



# The crystal ball of mediation: Predicting success at trial

*How accurate is the mediator in his or her basic judgment?*



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People often place unwarranted confidence in their own prediction of future events. Trial lawyers, judges and mediators live for the opportunity to tell their adversary or client what might happen in court and why. The problem with predicting the future in a case is that it has about as much validity as trying to gaze into and interpret the visions in a crystal ball. Interpreting the images in a crystal ball is

highly subjective and depends on the perspective of the gazer. Consider the famous Japanese movie mystery, *Rashomon*. The story describes a murder from several different viewpoints, all legitimate in their understanding of what happened. Yet, the search for the truth in these differing descriptions is hard to come by.

If someone predicted 25 years ago that each of us would be walking around with a computer in our pocket that is also used as a wireless device to make calls and send digital messages, that person would have been marked as a science fiction writer. Imagine if during the mid 19th century someone predicts that in the next century we would transport each other over oceans and continents by a flying apparatus that looks like a bird, but is safer than a horse and buggy? Or even a few years ago if someone predicted that Tiger Woods would melt down in the manner that he did.

Many litigators come to the mediation table looking for the mediator to tell the other side what will happen in court. Be careful what you wish for because the particular neutral you choose to give an assessment may not be properly positioned to do so in an accurate and fair manner. Why? Because the neutral might: (1) lack the type of experience needed to track jury reasoning; (2) lack critical information; (3) possess inaccurate information. Rarely will the neutral admit to you s/he is not positioned to read into the crystal ball, particularly if you hired that neutral for his/her alleged expertise in the field.

It comes down to these questions: How accurate is the person in their basic judgment? How well calibrated is the person in assessing the risk that they might be wrong?

## A quick survey

To prove my point, let's do a quick survey:

- 1) When did Attila the Hun fight the great battle of the Châlons?
- 2) How many years was Oliver Wendell Holmes on the U.S. Supreme Court?

*(Answers below – don't peek!)*

Instructions:

- Make your best guess.
- Set upper and lower bounds for each answer so that you are 95 percent confident that the correct answer will fall within your estimated range.

## The bandwagon effect

The major impediment with relying on the mediator to read the crystal ball when the mediator is not properly calibrated to do so is that people are drawn to the echo chamber. They want to have their opinions validated more often than they want to have their opinions about future events challenged. Accordingly, a weak neutral will necessarily stray away from presenting an unbiased perspective because that's what s/he thinks you want to hear. It's also known as the "bandwagon effect": The tendency to believe and state things because many others believe the same things. This necessarily results in validating the overconfidence you might have in your position. The vicious circle results and an impasse is created.

Clearly litigants overestimate their chances of winning at trial because both sides can't be right! Litigants also underestimate the importance of what they do not know. How can we avoid the gridlock that results from cycles of overconfidence? Here is one simple approach where the mediator might be helpful in getting both sides on the proverbial negotiation boat:

Quantify the components of the case into a "fair market value" approach for each claim, and create a range of outcomes. For example, in a product liability case where someone has lost use of a limb, generally there would be a low and high end of pain and suffering that can be expected. Place brackets around each. There would also be a low and high end of future economic loss (loss of income and medical specials). Place brackets around each. Add the brackets together with past economic loss and find the objective negotiating range. Then, use the mediator to moderate the potentially extreme predictions coming from counsel, and to provide guidance toward a common ground.

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Answers to survey  
1) Attila the Hun – 451 A.D. 2) Oliver Wendell Holmes – 28 years