of ability to estimate**

Much more startling is the fact that once the parties are expressing their probability estimation, those numbers differs significantly from their real subjective probability estimation. In other words, when the lawyers were stating that their chances to win in the court are 75% and 80%, they subconsciously did not believe those numbers. Of course, their statement might have been caused by the negotiation strategy and by the attempt to influence the other party, if they had not expressed the similar figures during the separate meetings.

In fact, the reason was different: Unfounded self confidentiality, lack of ability to estimate their chances correctly and inclination to deceiving oneself.

Situations in which the parties to mediation are unaware of their real subjective probability estimation have crushing effect on the negotiation effort. First, such parties usually fail to set their BATNA correctly. Second, excessively overestimated statements might cause the other party's lack of trust and will to negotiate. In those cases, the mediators' task is clear: To help the disputants to reality-check and to estimate correctly their subjective probability. Such a tricky assignment might be easily tackled by so called de Finetti game.

**De Finetti game**

Bruno de Finetti (13 June 1906 – 20 July 1985) was an Italian probabilist, statistician and actuary, known for his "operational subjective" conception of probability. Among other theories, he created an interesting tool that helps to overcome subjective overestimation of chances to success. This easy and adaptable exercise can be used without any preparation during all conversation and, what is more important, it is also easily useable for mediation.
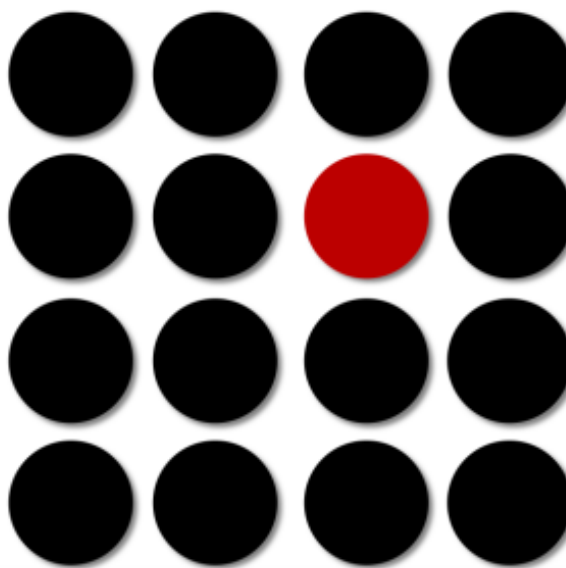
Assume there is a litigation procedure pending in the court and you want the parties to express their degree-of-belief that they will succeed. They are confronted with the fictional urn that is filled with 98 black balls and 2 red balls and they have two options to choose between:

> – *Option No. 1 – to randomly draw a ball from that urn: Should the party pick up a black ball, she will get $ 1000, should she pick up a red ball, she will have to pay the same amount.*

> or

> – *Option No. 2 – to wait until the judge render a decision in the litigation: Should the party win the litigation, she will get $ 1000. Should she lost, she will have to pay the same amount.*

**Betting a football match**

In this situation, the party will most probably opt for the ball-drawing. If she chose the second option, her subjective probability value would be larger than 98%. Indeed, this situation would be rather rare. Usually the parties estimate their subjective probability for litigation outcome under 98%. So, as a second step, you have to increase the number of fictional red balls in the urn until the chances to win (or lose) money seem equally likely for both options. You may, for instance, ask about the situation where the number of the red and black balls is equal and test the 50% chance to success. Anyway, at a certain point, the party will not be able to distinguish between the two option as you will be closing to her real subjective probability estimation.

By this single tool that obviously requires parties' frankness and willingness to participate, you are usually able to do some valuable reality checking and also to understand parties' subconscious feeling. According to my experiences, it proved to be really helpful instrument…not only in mediation. To inspire you a bit, professor de Finetti used to ask his students to estimate subjective probability of success of their favorite Italian football teams before important matches…Allegedly, they used those outcomes to some really successful betting.

I am afraid this will not be allowed in mediation…

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