



How Well Can You Predict the Outcome of Your Case?

By Jessica Hoffman, J.D., M.A.

In my years of studying jurors, I have come to find attorneys just as intriguing. Attorneys know their cases extremely well. So well, in fact, that it hampers their ability to predict the case outcome, which ironically is precisely the thing for which they study the case so intently. The objective of taking on any case is to win – whether that means a good-sized settlement, a motion to dismiss, a protective order, or a verdict at trial. Attorneys work countless hours toward that objective, but in becoming so familiar with the case, they become dissociated from the people who are deciding the case and are hearing the facts for the first time. Things that became important to the attorney over the course of time and which he/she thinks are the cornerstones to the case can be completely irrelevant to listeners, such as mediators, jurors, or judges, who have much less familiarity with the case. If the purpose is to persuade these listeners, attorneys need to learn to rely on strategies for preparation other than their own intuition.

Attorneys consistently make decisions about their cases based on their own predictions. They decide whether to mediate, whether to take a settlement or reject it, and whether to proceed to trial all based on their inner predictions. If attorneys are poor predictors of case outcomes, they may accept low settlement figures or reject adequate offers to settle. To become better attorneys and better serve clients, attorneys need to become more accurate predictors. One way of doing so is learning whether previous predictions were correct. Mock trials can test these predictions, as can post-trial juror interviews.

People as a whole often either over or underestimate their abilities on tasks. This is not specific to attorneys. Many attorneys are overly confident in their abilities to predict outcomes. This is due to many factors. Attorneys are supposed to be advocates for their clients. In doing so, attorneys display a confidence about their position. This confidence can, over time, skew the attorney's reasoning and make him/her overly confident about the likelihood of success. It is human nature to become more confident in a goal when expressing confidence to others. The more one espouses one's beliefs, the stronger those beliefs become. Further, attorneys wish for a good outcome. In wishing for something, they convince themselves that it is true. This is a strength for zealous advocacy but a weakness when it skews the attorney's ability to predict and therefore make sound decisions. Attorneys may also exhibit overconfidence due to a failure to recognize that they are not fully in control of the outcome. Judges, mediators and jurors have their own minds. To the extent that attorneys do not incorporate those individuals' control over the outcome, they disillusion themselves in making decisions or forming strategies.

A study done by Goodman-Delahunty, Granhag, et al., tested attorneys' abilities to predict case outcomes.¹ Participants consisted of 481 litigating attorneys, the great majority of which were civil litigation attorneys. They asked the attorneys what a win situation would be in terms of a minimum goal for the outcome of the case. They also asked what the attorney's degree of certainty was for achieving

*Continued from page 42***Case Name:** *Shannon Jones v. Francis Ferrer***Court Name:** Denver District Court**Case Number:** 2009 CV 5358**Trial Judge:** M. Mullins**Date of Verdict:** May 4, 2010**Verdict Amount:** \$25,000 total; \$4,522 medicals; \$12,878 non-economic; \$7600 physical impairment**Facts of Case:** Rear-end MVA at speed between 30 and 40 mph. Negligence admitted; causation and damages disputed. The defense made a statutory offer of \$16,500.**Injuries/Damages Claimed/Amounts:**

C5-6 herniation; L5-6 spondylolisthesis; shoulder pain; occipital headaches radiating to left crown; meds of \$4,522.00; 0 lost wages.

Unique Issues: Avid equestrian - competitive horse-jumping ability now limited by injuries.**Plaintiff's Attorney:** Scott Armitage, Paulsen & Armitage, Westminster**Defense Attorney:** Nina Hammon Jahn, Joel Varnell & Assoc., Denver**Plaintiff's Expert:** Scott Stanley, MD orthopedic surgeon, Denver-Vail Orthopedics, Lonetree; Tara Fischer, PT, Rocky Mountain Spine & Sport Therapy, Littleton**Defendant's Expert:** none**Insurer:** Farmers**Email:** scott@armitagelaw.com*Continued on page 46*

that minimum goal or better. In 32% of the cases, the outcome matched the minimum goal set by attorneys. In 24% of the cases, the outcomes exceeded the attorneys' minimum goals. In by far the majority, 44% of the outcomes were less satisfactory than the minimum goals. In a large proportion of the cases where the attorneys did not meet minimum outcomes, they erred on the side of being over confident. Further, the higher the confidence level, the farther off the attorney's prediction was from the outcome. The study also found that experience had no effect on the ability to predict case outcomes; experienced attorneys were no better at predictions than were inexperienced attorneys.

If attorneys are so bad at predicting case outcomes, thereby often making poor decisions regarding their handling of the case, how can attorneys do a better job for their clients and themselves? The answer lies in relying on input from people who are not handling the case. Attorneys are too ingrained in the case to predict what the decision-makers will do with the evidence. Focus groups and mock trials give attorneys an opportunity to test their predictions and to see what people distanced from the case find important. If done before mediation, focus groups and mock trials can direct the attorney as to whether to settle and what range of settlement figures are acceptable for that case based on what jurors would do at trial. Without the input from outside sources, the majority of attorneys will make decisions that will create an outcome that is less favorable than even their minimum goals.

Jessica Hoffman is an attorney and trial consultant at Huff & Leslie, LLP. Nationally renowned trial consultant David Ball, Ph.D., trained her and mentored her for three years. She specializes in helping attorneys shape their cases through strategy sessions, editing opening statements and closing arguments, aiding in jury selection and running focus groups and mock trials. You can reach her at jhoffman@huffandleslie.com or 303-232-3622.

¹ Jane Goodman-Delahunty, Pär Anders Granhag, Maria Hartwig & Elizabeth F. Loftus, *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCH., PUBL. POL. & LAW, 133-157 (2010).

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