JOURNAL OF EMERGING ISSUES IN LITIGATION

Tom Hagy
Editor-in-Chief

Volume 2, Number 2
Spring 2022

fastcase FULL COURT PRESS

Journal of Emerging Issues in Litigation

Volume 2, No. 2 Spring 2022

JOURNAL OF EMERGING ISSUES IN LITIGATION at $395.00 annually is published four times per year by Full Court Press, a Fastcase, Inc., imprint. For customer support, please contact Fastcase, Inc., 711 D St. NW, Suite 200, Washington, D.C. 20004, 202.999.4777 (phone), 202.521.3462 (fax), or email customer service at support@fastcase.com.

Publishing Staff
Publisher: Morgan Morrissette Wright
Production Editor: Sharon D. Ray
Cover Art Design: Morgan Morrissette Wright and Sharon D. Ray

Cite this publication as:

Journal of Emerging Issues in Litigation (Fastcase)

A Full Court Press, Fastcase, Inc., Publication

Editorial Office

711 D St. NW, Suite 200, Washington, D.C. 20004
https://www.fastcase.com/

POSTMASTER: Send address changes to JOURNAL OF EMERGING ISSUES IN LITIGATION, 711 D St. NW, Suite 200, Washington, D.C. 20004.

Articles and Submissions

Direct editorial inquiries and send material for publication to:

Tom Hagy, Editor-in-Chief, tom.hagy@litigationconferences.com

Material for publication is welcomed—articles, decisions, or other items of interest to attorneys and law firms, in-house counsel, corporate compliance officers, government agencies and their counsel, senior business executives, scientists, engineers, and anyone interested in the law governing artificial intelligence and robotics. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the Editorial Content appearing in these volumes or reprint permission, please contact:

Morgan Morrissette Wright, Publisher, Full Court Press at mwright@fastcase.com or at 202.999.4878

For questions or Sales and Customer Service:

Customer Service
Available 8am–8pm Eastern Time
866.773.2782 (phone)
support@fastcase.com (email)

Sales
202.999.4777 (phone)
sales@fastcase.com (email)

Overconfidence: A Risky but Pervasive Phenomenon in Litigated Disputes

Jeff Trueman*

Abstract: *"Overconfidence" may have negative connotations, but it can be beneficial in competitive situations like litigation where parties compete for resources. Nonetheless, posturing and overconfidence of opposing parties and counsel are common frustrations felt by lawyers and claims professionals. Most litigants fail to see themselves as overconfident even though that can result in miscalculations and erroneous risk assessments. Litigants can employ techniques to improve decision making but sometimes going to trial is considered the right decision for reasons that are considered more important than whether the result is better than the last settlement demand or offer. In addition to focusing on legal and financial threats that are external to themselves, litigants might also consider threats of their own making; namely, how they think about risk amid uncertainty.*

Most of us react negatively when someone is overconfident about themselves or their opinions. We have an inner voice that is quick to identify and judge anything that sounds arrogant or single-minded. That same voice, however, is peculiarly silent when we are overly confident about our own opinions or capabilities. We don't tolerate overconfidence in others, but we indulge in it ourselves.

Overconfidence is ubiquitous[1] and manifests in a few ways. First, we "overestimate" our abilities or likelihood of success.[2] Second, we "over-place" ourselves as compared to others.[3] We think that we are better than average as drivers of automobiles, parents, professionals, and so on. One study found that although newly wedded couples and those about to be married acknowledged that the overall divorce rate is roughly 50 percent, on average

Journal of Emerging Issues in Litigation / Spring 2022, Vol. 2, No. 2, pp. 139–147.

they believed that they as individuals faced a 0 percent chance of divorcing.[4] Finally, we are "over-precise" regarding the accuracy of our knowledge and beliefs.[5]

Variables That Can Influence the Rise or Reduction of Overconfidence

Despite the many ways in which we are overly confident, overconfidence has variability and can be influenced. We may be excessively optimistic about our opinions when we think in generalized or abstract terms, but we are less sure of ourselves when circumstances are detailed or uncontrollable.[6] Timing matters as well. When we are overly optimistic at the outset of a situation or a project, our confidence level is less likely to shrink—even in the face of contradictory evidence.[7] But we are more likely to change our minds if doubt and pessimism exist at the outset of an endeavor or project.[8] In my view, this indicates a strong need for confident people to "save face" if they are going to change their opinions, especially litigated disputes where they entered the case believing they would prevail.

