## Cognitive Barriers to Valuing Your Case for Settlement or Mediation

# Improving Your Risk Assessment

**by Laura A. Kaster**

Over 95 percent of litigated cases are settled. Indeed, the American Bar Association's landmark study on the vanishing trial established that between 1962 and 2002, the percentage of federal trials dropped from 11.5 percent to a scant 1.8 percent of cases filed.[1] Some members of the bar have, therefore, bemoaned the lost art of trying a case. But there is less discussion, less focus in law school, and even less preparation in practice for settlement, the primary method of actually resolving litigated disputes. Few corporations, insurers, law firms, or individual practitioners invest the needed energy in preparing for settlement or in evaluating and calibrating their own settlement performance and the accuracy of their case valuation.

How can we actually improve the accurate assessment of the value of a case in order to assure that the settlement, whether reached through negotiation or mediation, represents a better alternative for the client than actually trying the case?

In 1981, Roger Fischer and William L. Ury, in *Getting To Yes,*[2] measured negotiation success against the best alternative to a negotiated settlement. In a typical legal dispute, this means the present risk-assessed value of the judgment in a case if taken to trial. This has become the holy grail of negotiation lore. Nevertheless, few lawyers actually engage in a rigorous process to reach or improve their judgments about risk, or to track information that could help them assess whether they are accurately predicting the net present value of their cases at the time they enter into settlement discussions.

We do not engage in rigorous risk assessment or work on improving or calibrating our judgments to improve outcomes because in many cases lawyers do not believe there is a way to improve; they believe that case valuation is simply guesswork.[3]

Even large insurers do not track the information on rejected settlement offers and law firms that have excellent data in their files do not mine it to determine whether their predictions of net present value, and even of fees and costs as a component of that calculation, approximate reality at the end of the day. As discussed below, we know from several important recent studies that lawyers who fail to settle are not accurately valuing their cases.

In 2008, a large-scale analysis of attorney-litigant decision making was published by Randall Kiser of DecisionSet, and Martin Asher and Blakely McShane of the Wharton School. Supported by both earlier and later studies, *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*[4] analyzed over 2,000 cases in which one party rejected the other's final demand or offer and proceeded to arbitration or trial. The study addressed whether the party refusing to settle obtained as good a result after trial as the result they would have achieved had they accepted the demand or offer that was rejected—even without factoring in the cost and fees associated with trial.

The study compared the proposed settlement number with

the eventual verdict.[5] What they found was startling.

The results demonstrate that plaintiffs committed decision error in 61.2 percent of their cases. That is, in over 60 percent of the cases where settlement was refused, the plaintiffs received an award at trial that was equal to or less than the defendant's settlement offer.[6] Defendants made a decision error in 24.3 percent of the cases, paying more at trial than the last settlement offer made by the plaintiff.[7]

But the magnitude of error was very different. While on average, verdicts for plaintiffs were $43,100 less than the average offer, defendants paid on average $1,140,000 more than they could have to settle the case.

Randall Kiser recently studied New York cases and confirmed these results by demonstrating that the defendants' mean cost of error is roughly 19 times the plaintiffs' decision error.[8] Adding in the costs and attorneys fees, most of the cases examined should have arrived at a zone of possible agreement had the attorneys involved been able to accurately assess the value of their cases.

## Why Are We Making These Errors?

The underlying reason for poor risk assessment is that our brains get in our way. Our unconscious biases, heuristics, and reactions so color our assessment that we literally become blind to visible and knowable risk. This information is no secret. Business schools offer courses in improving judgment. Nobel laureates have been publishing on the subject for at least 30 years.[9] In addition, a great deal of popular literature explains these cognitive barriers in the context of economic and policy decisions.[10]

But despite the fact that the subject matter of law schools is judgment, lawyers are behind the curve in exploring the science that has developed on the formation of judgment and how to use it to improve client outcomes.

It is critical to understand that these are unconscious influences; by definition we are not aware of their impact on our thinking. But the results are evident and powerful, and they have a direct bearing on a lawyer's ability to accurately assess the risks of trial and even to conduct settlement negotiation and participate productively in mediation.

One potent example that influences both the formation of a judgment about the value of a case and the approach to negotiation is anchoring. Many studies have confirmed the effect of anchoring on decision making. You can do this little experiment yourself. Take the last three digits of your phone number—write them down. Now answer the following question: When do you think Attila the Hun sacked Europe? Was it before or after the year that those three digits represent? Write down before or after. Now write down your best guess at a date.

The actual year is 451 CE. Typically in exercises like this one, the disparity in the guesses (because this doesn't work if you know the answer) is approximately 300 years between people who had phone numbers beginning with six or higher and those with low phone numbers beginning with four or less.[11] In anchoring and adjustment, you typically start with a number you know and then adjust in the direction you think is appropriate. But the bias is that you do not adjust enough; you are tied to the anchor. Thus, people from Chicago consistently overestimate the population of Milwaukee while people from Green Bay underestimate it.

Although you know your phone number has nothing to do with the year in which an historic event occurred, the unconscious impact of a number you have focused on recently is enormous. So too, a recent event, a number the client or the client's spouse arbitrarily mentions, or some number a team member simply states he or she aspires to, may have a tremendous and unwarranted impact on how lawyers value their case.

The same phenomenon counsels against the typical belief that it is always better to have your opponent suggest the first number in a negotiation or mediation. Because that first number may anchor the discussion, you may want to consider being the one to do the anchoring.

Other unconscious cognitive barriers together cause attention blindness or selective attention. The author calls the confluence of the circumstances that impair litigators' judgment 'client think'. It is a version of the phenomenon Irving Janus defined as group think.[12] But for litigators, a large group is not needed. Janus based his study of group think on the Bay of Pigs fiasco during the Kennedy administration. He determined that the poor judgments arrived at were a product of the process of group decision making.

