

Don't be so sure!

Strategies for avoiding the perils of certainty and overconfidence in litigation, mediation and life.

By Robert H. Barron



Humans are dreadful at estimating the probability that we will be successful.

“Doubt is not a pleasant condition, but certainty is an absurd one.”

— Voltaire (1767)

Humans are predisposed toward certainty. This predisposition is hardwired. No matter how many times our unanticipated outcomes forcefully remind us that the only thing that is certain is that nothing is certain, we are still drawn to certainty. This affliction is called certainty bias.

Unfortunately, when an outcome is not certain, humans are dreadful at estimating the probability that we will be successful. We invariably focus on success and underestimate the potential for failure. But, if we are drawn to misplaced certainty and are also unable to accurately estimate probabilities that are less than certain, what is a human (and a lawyer) to do?

The purpose of this article is to remind us to suspect our feelings of certainty, illustrate the difficulties in estimating the probability of success, identify some of the root causes of misplaced certainty and poor estimations, and suggest strategies to help us resist certainty and better estimate probability.

Certainty bias is our psychological propensity to believe things with certainty that are



objectively uncertain. We come across certainty bias every day: an herbal remedy that works wonders, though its efficacy has never been tested; a big bet on the outcome of a can't-lose game; a case where the facts are clear and the law dictates a successful outcome. But remedies sometimes fail, all teams lose games they should win and some of the strongest cases go south.

One of the reasons we are susceptible to certainty bias and overconfidence is that, as Voltaire pointed out, feeling uncertain is uncomfortable. To avoid that discomfort, we unconsciously lean toward the psychological state that makes us feel better — certainty.

This overconfidence is exacerbated by the fact that we are smart (hopefully we all

believe we are smart) and we naturally want to be right. In the face of information that contradicts our position, we should wisely reassess the likelihood that we are correct. However, because we are smart and invested in our beliefs, we are susceptible to formulating creative paths around contradictory information. This allows us to discount the new information and maintain the certainty of our conclusion. Not so smart.

The terminology behind certainty does not help. In mediations, parties sometimes tell me that their case is a “slam dunk.” I ask them the likelihood of success in the NBA of making a slam dunk. The answers generally hover in the high-90% range. According to the NBA Miner website, the likelihood of making a slam dunk is 89%. Not bad, but not certain.

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In the context of litigation, we have all heard of cases that appeared to be clear winners but did not go as planned. When I discuss a “slam dunk” issue or case with a party, we normally agree that such a case has about a 75% chance of success. Again, pretty good, but far from certain.

One of the factors that cause us to overestimate the strength of our positions or beliefs is that the more we know about our position and the more invested we are in the outcome, the more susceptible we are to certainty bias. We’ve done the work — we know we are right!

This overconfidence is fueled by the fact that we give too much weight to the information we have and do not sufficiently consider the potential impact of information we do not have. We do this because it is far easier to build a strategy around what we know than to imagine potentially dam-

aging scenarios and the ways they might impact our plans for success.

Witness testimony is a good example. We build a strategy around what we know our witnesses will say. Have you or anyone you know had a witness fall apart on the stand or reverse his or her testimony? Probably. Do you thoroughly consider what your case will look like if one or more witnesses fall apart and assess your case with that possibility in mind?

Another psychological dynamic that prevents us from accurately assessing the likelihood of success is our fear of considering failure. Who wants to fail? Who wants to think about failure? Nobody! We want to think about and plan for success.

Considering failure brings out some of the same visceral physical responses that come with actual failure. However, by forcing ourselves to consider failure in all of its inglorious permutations, we will be in a better position to accurately assess our position and we will improve our chances of a successful outcome.

There are a variety of strategies that can help us challenge our certainty and overly optimistic beliefs. My favorite approach is to ask the following: A year from now, when we are reviewing why our plans failed, what are we talking about? This forces us to consider a future of failure and to identify the paths we could plan for today to reduce the chance of failure tomorrow.

A more refined term for this approach is scenario planning. In scenario planning, you identify the potential outcomes that a strategy or approach can take, for better and, importantly, for worse. You then identify the controllable and uncontrollable factors common to each scenario that are critical to increasing the likelihood of a positive outcome.

This approach serves two purposes. First, it allows you to identify the key controllable

factors. You then develop a plan that positively influences the controllable factors and therefore maximizes the likelihood of a positive outcome. This planning process will also help you understand how easy or difficult it will be to control those factors.

Second, this approach forces you to consider the uncontrollable factors that can lead to failure or to a level of success that falls far short of your expectations. While you may not be able to influence the uncontrollable factors, neglecting to consider them is one of the biggest blind spots you need to remove when estimating the likelihood of success.

Another way to use scenario planning is to identify a range of three to six future scenarios ranging from best to worst outcomes. You then put a percentage likelihood on the occurrence of each scenario so that the total for all the scenarios adds

up to 100%. You then use those percentages as a template for assessing the likelihood of substantial success, moderate success and failure.

In mediations, I sometimes separately ask parties to identify three possible economic outcomes if the plaintiff wins the case; a reasonably high, moderate and low outcome. We then put a percentage likelihood on those three outcomes and combine that calculation with the percentage likelihood that the plaintiff will lose the case. We then use that calculation to assess the value of offers and demands against the percentage likelihood of success. This helps the parties focus on the fact that success and failure are relative and helps them better consider the attractiveness of each offer.

Another strategy for challenging overconfidence is to seek an outsider's view of the case. This generally involves talking to an

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attorney at your firm or another attorney who handles similar cases. The problem with this approach is that you are asking someone whose background and approach may be similar to your own — certainly helpful — but not the most helpful source for outside advice that will challenge your level of confidence.

The trick is to hear from outsiders whose approach differs from yours, as they will be more likely to see potential problems you may have missed. A mediator's job is to fill this role by discussing and challenging assumptions. Another approach is to talk to an attorney from the opposite side of the bar who can bring a perspective that is 180 degrees from your own.

And, finally, life. We are every bit as susceptible to certainty bias in our day-to-day activities as we are in our business dealings. Some might argue that we are more susceptible. Who knows more about us and is better at making decisions for us than us?

The reasons for our overconfidence in life are the same as those in litigation. Luckily, the solutions are the same as well. Take a moment before making a significant life decision and entertain the potential for failure. It can be a scary undertaking, but

not as bad as actually failing. Consider alternative scenarios where events do not go as planned. Talk to someone who can offer another perspective.

However, none of these strategies will improve your ability to better assess your positions unless you embrace the possibility or perhaps, dare I say, the "certainty" that you are overconfident. If there is only one take away from this article, it should be that any time you feel certain, any time you feel confident, take that critical step back and ask: But could I be wrong? ☞

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