

HELP ME HELP YOU MAKE A DEAL

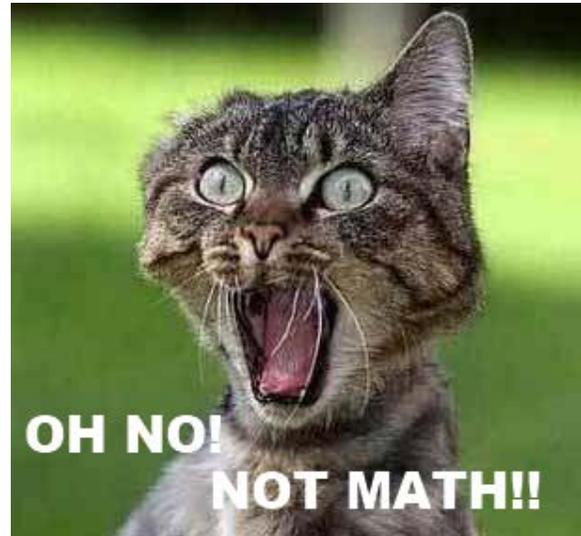
My name is Steven Schulwolf and I would be honored if you would consider using me as your next mediator. As a litigator I have submitted many mediation submissions on behalf of clients. Those submissions typically analyzed the relevant law, highlighted the evidence that supported my client's positions and outlined a probabilistic analysis consistent with my client's evaluation of the case. As a lawyer I have interacted with the top mediators from all over the country. In preparing to be a mediator I received formal training and have shadowed mediators to study their techniques. I look forward to acting as a peacemaker and assisting parties in resolving their disputes.

An effective mediator must be neutral and be able to assist the parties in fully appreciating their litigation risks. For the vast majority of my 25-year practice I have litigated complex commercial matters in trial and appellate courts in a variety of jurisdictions. While the majority of my career has been defense work, I have also represented a few plaintiffs and have obtained a seven-figure AAA arbitration award. I have significant experience in insurance coverage disputes for multi-million dollar environmental and mass tort claims. These cases are frequently mediated, often over numerous sessions. As such, I am a veteran of the mediation process.

My interest in mediation is not a passing fad. In 1998 I left the Chicago office of Lord, Bissell & Brook to teach at a law school in Plovdiv, Bulgaria. While there, I co-taught a class focusing on alternative dispute resolution ("ADR") methods, including mediation, which was a relatively new concept in Bulgarian jurisprudence at the time. Thus, not only have I participated in close to a hundred of mediation sessions, I have studied the mediation process.

As a longtime litigator, I have a skill for synthesizing and explaining complex legal issues and fact patterns. I am confident that my

experience will assist me in assessing a party's "story," including the legal arguments and evidence that purportedly support it. Reducing the complex to the understandable – whether it be disputed precedent, facts or even numbers – can be key in assisting the parties evaluate settlement options.



Many lawyers have an aversion to math and numbers. I do not. A mediator that is willing to analyze models and assumptions can greatly assist the parties in evaluating the value of a case and in ultimately arriving at a settlement amount that is acceptable to all sides. Mediation works because parties are able to take control of their own cases and avoid the zero sum outcome of a public trial. In the absence of a settlement the fate of the parties will be determined by a group of 12 strangers, or one in a black robe. Thus, no matter how divergent parties' views are of the merits of a particular case, they typically share one thing in common – a preference to regain control of how to resolve their legal dispute in a confidential manner. I understand this and can help you achieve your goals.

The vast majority of legal disputes involve money and the majority of settlement negotiations ultimately devolve into numbers.

For example, a plaintiff must decide “how much” is enough and a defendant must determine how much a case is worth to “make it go away.”

In advising clients, lawyers are frequently asked to predict the future and “read tea leaves.” Valuations are often informed by experience with particular judges, jurisdictions and prior outcomes. This is part art form and science. While that is true, it is important to understand the process. Parties are forced to value their case by assessing the likelihood of future events. When future events are impacted by other factors (*i.e.* how will an evidentiary ruling impact a party’s chance to win at trial?), accurately calculating probability becomes more difficult in ways that are not always readily apparent.

