LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
FRIDAY SEPTEMBER 4, 2026

The peril of certainty in mediation, part 1

Confidence helps lawyers try cases. Certitude makes them misread risk, misprice settlement and mistake compromise for surrender.

By Greg Derin

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"I detest a man who knows that he knows," Oliver Wendell Holmes Jr. wrote to his friend and correspondent Harold Laski. Holmes was describing a personality flaw, but the warning fits litigation precisely. The danger is not conviction; it is the point at which conviction makes further inquiry feel unnecessary.

I have watched that posture at the mediation table for 24 years. Litigants, and occasionally their counsel, arrive convinced not merely that their case is strong, but that no reasonable judge, jury, arbitrator or adversary could see it any other way. This is not a rare affliction or the sign of a difficult client. It is a common condition among people who have lived inside a dispute long enough to have a stake in its outcome.

The behavioral economics literature has a name for this phenomenon. In "Self-Serving Assessments of Fairness and Pretrial Bargaining," a study that has become a staple of negotiation scholarship, George Loewenstein, Samuel Issacharoff, Colin Camerer and Linda Babcock reported that when both sides in a simulated pretrial dispute evaluated the same underlying facts and predicted what a judge would award, plaintiffs' predictions ran substantially higher than defendants' — not because either side had better information, but because each had absorbed the same facts through a self-interested lens. Most strikingly, the authors found that the self-serving gap was substantially greater among bargaining pairs that failed to settle than among those that did. In other words, certainty is not simply a byproduct of a strong case. It is manufactured by the position itself and can be one of the more reliable predictors of impasse.

Nothing is a given

Mediation does not ask a client to surrender conviction. A party may have compelling evidence, favorable law and a justified sense that the other side is wrong. But a strong case is not a guaranteed result. Counsel's task is to hold two ideas at once: advocate vigorously on the merits while recognizing that outcomes depend on imperfect evidence, fallible decision-makers and unpredictable judgment.

Certitude has a recognizable vocabulary: The other side is lying. The email proves intent. No rational fact-finder could reject our damages model. The opening offer is an insult, not information. Any compromise is betrayal.

Confidence permits analysis; certitude forecloses it. Once a client experiences the merits as self-evident, risk stops resembling risk, the other side's account becomes corrupt rather than disputed, and settlement starts to feel like capitulation.

Daniel Kahneman, in *Thinking, Fast and Slow*, described a related trap he called the illusion of validity: the more coherent a story feels from the inside, the more confidence it generates, regardless of how much evidence actually supports it. A trial narrative rehearsed for months, repeated to colleagues and believed by the client can feel airtight precisely because it is familiar, not because it is correct. The mediator's task is to reintroduce what certitude has crowded out: contrary evidence, uncertainty and another point of view.

The case counsel sees versus the case a skeptic might see

Every experienced trial lawyer knows that even a strong case carries risk. A credible witness may not be believed. An ambiguous document may read differently to someone else. A judge may resolve a discretionary issue the wrong way. A jury may find liability and still gut the damages. A favorable judgment may be delayed, appealed or hard to collect. None of this means that a case is weak; it only confirms that litigation requires prediction, not prophecy.

Socrates offered a useful discipline: distinguishing what we know from what we merely think we know. A client may know the facts as lived and still not know how a skeptical fact-finder will read them.

Before mediation, counsel should prepare the client for two cases — the one counsel will present and the one a skeptical decision-maker might see — using four questions: What is the other side's strongest fact, document or witness? What will be hardest to explain away? What must the fact-finder accept for a high-end result? If the key issue breaks the other way, what happens to liability, damages, cost, timing and leverage?

From there, counsel can name three potential outcomes: the best realistic result, the most likely result and a plausible adverse one. The point is not to frighten the client into settling. It is to separate what is known from what is inferred, what is hoped from what is likely.

When the dispute is not about the money

Not every hard negotiation is entirely about the law or dollars. Daniel Shapiro, founder and director of the Harvard International Negotiation Program, writes in *Negotiating the Nonnegotiable* about conflicts that become emotionally nonnegotiable. In such cases — where compromise may feel like a threat to identity, dignity or relationship, not merely to the balance sheet —the client is not only saying, "Their valuation is wrong." He or she may be saying, "They are trying to erase what happened."

Shapiro calls the resulting dynamic the "Tribes Effect": an us-versus-them mindset in which the other side becomes not merely wrong but morally suspect, and any sympathy for their position starts to feel like disloyalty. A client caught in that mindset will spend well past the economic value of the claim, because the negotiation has become about vindication rather than money.

In an earlier book, *Beyond Reason: Using Emotions as You Negotiate*, Shapiro and Roger Fisher identify five "core concerns" that are responsible for many, if not most emotions in negotiation: appreciation, affiliation, autonomy, status and role. A client who feels unheard, controlled, disrespected or cast in an unwanted role may not be able to evaluate a settlement in financial terms at all — until someone names what else is actually at stake. And here, certitude compounds the problem: a client who is "certain" of the legal merits and unaware of the identity stakes beneath them will read every settlement number as a verdict on the wrong question.

Conclusion

Diagnosing certitude as an obstacle is the harder half of the equation, and it does not resolve the problem on its own. Knowing that a client is entrenched in a certain mindset, and knowing why, is not the same as knowing how to overcome the problem before the parties commence a mediation session. In part 2 of this series, we will explore seven specific steps counsel can take, well before mediation begins, to test for certitude and shift a client's mindset while there is still time to make a difference.

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