He identified the following symptoms of group think:

1. The group feels it cannot fail.
2. The group rationalizes away disconfirming data and discounts warnings.
3. The people in the group believe they are inherently better than their rivals; the opposition is stereotyped.
4. Dissent is discouraged, overtly or covertly.
5. The group comes to the belief that it unanimously supports a particular proposal without necessarily asking what each individual believes.
6. Individuals self-censor. Few or no alternatives are discussed and people do not surface risks or seek outside expertise that has no vested interest.

This description fits many client/lawyer teams faced with bringing or defending suit. After all, even the solo lawyer becomes a team with the client and knows the desired outcome. The natural consequence of attorney/client relationships is magnified by the change in

the general view of the profession—from counselors to hired guns. If the client communicates the expectation of hearing only positive views, and the ability to go elsewhere if unsatisfied, client think is even more likely. Other cognitive impacts include the product of overconfidence (the mistaken belief in the accuracy of our predictions),[13] and sunk cost biases.[14] These are all worthy of further examination and understanding, and have significant impact on decision making.

Together, all of these and other cognitive barriers coalesce to actually impair our ability to fully see and therefore evaluate the evidence before us. If you have any doubt that you can miss information because you are concentrating on (or biased by) something else, look at a YouTube presentation called the "Monkey Business Illusion," by the authors of the *Invisible Gorilla*. It can be found at www.theinvisiblegorilla.com/videos.html.

### How Can We Improve?

We are all subject to these unconscious impediments. We don't realize it, obviously, because they are unconscious.

So what can we do to improve our judgment in valuing our cases? How can we improve our chances of seeing and weighing risks?

First, we need to improve our chances that we will actually perceive damaging information. We need to see things from the opposing perspective to avoid attention blindness. If you have a team of attorneys working on discovery, one member of the team should be assigned to be the devil's advocate, to truly adopt the role of the other side and to review documents, depositions and legal developments with that perspective, alerting the client and lead lawyer directly and actually providing the damaging or dangerous document or testimony, without gloss or explanation. This requires giving that person real authority and an understanding by the entire team that the assignment is really forwarding the team goals.

Use of the devil's advocate should not await a mock jury at the end of the case; it needs to be ongoing. Ask the client to role play as the opponent, and give what he or she thinks will be the opponent's reaction or testimony. Try to get intelligence on the other side's views. These methods, or having an independent expert or a person who does not know what side you want supported evaluate the evidence, are ways to stymie attention blindness.

To calibrate your ability to predict the cost of litigation and the accuracy of your risk assessment, start systematically recording offers by yourself and your opponents and then keep a record of the final result at trial or settlement. Keep tabs on your estimates of fees and costs and then compare them to the actual results dating from the time of the settlement offer forward. (Don't count sunk costs.) Encourage your colleagues to do the same. Examine the reasons for discrepancies and try to calibrate your predictive accuracy.

Make it a firm policy to give and get feedback on settlement positions. In other words, become as methodical in preparing for settlement as you are in preparing for trial. Establish and follow a method for collecting and evaluating information and countering cognitive biases. Remember that the biases will sabotage these efforts, so make them routine, get early client buy-in, and develop a system that confirms that the procedures you establish are followed.

You can have better information—less blurred by attention blindness—even early in the case. Once you have better information, you will be in a better position to assess risk going forward and to use that risk assessment to calculate the net present value of a potential award less the costs of going to trial. Accordingly, you will position yourself for obtaining greater negotiation and mediation information, and improving strategy and client results. ⚖

### Endnotes


1. Patricia Lee Refo, The Vanishing Trial, 30 *ABA Litigation* 2 (2004).
2. Roger Fisher and William L. Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (Penguin Group 1981).
3. In an excellent piece on using decision trees and other methods to assist in valuing patent cases, the authors nevertheless refer to the critical component, the risk assessment, as guesswork. Christopher J. Renk and Erik S. Maurer, *Setting Goals, Managing Expectation and Estimating Cost in Patent Litigation,* www.bannerwitcoff.com/_docs/library/articles/assessingrisks.pdf.
4. 5 *Journal of Empirical Legal Studies* 551 (2008).
5. *Id.* at 563.
6. *Id* at 566.
7. *Id.*
8. Randall Kiser, *Beyond Right and Wrong* (Springer 2010).
9. *E.g.,* Amos Tversky and Daniel Kahneman*, The Framing of Decisions and the Psychology of Choice, Science* (1981).
10. Such as Richard H. Sunstein and Case R. Thaler, *Nudge* (Yale 2008), and Christopher Chabris and Daniel Simons, *The Invisible Gorilla and Other Ways Our Brains Deceive Us* (Random House 2010).
11. *E.g.,* Thomas Gilovich, Dale W. Griffin and Daniel Kahneman, *Heuristics and Biases: The Psychology of Intuitive Judgement*, 122- 126, 136-137 (Cambridge U. Press 2002).
12. Irving Janus, *Victims of Group Think* (2d Ed. Houghton Mifflin 1982).
13. Jane Goodman-Delahunt, Pär Anders Granhag, Maria Hartwig and Elizabeth Loftus, "Insightful or Wishful: Lawyer Ability to Predict Case Outcomes," *Psychology, Public*

*Policy & Law* (May 2010) (finding that litigators (particularly male litigators) are overly optimistic in the predictions of trial outcomes and the higher the level of confidence in their predictive capacities, the more likely they were to fall short of their goals.) *See also Nudge* at 31-33.

14. Sunk costs are retrospective (past) costs that have already been incurred and cannot be recovered.

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