EVALUATING YOUR CASE – HOW CONFIDENT ARE YOU?

Case evaluations are part of a litigator's routine practice, from the beginning of the lawyer's engagement and continuing at various times during the litigation. Some clients require formal periodic evaluations from their lawyers, while others simply trust their lawyer to have properly evaluated the case. I believe proper case evaluation is essential to preparation for a mediation. Over the years, I've observed that lawyers with clear assessments of their case tend to achieve better results in mediations: they have a more thoughtful approach to their negotiation starting point, a better sense of the range for serious negotiations, and a sharper focus on when to stop.

Every case is full of uncertainty. There are known uncertainties, or risks, such as pre-trial rulings by the judge, credibility of witnesses, admissibility of evidence, and trial experience of counsel. Unknown risks might include change of controlling statute or judicial decision; death of a judge, expert witness or trial counsel; or even bankruptcy of a party. Analyzing these risks is inherently subjective but nonetheless essential to a lawyer's case evaluation in preparation for mediation.

My typical practice is to ask counsel on each side to estimate the percentage likelihood of a verdict or judgment for plaintiff. I frequently get estimates like this: plaintiff's counsel sees a 75% probability of a favorable judgment, while defense counsel estimates plaintiff's chances at less than 25%. Why do good lawyers reach such wildly divergent opinions? The answer may be that unrecognized, subconscious biases are at work: *overconfidence bias and positional bias*.[1]

Over-confidence bias. This bias causes people to believe that they perform better than others – better drivers, better negotiators, better evaluators of the facts and law. Studies have shown that 80% of college drivers reported that they drive better than the average drivers, and that 68% of an MBA class predicted that their outcomes in various negotiation exercises would be in the top 25% of the class![2]

The ability of lawyers to accurately predict litigation outcomes, and the effect of over-confidence on those predictions, has been examined in various studies. Lawyers in 337 civil cases from around the country were asked what they considered the minimum result for "success" would be for their case, and asked their confidence in achieving that goal, stated as a percentage. The study compared actual trial results to the predictions, revealing that 44% of the cases failed to achieve the lawyer's stated goal – victims of over-confidence. Perhaps not surprisingly, the higher the predicted success, the greater the over-confidence.[3]

Over-confidence leads to *over-estimation*, another judgmental bias that causes people to irrationally evaluate an actual settlement offer against their chance of getting a better result at trial. I have previously written about a long-term study demonstrating the adverse effects of over-estimation. That study showed that plaintiffs were wrong 61% of the time when they chose to go to trial rather than accept a settlement, and

[1] This article is adapted from a presentation by Atlanta mediator Hunter R. Hughes at the October, 2015 ABA Advanced Mediation and Advocacy Institute, and from Mr. Hughes' article, *How our Subconscious Bias Impacts Negotiations and The Mediation Process,* 4 American Journal of Mediation 1 (2010).

[2] Hughes, 2015 ABA Advanced Mediation and Advocacy Institute.

[3] INSIGHTFUL OR WISHFUL: Lawyers' Ability to Predict Case Outcomes, 16 Psychology, Public Policy and Law No. 2, 133-157 (2010)

those errors in judgment cost them an average of $43,000. Defendants were wrong less often (24%) but, on average, the poor decision cost them $1.1 million.

Positional, or Self-Serving, Bias. Working alongside over-confidence and over-estimation is *positional* or *self-serving bias*, which causes people to interpret events and forecast outcomes on the basis of self-interest. In a positional bias case study, 40 lawyers were given identical facts about a case in the same jurisdiction. All lawyers got copies of jury awards for comparable cases in the jurisdiction and were asked to evaluate the case. Half the lawyers were randomly assigned to be plaintiff's counsel, and they valued the case from $32,000 to $675,000, with a median over $300,000. The other half, randomly assigned as defense counsel, valued case from $3,000 to $50,000, with a median of about $30,000.[4] Thus, despite seeing identical injuries, jurisdiction and verdict histories, those assigned as plaintiff's lawyers valued the case more than 10 times higher than defense counsel. The sole difference was their "position" – it was in their interest to skew the evaluation to favor their side of the case.

Self-serving bias explains why, for example, supporters of political candidates hear the same debate and conclude that their candidate "won". Or why opposing lawyers read the same case law or witness transcript, only to reach opposing conclusions. This bias often surfaces when related to a matter of self-esteem -- most lawyers, for example, believe that they will perform better than the "average lawyer", a bias that directly influences their case evaluation in the context of an adversary's competing opinion. Moreover, a high percentage of people believe that *others* are more susceptible to self-serving bias. Thus, each side accuses the other of being driven by bias when, in fact, both are pulled by their self-serving bias, confident that their position is the correct one.[5]

Recognizing these biases will help lawyers prepare for mediation if they take steps to minimize their influence on subjective case evaluations. One means of countering the effect of over-confidence and self-serving bias is to seek third-party input. In larger cases, focus groups and mock trials can be valuable. Consider challenging your litigation team to reconstruct a hypothetical loss at trial – break down the case into variables that would lead to a loss and re-evaluate each of them. In other cases, simply asking the advice of an experienced lawyer not involved in case provides a meaningful reality check. At the end, the goal is to arrive at a more rational assessment of the case to help guide your negotiations – starting point, acceptable ranges of settlement, and walkaway point.

[4] Hughes, 2015 ABA Advanced Mediation and Advocacy Institute.
[5] Cordelia Fine, *Mind of Its Own: How Your Brain Distorts and Deceives* (W.W. Norton 2006)