Overconfidence has its place within our own psyches, even though we may not like to deal with it in other people. Studies show that it can provide benefits such as greater self-esteem and motivation to do difficult things.[9] Overconfidence may also be strategically deployed to deceive and persuade others, especially in competitive situations like litigation and mediation of litigated disputes.[10] Each side often postures with tough talk that predicts ultimate victory, even in the face of evidence that is unfavorable to its case. Internal conversations between counsel and client may be more nuanced and balanced—but not always. Organizational cultures and ungrounded client expectations often fan the flames of "confirmation bias" where everyone on the team gravitates around evidence that supports their position, while discounting or ignoring everything else.[11] Usually there is little appreciation of how many consequential factors reside out of any lawyer's control, such as which judge is assigned to the case, what opposing counsel says to the judge or jury, how the judge rules on key pieces of evidence, whether key witnesses perform as expected, how the jury resolves

credibility issues, and so forth. Although we tend to ignore or discount complications in our own case, we react negatively when the other side does the same thing.

How Legal Professionals Manage Overconfidence, or Not

A couple of years ago, I talked to over 50 litigators and claims professionals about what frustrates them in mediation.[12] One popular frustration is overconfidence and posturing of opposing counsel. Overconfidence and posturing tend to go together. When one or both sides employ extreme bargaining positions, the other side usually believes the other is overly confident and less credible, resulting in less meaningful demands and offers in response.[13]

Perhaps one of the greatest inefficiencies in litigation, driven in part by overconfidence, is the late timing of settlement decisions. Many lawyers test each other's resolve under the belief that the best settlement numbers come only under the pressure of an impending trial date. To be fair, economic value can be created by preparing cases for litigation. For example, carriers increase offers at predictable times during the run-up to trial: when the defendant is served, after the plaintiff is deposed (assuming he or she performs well), after dispositive defense motions are denied, and when experts are disclosed or retained. More often than not, many attorneys wait until very close to trial before moving off their bargaining positions. By that time, significant amounts of time and money are invested in an adjudicative process that in all likelihood will not be utilized.

Nonetheless, lawyers believe that it is important to maintain a high level of confidence in one's case.[14] Of course, it is difficult if not impossible to know when one's confidence is overblown, impeding the ability to manage risk effectively and efficiently. Lawyers often pretend not to be concerned about weaknesses in their cases[15]—a tactic that frustrates all participants in mediation. Perhaps it is no surprise that not one attorney participating in my study admitted to being overconfident and only one senior insurance adjuster admitted that internal discussions "can be an echo chamber."[16]

Overconfidence blends well with the lawyer's professional responsibility to "zealously" represent the client's interests.[17] After all, it is hard to image a zealous advocate who is ponderous, constantly qualifying, and indeterminate. It is important for lawyers to maintain confidence in order to maintain a successful practice and to develop trial strategies that will survive challenges by opposing counsel. At the same time, however, clients are not well advised by lawyers who are blind to risks that are reasonably likely to occur. Confidence is imperative but overconfidence is unethical in my view, and it can be very expensive as the following case illustrates.

An Expensive Case Study in Overconfidence

Imagine a wrongful death case where a bicyclist dies after colliding into a trailer that was parked behind a landscaping truck. The deceased rider suffered trauma to the top of his head and his helmet was cracked down the middle, suggesting he wasn't looking where he was going. The truck was parked legally but the driver admits it may have been dangerous where he parked. The truck may have stopped short, leaving the bicyclist little time to react. Jury research indicates these points will be important. The bicyclist and his wife were firefighters. Their 9-year-old daughter suffered from depression after her father died.

The defendant has two insurance policies, one for $2 million dollars in primary coverage and another for $10 million in excess coverage. Assume a comparative fault jurisdiction where any award to the plaintiff may be reduced by a percentage if he or she is found partially at fault for the accident. As defense counsel or claims professional, would you reject a settlement demand made by the surviving family to settle within the limits of the primary coverage?

This was a real case in Texas.[18] Unfortunately for the defense team, who rejected three demands to settle for $2 million or less, the jury awarded the surviving family almost $28 million. Ultimately, the surviving family accepted almost $10 million in order to avoid an appeal. But that's not all. Because it failed to accept reasonable settlement demands from the plaintiff, the primary carrier was liable under Texas law for the entire settlement amount.

