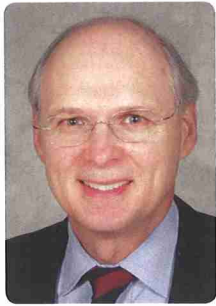


## What Are the Consequences of Being Overconfident in Assessing Your Client's Claim? by Mike Hawkins, Esq.



When lawyers are negotiating for their clients directly with another lawyer or through a mediator, their initial proposals and counters are typically at significant odds with each other. Is it possible this is purely a negotiation strategy, or is it a result of being overconfident in assessing the client's claim? The ultimate

result for a client is achieved through an objective and legitimate assessment of the claim based upon the totality of circumstances including the facts, applicable law and objective analysis of the damages and risk.

In a University of Pennsylvania article by Chelsea Berry (2017) titled, "A Proposal to Study the Effect of Optimism, Overconfidence, and the Planning Fallacy on Lawyers' Ability to Secure Favorable Results for Clients," the author examined how over confidence can impact decision making. It has application to negotiations and participation in mediation.

As a mediator, it can be very challenging when counsel for either party is overly confident about the claim and how this influences their client in trying to create meaningful dialogue that can lead to a settlement. As pointed out in the article, "Overconfidence is the tendency for people to exaggerate the extent to which they know that a decision is correct." Daniel Kahneman, another commentator, states, "Overconfidence is another manifestation of people's tendency to focus on only the information available, a phenomenon he calls "what you see is all there is."

When we reflect upon these observations, we see it often in mediating claims. It reminds me of the saying that someone has blinders on and is unwilling to see the big picture and thus have an unrealistic view and assessment of the value of the claim. It really emphasizes the importance of an objective and legitimate analysis of all facts, the law, and likelihood of success.

In this regard, the author notes that plaintiffs were wrong in thinking they would do better at trial 61.2% of the time and defendants were wrong 24.3% of the time. But when the defendants were wrong, it was by a large margin. This distinction may be because the defendant often has greater access to documents, facts, and witnesses who can testify about what occurred.

All of this data strongly suggest that counsel for plaintiffs and defendants would serve their clients best by getting the facts as they are, versus their version of facts as they choose to see or perceive them.

As a mediator, unrealistic overconfidence often ends up taking extra time in bringing the parties closer to a solution. Often the cases that do not get settled are those where at least one of the parties overestimate the value of their claim or underestimate the risk, and thus the spread between numbers force the likelihood of a trial in order to resolve the matter.

In conclusion, all counsel and their clients will benefit from efforts to be objective about their positions from the outset of a claim and to work diligently to gather the essential facts and law, jury analyses and anything else that will assist in the evaluation of the claim. In my experience, the best result from a mediation perspective was a presentation by a plaintiff's attorney that included a meaningful binder of documents, financial analysis, jury verdict analysis, and the law to support his client's position. It was objective and compelling to the defendant's decisionmaker.

The key takeaway: do not be so overconfident that you miss the opportunity for a good resolution for your client.

Mike Hawkins has over 40 years of experience as an attorney and hundreds of successful mediations. Mike uses a tried and true approach that enables both parties to comfortably maneuver through the mediation process toward resolution while ensuring their interests are protected. He understands that mediation involves compromise and negotiation, and he provides each party with a Preparation Guide that ensure the process remains on track and consistent throughout the mediation. This approach has resulted in a better than 80% success rate in settling disputes.