Settlement negotiations are like the old TV show, “Let’s Make a Deal.” For those of you, like me, that are old enough to remember, Monty Hall would offer a contestant the option to choose between three doors. Behind one door is a car. The other two doors conceal goats. After you select a door, before showing it to you Mr. Hall reveals a goat behind one of the two other doors. There are then two remaining doors – the one you initially selected and one other door. Mr. Hall then asks whether you want to switch doors. The audience screams advice and encouragement. Should you switch and take the other door? The overwhelming number of people believe: (1) that there is an equal probability that the car is behind the two doors; and (2) because it is a 50-50 proposition, they keep their initial selection to avoid the possibility of switching from a winner. Thus, if you listen to the roaring audience, you stick with your initial choice. While you still might win the car, by rejecting Monty’s offer to switch, you have made a big mistake. Contestants that switch doors double the likelihood of winning a car.

Wait, what? If your reaction is that there cannot be any advantage to switching, you are not alone. The Monty Hall problem has confounded people for years. In 1990 when Marilyn vos Savant (who purportedly possessed one of the highest IQs in the world) noted in *Parade Magazine* that there was an advantage to switching doors, thousands of people – including prominent mathematicians – insisted that she was wrong.¹ Books and articles have analyzed why the Monte Hall problem is so difficult to solve. Not only is the problem difficult to understand, even after hearing explanations, many people remain skeptical that switching is, in fact, the correct course of action. In fact, one study concludes that pigeons more quickly realize that switching is advantageous than humans. Yes, pigeons.



Before chiming in on the problem’s relevance to mediation, let me attempt to convince you that you should, in fact, switch doors. Ms. vos Savant’s first attempt to pacify her outspoken critics was to change the rules. Let’s assume that there are now one million doors and you select door number 54,782 because, of course, that is your favorite number. Monty then reveals 999,998 goats. There are now only two doors left and one has the car -- do you switch? At this point most people begin to realize that their initial selection was a one in a million shot. Did they really get lucky and pick the car? Do they really now have a 50-50 shot of being right after Monty revealed all those goats? Studies show that when the number of doors is increased, people

¹ Rosenhouse, Jason, *The Monty Hall Problem: The Remarkable Story of Math’s Most Contentious Brain Teaser* (Oxford University Press 2009) provides a thorough analysis of the problem.

intuitively understand that they should switch from their initial selection.

Thankfully, the Monty Hall problem presents a finite set of possibilities for the distribution of the two goats (“G”) and one car (“C”). I depict them as follows with each respective door separated by a comma:

G, C, G
G, G, C
C, G, G²

Under the rules of the game, after you select a door Monty must reveal a goat. Let’s assume you select Door Number 1. Placing an X to indicate when Monty is forced to reveal a goat reveals the following possibilities:

G, C, X
G, X, C
C, X, G or C, G, X

This demonstrates two crucial facts. First, in selecting Door Number 1, there was a 1 in 3 chance that you initially correctly selected the car and a 2 in 3 chance that you did not. Second, under the rules of the game, in both situations where your original selection was incorrect, after Monty reveals a goat, the remaining door must now conceal the car. In 2 out of 3 options, when you switch you will win the car. Switching doubles the likelihood of winning.

A further illustration might help. What if Monty no longer must reveal a goat? Let’s assume that Monty now can reveal the car, and if he does, you lose and the game ends. As before, if he reveals a goat, he offers you the opportunity to switch. Under this new, modified scenario, there is no benefit to switching

because there now is a 50-50 likelihood that the car is behind either door. In other words, only in the modified approach does revealing a goat actually mean that the odds for your original selection have improved, from 33% to 50%. Not so in the original problem. A formula called Bayes’ Theorem allows you to calculate how certain events impact the probability of other events, or contingent probability.

