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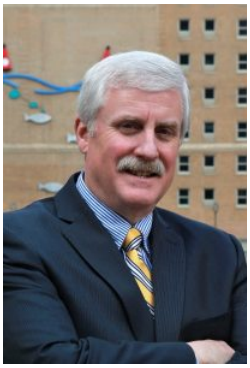
ON MEDIATION: Attorneys are confident. That's a good thing, right?

By: James J. Mathie December 12, 2016 1:51 pm

In a recent column about BATNA, I suggested that as you get closer to your BATNA range, you will want to evaluate your confidence about that range.



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Why should you be concerned about this? Litigators who are not confident about their cases will have a harder time making arguments that lead to victory at trial, right?

While that's true, confidence is valuable only if it relates to a desired outcome. Having confidence in the trial result at mediation is only valuable if you predict correctly.

How good are attorneys at predicting trial verdicts? Research conducted on this question in recent decades has produced fairly consistent results and is not especially encouraging.

In the 1960s, a study compared final settlement offers and demands with actual verdicts in 443 personal-injury cases. Its conclusion? Only a sixth of the demands and offers came even within 25 percent of the final verdict amounts. Neither plaintiffs nor defendants proved better at predicting the outcomes.

A decade later, a study comparing pretrial settlements with valuations by an independent panel composed of plaintiff and defense attorneys and claim professionals found that 40 percent of the parties settled for less than the panel valuation had called for. And the settlements were all over the place, varying from one-sixth to two times the panel's value. In 77 percent of the cases, the clients fared worse than the panel said they should have.

In the 1980s, a "same case" experiment gave 40 practicing attorneys the same facts, comparable jury awards and venue information and then assigned them either the plaintiff or defense attorney's role in a negotiation. To provide a personal incentive, the results were published with names. The plaintiff's opening demands ranged from $32,000 to $675,000; the defenses offered from $3,000 to $50,000. In the end, the settlements came out to between $15,000 and $95,000. All of this from the same facts.

In the 2000s, a study of 4,532 California cases that were litigated between 1964 and 2004 found both that predictions had become less accurate during the study period and that the cost of committing errors had soared. Sixty-one percent of the plaintiffs in those cases and 24 percent of the defendants obtained a result at trial that was the same or worse than could have been gotten through a pretrial settlement. Between 2002 and 2005, the average cost of these decision errors was far higher for defendants ($1.14 million) than for plaintiffs ($43,100.)

A later study of 5,653 California and New York cases reached similar conclusions: Plaintiffs were wrong 60 percent of the time, costing them $73,400 on average. Defendants were wrong far less often, only 25 percent of the time. Even so, their average cost for being in error came to just more than $1.4 million.

What's going on? Well, for one, it's not easy to predict the future.

And that fundamental difficulty is complicated by cognitive biases. One such bias is optimistic overconfidence. Some attorneys – or maybe all attorneys at least some of the time – are guilty of being overconfident.

Optimistic overconfidence can be expressed in three ways:

Overestimation: an inflated perception of one's abilities, performance or chance of success;
Overplacement: a tendency to regard and rank one's self more highly than others; and
Overprecision: an excessive certainty regarding the accuracy of one's beliefs.

Together, or individually, these biases can lead to unwarranted overconfidence in your ability to win at trial. This, in turn, can have an adverse effect on negotiations.

With optimistic overconfidence there are two questions: How accurate is your basic judgment? And how well have you taken into account the possibility that you might be wrong?

The pernicious nature of overconfidence has been demonstrated by research.

In a study titled Insightful or Wishful?, researchers asked 481 litigating attorneys in 44 states two questions about a case they were working on and that was scheduled for trial in the coming months: "What would be a win situation in terms of minimum goal for outcome of this case?" "From 0 to 100%, what is the probability that you will achieve this outcome or something better?"

Foreseeing that lawyers would be overconfident (they were), the researchers included a de-biasing technique – asking some attorneys to generate counterarguments before making their predictions. Although this technique had previously worked with attorneys in simulated cases, it had no effect when attorneys were predicting their own cases.

Working alone to overcome this bias can be difficult. Luckily, mediation offers some help.

At the outset of mediation it's not uncommon for both parties to claim about a 70 percent chance of winning. Obviously they both can't be right.

One common cause of overconfidence is the fact that negotiators often only have access to some of the information relevant to their case and underestimate the importance of what they do not know.

Having only part of the pertinent information reduces the accuracy of predictions. In one study, participants were divided into four groups and received either just background data, background data and either a plaintiff's or defendant's argument, or background data and both arguments.

Those who received the background data and both arguments turned out to be more accurate when it came time to predict a jury verdict. Even so, the subjects who had received only the one-sided information tended to be more confident about their predictions than those who had heard both sides.

Lawyers who are entering mediation fall into the middle of the three categories. They have background data and know their own arguments, but not necessarily the other side's. They are confident, but not necessarily accurate.

Fortunately, mediation presents an opportunity to obtain a more rounded view of your case. This comes mostly from listening to the other side.

The willingness to hear the other side out, all the while recognizing that you could be optimistically overconfident, will improve your ability to predict a case's outcome. This, in turn, will make you a better negotiator.

See you at mediation.

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