



MICHAEL R. DILIBERTO, ESQ.



Risky Business

Most cases settle to avoid risks inherent in taking a case to trial. We decide whether to accept a settlement today, versus a likely result at trial, in light of risk factors that may be beyond our control. But can we control our biases that allow us to miscalculate the true risk level, causing us to leave money on the negotiation table?

A recent malpractice lawsuit filed by Playboy against its former litigation counsel in Los Angeles alleges that Playboy was not adequately informed about the risk of defending a wrongful termination action at trial. In the complaint, Playboy alleges its attorneys advised (1) Playboy had a 75 percent chance of defeating the claims; (2) only one-third of mock jurors found against Playboy; and (3) Playboy's exposure was less than \$3.3 million. Ultimately, the jury returned a verdict of \$6 million against Playboy, with punitive damages and attorney fees to be determined.

Playboy also alleges its lawyers failed to advise Playboy to accept two earlier settlement demands that were within insurance policy limits, and that the case could have settled for \$1 million before trial. The law firm "made a wildly optimistic evaluation of the likelihood of success," argued Playboy.

In another recent case, a former Reddit CEO sued her previous employer, Kleiner Perkins, for discrimination, seeking more than \$16 million. Confident that she could do better at trial, plaintiff rejected a seven-figure settlement offer, then lost at trial. She incurred \$2.7 million for her fees and costs, and owes Kleiner \$276,000 in costs.

What makes us overlook risk and maintain a rosy outlook despite contrary evidence? "Confirmation bias" is a trap. It leads us to seek out information that supports our point of view and avoid information that contradicts it. The mind fixes on a theory of the case, and then looks for confirming evidence. It's easier for us to process affirming information rather than negative information. This can explain why someone who thinks they have a winning case may ignore compelling evidence to the contrary. Negotiators are subject to the same biases.

We also tend to be more confident in our judgments and knowledge than objective facts would support. Studies typically show that 67 to 96 percent of people rate their own skills as better than those of their peers. Social scientists believe that overconfidence is an adaptive trait that has become an integral part of the human psyche, resulting in a bias of "positive illusions."

So how do you make better decisions and avoid the confirmation bias trap? Professors John S. Hammond, Ralph L. Keeney and Howard Raiffa suggest the following:

1. Have someone you respect test your decision, to argue against the decision you're contemplating. Or, build the counterarguments yourself. Rank the alternatives and consider the position with an open mind.
2. Be honest with yourself. Are you really gathering information to help you make a smart choice? Or are you just looking for evidence to confirm what you're thinking?
3. Expose yourself to conflicting information. Examine all the evidence and don't be soft on the disconfirming evidence.
4. In seeking the advice of others, don't ask leading questions that invite confirming evidence.