MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

Mediation Notes

July 2019

Overcoming Bias in Dispute Resolution

I participate in mediations across the country. Mediation cultures vary, as I have written about previously, but one constant is the view by the lawyers that trial is the "aim" and a litigated conclusion is somehow expected to occur. As if settlement is sort of an unexpected, but begrudgingly agreeable, detour from the intended path. There is a tendentiousness in the bar favoring trial, "unless by chance we settle." Cost, pain, delay, and uncertainty inherent in resolution by trial and trial preparation is discounted by lawyers for many reasons. Typically, we do not share our clients' pain—absent a high degree of empathy, which research shows is lacking in many lawyers (Myers-Briggs Inventory scores reveal many INTJ's).[1]

Inherent in trial-centric representation is an inverted probability assessment. While lawyers are focused on trial preparation and formal discovery, only two percent of filed cases reach trial, while the overwhelming majority settle. The data would clearly suggest the mindset should be, "The case will settle if not dismissed by motion, and it will only go to trial in rare circumstances." Metaphorically, lawyers are spending a lot of time and money gathering and saving all of the relevant documents to PDF folders, anticipating trial exhibits, when in almost every case, we create and share WORD documents to reach a settlement agreement.

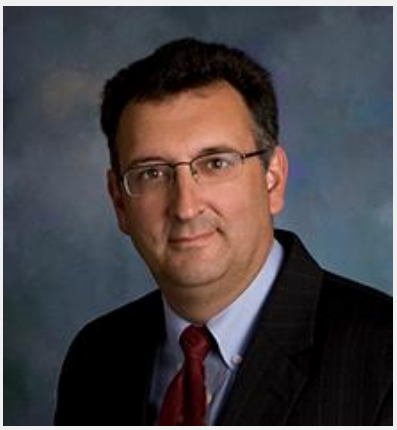
Confirmation bias is a another problem with some clients and carriers. This means the lawyer and client acquire a view of the dispute and seize upon information that confirms their initial opinion or assumptions and simultaneously disregards data that is contrary to their opinion or beliefs. Evidence challenging these beliefs is out there, but lawyers and clients intellectually "shelve" the contrary evidence that contradicts their vision of the case.

Larger institutions with multiple decision-makers have a bigger problem because of the number of people who have adopted the articulated theme or shared perception of the case. Shared beliefs are much harder to challenge and change than beliefs of lone individuals. (More people drinking the Kool-Aid makes the Kool-Aid seem okay). Collective adhesion to an idea or perception is harder to break. (Organizations for atheists have a hard time with consistent participation because they don't go to a house of worship regularly to reinforce their beliefs). A heartfelt and shared belief is very hard to change. That's why pre-mediation submittals are so critical. Usually the defenses are harder to develop and harder

for the client to understand than is the case-in-chief the plaintiff has to prove. Defendants need time to articulate their defenses and for the plaintiff to digest the facts supporting the defenses. The facts and messaging has to come well before mediation, not on the day of. The contrary facts or data have to stew a little while in the head of the person you are trying to persuade. Confirmation bias gets worse as you approach trial because you will have invested more money and mental energy reinforcing the story you seek to tell.

We are all well advised to be cognizant of our trial bias and have a heightened appreciation for lawyer activity that truly assists in moving toward a foreseeable negotiated resolution versus activity that is singularly related to trial preparation and rarely obtained verdicts.

[1] https://www.verywellmind.com/intj-introverted-intuitive-thinking-judging-2795988



Should you have additional inquiries, please contact:

David W. Henry, Esq.

Florida Supreme Court Certified Circuit Civil Mediator

Member, National Association of Distinguished Neutrals

Landmark Center One | 315 E. Robinson, Suite 550

Orlando, FL 32801

407.420.4418

dwhenry@mdwcg.com

*Please contact us for in-house mediation training and CLE programs designed for law firms, insurance professionals and in-house counsel.

Marshall Dennehey Warner Coleman & Goggin

www.marshalldennehey.com

Contact Us

The material in this newsletter has been prepared for our readers by David W. Henry, shareholder at Marshall Dennehey Warner Coleman & Goggin. The views of the author do not necessarily reflect the views and opinions of Marshall Dennehey Warner Coleman & Goggin, and the newsletter is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.

ATTORNEY ADVERTISING pursuant to New York RPC 7.1 © 2019 Marshall Dennehey Warner Coleman & Goggin. All Rights Reserved.