Risk Analysis or Bargaining Position?

For the defense, the risk analysis may have sounded something like this (because it often sounds like this in mediation): "We are confident that a jury will find our client was not negligent. In the alternative, if a jury finds our client partially negligent, we believe a jury will find the plaintiff comparatively at fault for 50 percent or more, resulting in no recovery." To me, language like this is not risk analysis. Instead, it states a bargaining position that suggests there is zero risk for the defense.

Even when lawyers qualify their predictions with phrases like "I believe that we have a *strong* chance of prevailing," do clients (or the lawyers themselves) really know what that means? Is it a percentage that is 75 percent or greater? Or more like 55 percent to 65 percent? Instead, to best express the level of risk or chance of success, counsel could translate her prediction about the outcome into numbers or percentages that enable a meaningful evaluation of the case.[19] Additionally, the valuation should be flexible enough to change over the development of the case and during trial. It should go without saying that not everything in litigation goes as planned, otherwise cases would not settle during trial as they sometimes do.

Blaming Outside Forces

Some might say the jury's verdict of $28 million in the Texas case is a good example of a "nuclear verdict" or "social inflation." Carriers and the defense bar have been talking about these phenomena for a number of years, so it seems to me the defense team in the Texas case knew a socially inflated verdict was possible but seemed remote enough to reject three demands to settle for $2 million or less.

Of course, plenty of cases go the other way. Sometimes plaintiffs walk away from decent settlement offers only to get less or nothing at trial. Talented, experienced lawyers on both sides can be blinded by overconfidence and lulled into thinking outside forces are to blame for bed outcomes. When something bad happens to us, we blame our environment,[20] such as social inflation or a biased judge (who may or may not have been "plaintiff friendly" in the Texas

case). But when we see bad things happen to others, we think there's something wrong with their character or personality.[21]

Over a decade ago, researcher Randall Kiser documented how often attorneys did better or worse at trial compared to their opponents' last settlement proposal.[22] Generally, Kiser found that plaintiffs' attorneys did worse at trial almost 60 percent of the time at a cost of about $40,000 per error. On the defense side, Kiser found that they did worse at trial in about 25 percent of cases at a cost of approximately $1.1 million per error.

Because most cases settle at some point, perhaps these findings have resonated with the bar. On the other hand, some cases really need to be tried by a judge or jury; some fights are worth having. As Kiser's research shows, a bad outcome at trial for one side is a great outcome for the other. My point is not that counsel should default toward settlement. Instead, consider practices that might improve decision-making.

Making Better Decisions

First, recognize the possibility that unexpected factors may substantially interfere with your assessment. Although we feel empowered when we say "no" to a settlement offer or demand, does that feeling of satisfaction make us blind to what may lie ahead? Second, defense litigators seem to ignore a powerful cognitive bias leveraged by the plaintiff's bar when its members ask juries to make awards: anchoring (decisions are biased in favor of a reference point that can be suggested in advance of a decision).[23] You can read more about the anchoring bias elsewhere, but defense litigators could, and perhaps should, counter this bias during their closing arguments.[24]

Third, can your team talk about how its evaluation may be off? Granted, some clients have no interest in lawyers who recommend settlement; they want counsel to focus on winning the case—period. But I wonder whether the defense team in the Texas case permitted or encouraged its members to make the case for a verdict more than $2 million. Considering what's at stake in some cases, why not have that kind of discussion?

Defining Professional "Success"

Even when attorneys are making better risk-management decisions, sometimes there is more than money at stake. Some lawyers define success in ways that differ from Kiser's economic criteria. A number of attorneys who make "bad" decisions according to Kiser's research told me they *would try those cases again*. They define success in terms of executing their clients' objectives and earning client loyalty. Furthermore, some lawyers feel that they can be, and perhaps should be, responsible for the decisions of other people (such as judges and juries). They believe their actions can determine the outcome of a case. Similarly, many clients believe that their story will persuade judges and jurors.

