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PROFESSIONAL RESPONSIBILITY

Lawyers, leave the odds to Vegas

By Hon. Jay C. Gandhi

When it comes to mediation, counsel typically adopt a well-worn approach. They author persuasive briefs, craft effective presentations, and calculate settlement targets — all rooted in the righteousness of their client's position. But at this juncture, prudent counsel also need to take a moment to pause their advocacy to fully and objectively calibrate their assessments. This will assist their clients in making the informed, tactical decision of whether to settle or proceed to trial. In other words, counsel should accurately and thoroughly advise clients of what often seems inconceivable at the time: The judge or jury may find *against* the client.

Be it plaintiff or defendant, counsel that overlook or underestimate this *innate*, *ever-present* risk do so at their own peril, and may invite unintended consequences. The recent allegations advanced by Playboy Enterprises Inc. against Sheppard, Mullin, Richter & Hampton LLP serve as a cautionary reminder about overestimating a client's odds at the so-called courthouse casino.

In April, Playboy filed a professional malpractice action against its former litigation counsel, Sheppard Mullin, in Los Angeles County Superior Court. The magazine company seeks at least $7.6 million in damages. Playboy contends

Playboy founder Hugh Hefner in Los Angeles. Associated Press

the law firm exposed it to millions of dollars of damages by encouraging Playboy to take an underlying wrongful termination action to trial rather than advocating for settlement.

According to the complaint, Sheppard Mullin defended Playboy in the underlying lawsuit brought against the company by a former employee. Playboy alleges it was motivated to proceed to trial because the law firm 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 $3.5 million. Notwithstanding Sheppard Mullin's predictions, Playboy allegedly lost "in speculator fashion" and the jury returned a verdict of $6 million in compensatory damages, plus an entitlement to punitive damages and attorney fees.

Post-trial, Playboy negotiated a settlement with the plaintiff that "left a liability well in excess of the [insurance] policy limit." Playboy alleges it was not properly informed of the risks of an adverse jury verdict. Playboy also alleges the law firm failed to recommend that Playboy accept two earlier settlement demands by the plaintiff that were within the company's insurance policy limits, instead giving rosy projections about what would occur at trial.

Sheppard Mullin has publicly denied the claims and has asserted it expects vindication. It surely has a different assessment of the events leading up to trial, and the firm is likely to vigorously defend against the malpractice claim. The case is at the preliminary stages, and observers will have to stay tuned to see whether either party emerges as the victor, or perhaps a sensible settlement is achieved.

Regardless of the outcome, one principle remains plain. The allegations in the Playboy lawsuit are an admonition that any attempt to calculate the probability of a favorable versus an unfavorable litigation outcome is prone to error, and poses hazards to counsel endeavoring such divinations. Indeed, in a 2010 study of the ability of litigators to predict the outcome of their own cases, researchers concluded that litigators are systematically overconfident and poor forecasters, more prone to self-bias and wishful thinking than acting as profes-

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sional bookmakers. Goodman-Delahunty, J., Granhag, P., Hartwig, M., & Loftus, E., "Insightful or wishful: Lawyers' ability to predict case outcomes," Psychology, Public Policy, and Law (2010).

These cautions exist regardless of whether one sits on the plaintiff or defense side. A bullish expectation of a future recovery that results in a defense verdict may leave plaintiffs — who were banking on a payday — feeling less than satisfied and believe they were led astray by their counsel; equally true, defendants who forewent settlement and proceeded to a losing trial may target counsel. And such cautions should be taken soberly by counsel, as professional malpractice cases pose the danger of severe financial consequences, reputational harm, and unflattering press coverage — the trifecta of litigation pain.

So what are the chief takeaways for litigation counsel preparing clients for mediation or other settlement discussions? Counsel should remain mindful that there is no precision in trial work and may want to adopt these prophylactic measures:

1. Leave the odds for Vegas.

Astute counsel should repeatedly remind clients that litigation is inherently unpredictable, and memorialize that advice in writing. Even using mock juries, hired consultants, and prior trial experiences, skilled counsel may be ill-equipped to predict how any specific judge or jury will respond to a certain set of facts and arguments. While counsel often are solicited to provide such predictions, any prognostication should come with the caveat that no counsel has a crystal ball. Judges and jurors think differently. An experienced, unbiased mediator — intimately familiar with the "house" — can supply invaluable insights in this regard.

2. Settlement has the benefit of control.

Even the most confident of counsel should remain ever heedful of the non-pecuniary benefits of settlement. Notably, the client is able to control his, her or its own destiny and not leave it in the hands of an overworked, harried judge or the vagaries of pooled strangers from all walks of life. Also, a major distraction is removed and the client can turn his thoughts and labors to more worthwhile professional and personal pursuits. Further, settlements can remain private, the lengthy trial and appeals processes are shortcut, and the considerable costs of motion practice, discovery and/or trial are saved and can be invested into more profitable ventures. While some of these aspects may not readily lend themselves to a dollar value, counsel should stress the considerable value of such advantages.

3. Have the carrier pull up a seat.

Insured clients that have tendered their defense to the insurer may be in a special position in light of certain rights they may have against their insurer given a particular settlement demand. The nuanced possibilities of conflicting interests that may arise is beyond the scope of this piece, but the key lesson is that counsel should be mindful to have the carrier at the table.

Even the most measured of lawyers may face malpractice lawsuits from disgruntled clients. But lawyers can protect themselves and minimize risk. Next time a client asks, "What are my odds?" remember a trial remains a game of chance and often with no second bets. And both winning and losing is a part of gambling and fully inform the client, in writing, of all the costs and benefits of a certain settlement versus an uncertain trial.

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