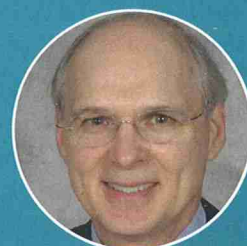


## Negotiation Notes and Mediation Minutes

# Are You Overconfident in Evaluating a Case for Negotiation or Mediation?



By Michael W. Hawkins

In the past, I have stressed the importance of using objective and legitimate criteria in presenting a client's case. This can apply to the facts, the law and the monetary value of a claim. When either party fails to be objective, it makes it much more difficult to create an environment and dialogue that's conducive to an early resolution or solution for the parties.

One reason for a party's inability to present an objective and legitimate basis for their claim occurs when the lawyer is overconfident about predicting the value or likely outcome of the case. In a study by UC Irvine psychologist and law professor Elizabeth Loftus, she found that lawyers often overestimate their chances of success when they predict the outcome of a case. This is consistent with other findings that overconfidence is common in human decision-making.

If the lawyer is creating unrealistic expectations for their client, it can make negotiations difficult. At a mediation, much time can be spent by the mediator or other party in an effort to get the case on track for resolution. It's not unusual for the mediator to hear, "My lawyer told me this case is worth so much and he/she would not recommend anything less." This is particularly problematic if the advice is not objective, legitimate or realistic under this totality of the circumstances.

In Loftus's research, it was discovered that 44 percent of outcomes were less successful than the goals set by the lawyers. Thirty-two percent matched the goals and 24 percent exceeded them. "The higher the expressed level of confidence, the more likely lawyers were to fall short of their goals," Loftus stated. Interestingly, she found that "male attorneys were found to be more overconfident than female attorneys."

Loftus also pointed out that, "a client will be more satisfied with an attorney who's realistic than one who pushes litigation without delivering results." It's not difficult to imagine the impact on a client when their lawyer says the case is worth a million dollars — only to realize in mediation (much less at trial) that the claim is only worth \$50,000.

So what does this study emphasize for meaningful negotiations or a mediation? I go back to the fact that the most effective presentations by counsel are those with credibility, objectivity and legitimate support. It definitely does not serve a client's interest and, over time, a lawyer's reputation to overestimate the value and likely outcome of a claim.

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