Insurance companies may litigate for reasons not readily apparent to outsiders. They can afford to take risks. Executives of insurance companies may want to send a strong cautionary signal to the plaintiffs' bar, "Think twice before suing us." Payment of any amount to settle may be highly scrutinized when a liability defense can be asserted. Often, a great deal of internal pressure exists within an insurance company to maintain the status quo of how risk is managed. An underwriting department may be overly invested in exclusionary language and not want the claims department to settle. Case reports from lawyers who may be risk averse filter their way up to company leaders who may be risk seeking and view "questionable" outcomes as "winnable" outcomes. This raises an interesting dichotomy between the ways in which jury verdicts are viewed. While individuals look to juries as potential sources of accountability, some institutions view them as sources to be blamed or as "cover" when corporate politics or an executive's ego take priority.

These dynamics give context to Kiser's findings and as a result, challenge lawyers and mediators to consider any number of reasons why litigants may want to assume more risk than seems rational. Many mediators believe their assessment of risk is more realistic than that of the parties or counsel. Perhaps mediators should acknowledge their own biases. In my view, sometimes lawyers have an unshakable confidence in his or her client's case for professional reasons and no mediation technique can alter it.

Conclusion

We spend so much time and money and other resources trying to protect and enforce our rights against others that we overlook threats from within ourselves. The famous physicist Richard Feynman said, "The first principle is not to fool yourself—and you are the easiest person to fool." We venerate the image of Lady Justice, symbolizing fairness and impartiality as she oversees the adjudication process. Although she may hold the scales of justice in one hand, she also carries a large sword in her other hand. And she's blindfolded. Knowing that, how confident should you be?

Notes

* Jeff Trueman (jt@jefftrueman.com) is an experienced, full-time mediator and arbitrator. He helps parties resolve a wide variety of litigated and pre-suit disputes and interpersonal problems concerning catastrophic injuries, wrongful death, professional malpractice, employment, business dissolution, real property, and domestic relations. Jeff is a past Director of Dispute Resolution for the Circuit Court for Baltimore City where he oversaw over 70 retired judges and senior attorneys conducting over 1,500 mediations, settlement conferences, and neutral evaluations per year. He is a Distinguished Fellow of the International Academy of Mediators, an invitation-only membership organization consisting of some of the most successful commercial mediators in the world.

1. Jane Goodman-Delahunty, et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, Psych., Public Policy and Law, 133, 135 (2010).
2. *Id.*
3. *Id.*
4. Eyal Zamir & Doron Teichman, Behavioral Law and Economics, 61-62 (2018).
5. Goodman-Delahunty, *supra* note 1, at 133, 135.
6. Zamir & Teichman, *supra* note 4, at 62.
7. *Id.*
8. *Id.*

9. Alice Solda, *Deceiving Yourself to Better Deceive Others*, Behavioral Econ., February 25, 2022, https://www.behavioraleconomics.com/deceiving-yourself-to-better-deceive-others/ (accessed Jan. 15, 2022).

10. *Id.*

11. Paul Brest & Linda Hamilton Krieger, Problem Solving, Decision Making and Professional Judgment: A Guide for Lawyers and Policymakers, 277 (2010).

12. Jeff Trueman, *Mediation in the World of Commercial Dispute Litigation: An Inside Look at the Challenges for Counsel, Mediators, and Insurance Claims Professionals*, 63 Wash. U. J. L. & Pol'y 207 (2020).

13. *Id.* at 213.

14. *See* Randall Kiser, How Leading Lawyers Think: Expert Insights into Judgment and Advocacy, 173 (quoting an attorney, "Never take a judge's evaluation of your case if you believe in your case.").

15. Trueman, *supra* note 12, at 214.

16. *Id.*

17. Goodman-Delahunty, *supra* note 1, at 153, *citing* Ziva Kunda, *The Case for Motivated Reasoning*, Psych'l Bulletin, 108, 480-498 (1990).

18. *AGLIC v. ACE*, 2019 WL 4316531 (S.D. Tex. Sept. 11, 2019), *aff'd*, 990 F.3d 842 (5th Cir. 2021).

19. *See Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284-85 (7th Cir. 2002).

20. Russell B. Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 Ohio St. J. on Disp. Resol. 281, 303 (2006).

21. *Id.*

22. Jonathan D. Glater, *Study Finds Settling Is Better Than Going to Trial*, N.Y. Times, Aug. 7, 2008.

23. Zamir & Teichman, *supra* note 4, at 79-82.

24. *See* Robert F. Tyson Jr., Nuclear Verdicts: Defending Justice for All, 33-49 (2020).