

## The first principle is not to fool yourself

We spend so much time and money 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.”

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 and manifests in a few ways. First, we overestimate our abilities or likelihood of success. Second, we are overly precise regarding how accurate we think we are about our perceptions and conclusions.

Finally, we over-place ourselves as compared to others. In other words, we think that we are better than average as drivers of automobiles, parents, professionals, etc. In one study, although newly wedded couples acknowledged that the overall divorce rate is roughly 50%, on average, they believed that they as individuals faced a 0% chance of divorcing.

Despite the many ways in which we

JEFF  
**TRUEMAN**  
Commentary



are overly confident, there is variability to the phenomenon and it can be influenced. We are more likely to be excessively optimistic about ourselves when we think in generalized or abstract terms, but when projects involve numerous details that we cannot control, we are less sure of ourselves.

Timing matters as well. When we are overly optimistic at the outset of a project, our confidence level is less likely to shrink – even in the face of contradictory evidence. But we are more likely to change our minds if doubt and pessimism exist at the outset.

Even though we may not like to deal with it in other people, overconfidence has its place within our own psyches. Studies show that it can provide benefits such as greater self-esteem and motivation to do difficult things.

Overconfidence may also be strategically deployed to deceive and persuade others, especially in competitive situations like litigation and mediation of litigated disputes. Each side often

postures with tough talk that predicts ultimate victory, even in the face of evidence that is unfavorable to them. Internal conversations between counsel and client should be nuanced and balanced, but may not be.

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. Usually there is little appreciation of how many consequential factors reside out of any lawyer’s control.

But risk management may be larger than how we perceive uncertainty or value money. Sometimes it’s not about money at all. Many attorneys 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 judges and juries. They believe their actions can determine the outcome of a case. Similarly, clients often feel the same way.

Insurance companies may litigate for reasons not readily apparent to outsiders. Although they can afford to take risks, 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 form of accountability, some institutions blame them or use them as “cover” when corporate politics or an executive’s ego takes priority.

These dynamics 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. Sometimes lawyers have an unshakable confidence in a client’s case for professional reasons and no mediation technique can alter it. If you make it past Feynman’s first principle, I wish you good success.

**Jeff Trueman is a full-time mediator and arbitrator. He can be reached at [jt@jefftrueman.com](mailto:jt@jefftrueman.com).**