To be clear, I am not saying that mediators and lawyers need to have ever heard of Bayes’ Theorem – let alone apply it – to settle cases. However, a general understanding of probability cannot hurt in assessing the likelihood of future events, which, after all, is the lynchpin for valuing a case. Experts in mathematics, psychology and philosophy use the Monty Hall problem to demonstrate our cognitive limitations. One book highlights man’s poor choices, coining the phrase *Bozo Sapiens*.³ The Monty Hall problem underscores that humans are hard-wired to misunderstand seemingly simple probability calculations. And if mankind is really Bozo Sapien, a sub-species certainly must be the number fearing, *Homo Advocatus*. Lawyers, like most people, are often prone to miscalculations in situations where their gut strongly points to an incorrect conclusion. The pigeon experiment discussed above also demonstrates that humans are likely to have an emotional attachment to initial assumptions that causes them to miscalculate certain probabilities.

The purpose of this discussion is not to exhaustively address probability theory, but to suggest that thinking about it can help lawyers value cases and find common ground. I believe that the Monty Hall problem is relevant to settlement negotiations for several reasons, which can be used by a skillful mediator:

² We could include another scenario of C, G, G with the two goats reversed (*i.e.*, we could number the goats as Goat 1 and Goat 2). However, both C, G, G scenarios would collectively have a 33% likelihood because we all agree that initially there is a 1 in 3 chance that the car is behind each door.

³ Kaplan, Michael and Kaplan, Ellen, *Bozo Sapiens: Why to Err is Human* (2009 Bloomsbury Press).

- **Intelligent people can miscalculate probability, oftentimes because it is more difficult than they understand.**
- **Psychological factors often explain decisions against one's interests.**
- **Parties have difficulty adjusting their value of a case based on new facts.**

Despite all of our limitations, mediation is typically successful and most cases settle. Why?



One reason is that a mediator's job is not to force the parties to agree on the "right" settlement amount. Parties frequently settle to avoid the risk that a judge or jury might misunderstand the law, evidence or probability.⁴ The reason the parties ultimately agree on an acceptable resolution is irrelevant.

To achieve a settlement, a mediator must be a good listener, be trusted as a neutral, understand the nature of the legal dispute, and understand how the parties value their case. A

⁴ See e.g., Schneps, Leila and Colmez, Coralie, *Math on Trial: How Numbers Get Used and Abused in the Courtroom* (Basic Books 2013).

⁵ Complex litigation usually becomes a battle of the experts. In Federal Court, district court judges are tasked with being the "gatekeeper" in an effort to keep "junk science" out of the courtroom. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). In products liability cases, plaintiffs often attempt to present experts that opine that the defendant's drugs caused the plaintiff's harm, sometimes by relying on statistical analysis. Defendants typically seek to bar such testimony claiming the data is not "statistically significant." Compare, *In re: Zolofit*, 2015 WL 7776911 (barring plaintiff's expert and noting he failed to demonstrate that the concept of "statistical significance" had been abandoned) with *Milward v. Acuity Specialty Prods. Grp., Inc.*, 639 F.3d 11, 25 (1st Cir. 2011)(overturning district court and determining that the "lack of statistical significance" is not the proper basis for excluding an expert's opinion). That courts take different approaches concerning probability in the courtroom underscores the risks of litigation and is something about which a good mediator can discuss with the parties and their lawyers.

mediator that can evaluate assumptions and calculations that drive the party's valuation of the case from both a legal and probability perspective is invaluable.

A good mediator must be flexible and convince the parties that they must be as well. Sometimes good-faith calculations made months ago to obtain settlement authority from management may become outdated because they fail to take into consideration new factors. A good mediator can convince parties that it is in their best interests to reevaluate the "lines in the sand" that they have drawn.

I have broad interests and experiences that allow me to assist in the resolution of a wide array of disputes. As the managing partner of a law firm for 15 years, I have been forced to think creatively in an effort to reach compromises that keep people happy – or happy enough. Not all cases require an understanding of statistics. Most cases present legal disputes and disagreements over the material facts. That said, statistics are often disputed in courts around the country.⁵ I would be happy to assist you in resolving these and other such cases.

You may already have preferred mediators and I respect loyalty. However, if you have not yet found a preferred mediator or the other side will not accept your preferred choice(s), give me a chance and Let's Make a Deal!