

## **Setting a Course to Mediation Success: Addressing Excessive Optimism About Litigation Outcomes**

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Our last two articles discussed how Navigator uses rigorous financial analysis and evaluation of risk aversion to achieve mediation success.<sup>i</sup> This article reviews how Navigator assists in addressing excessive optimism about litigation outcomes.

### **The Causes Of Excessive Optimism About Litigation Outcomes**

The mediation process requires lawyers and their clients (the “Parties”) to compare certain settlement options with their subjective assessments of likely outcomes if they pursue litigation.<sup>ii</sup> Subjective assessments can be overly optimistic because:

- Such assessments create a favorable starting point for settlement negotiations, and permit lawyers to position themselves as strong advocates for their clients and formidable adversaries to the opposing side.
- Subjectivity is inherent in the standard approach for evaluating litigation outcomes,<sup>iii</sup> which requires (a) estimates of recoverable dollar amounts, probability of success, and costs of litigating,<sup>iv</sup> as well as (b) judgments regarding the governing judge and jury pool, each side’s strategies and work product, and the respective lawyers’ quality and experience.<sup>v</sup>
- “Optimism bias<sup>vi</sup> exists cognitively in most Parties, which inflates perceptions of the chances of winning in court and suggests that pursuing litigation is more attractive than it actually is.<sup>vii</sup>

### **Addressing This Excessive Optimism**

A Party’s excessive optimism can create frustration and over-reaction by the other side in mediation, and cloud decision-making on what are acceptable “middle ground” settlement ranges, which in turn move Parties away from settlement.<sup>viii</sup>

Navigator’s approach is to address excessive optimism first by ensuring that Parties’ subjective assessments and judgments stand up to an objective review.<sup>ix</sup> That

promotes more realistic settlement expectations and negotiations.

Navigator's approach also recognizes that excessive optimism can create settlement opportunities. High expectations regarding litigation outcomes will require a significant investment in the case to prevail.<sup>x</sup> That expectation in turn should mean there are increased "avoided litigation cost savings" that can be shared in reaching a settlement.<sup>xi</sup> Navigator's focus on financial analysis can help the Parties understand better how to calculate litigation expenses in this scenario, and what the Parties are gaining/giving up in a negotiated settlement as a result.<sup>xii</sup>

Even if the Parties cannot achieve a *full* settlement because of excessive optimism, Navigator helps use that optimism to find acceptable *partial* settlements.<sup>xiii</sup> Specifically, Navigator works with the Parties to evaluate those issues on which they are most optimistic *and* therefore should create the greatest "return" on their litigation investment.<sup>xiv</sup> After identifying these most productive issues for adjudication, the Parties can negotiate an "issue modification" agreement that will govern the litigation going forward.

This partial settlement agreement will not only limit issues to be determined by the factfinder in a case to those that matter most to each side and that are in real dispute. It will also clear away the other less important issues that are not worth the litigation cost and uncertainty and ensure that Parties' litigation resources are not invested unproductively.<sup>xv</sup>

## **Conclusion**

Navigator can help you set a course to mediation success by understanding the reasons for and the influence of excessive optimism, and by developing strategies to use that optimism to achieve a full or partial settlement that reduces litigation costs and risk and provides higher returns from litigation process.

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and should not be relied upon as legal advice.

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- i [Setting-a-Course-for-Mediation-Success.pdf \(navmas.com\);](#)  
<https://www.navmas.com/wp-content/uploads/2024/05/Navigator-Accounting-for-Risk-Aversion.pdf>
- ii See, e.g., J.J. Prescott and Kathryn E. Spier, *A Comprehensive Theory Of Civil Settlement*, 91 NYU Law Review 59, 69–70 (April 2016) (“Prescott and Spier Article”); John Bronsteen, *Some Thoughts About the Economics of Settlement*, 78 Fordham Law Review 1129, 1132 (2009) (“Bronstein Article”);  
<https://www.linkedin.com/pulse/mediation-tip-calculating-risk-adjusted-value-case-patrick-russell-pn3wc/> at 3 (illustrating the “product rule of probability”).
- iii See, e.g., J.J. Prescott and Kathryn E. Spier, *A Comprehensive Theory Of Civil Settlement*, 91 NYU Law Review 59, 69–70 (April 2016) (“Prescott and Spier Article”); John Bronsteen, *Some Thoughts About the Economics of Settlement*, 78 Fordham Law Review 1129, 1132 (2009) (“Bronstein Article”);  
<https://www.linkedin.com/pulse/mediation-tip-calculating-risk-adjusted-value-case-patrick-russell-pn3wc/> at 3 (illustrating the “product rule of probability”).
- iv Prescott and Spier Article, *supra*, at 69–70; Bronsteen Article, *supra*, at 1132;  
<https://www.linkedin.com/pulse/mediation-tip-calculating-risk-adjusted-value-case-patrick-russell-pn3wc/> at 3 (illustrating the “product rule of probability”).
- v Ben Depoorter, “*Civil Litigation: Optimism and Expenditures: The Effect on Settlements*,” The Judges’ Book: Vol. 7, Article 3, at 4–5 (2023),  
<https://repository.uclawsf.edu/judgesbook/vol7/iss1/3> (“Depoorter Article”).
- vi Craig. R. Fox and Richard Birke, *Forecasting Trial Outcomes: Lawyers Assign Higher Probability to Possibilities That are Described In Greater Detail*, 26 Law and Hum. Behav. 159, 168–69 (2002); Richard Birke and Craig. R. Fox, *Psychological Principals in Negotiating Civil Settlements*, Harvard Negotiations Law Review, 1, 4 (1999); Oren Bar-Gill, *The Success and Survival of Cautious Optimism: Legal Rules and Endogenous Perceptions in Pre-Trial Settlement Negotiations*, Discussion Paper No. 375 07/2002, p.

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2-5 (The Harvard John M. Olin Discussion Paper Series: [http://www.law.harvard.edu/programs/olin\\_center/](http://www.law.harvard.edu/programs/olin_center/)) (“Bar-Gill Article”); see also <https://www.pon.harvard.edu/daily/business-negotiations/beware-your-lawyers-biases>.

vii Jeffrey J. Rachlinsky and Andrew J. Wistrich, *How Lawyers’ Intuitions Prolong Litigation*, 86 Southern California Law Review, 101, 109, 151 (2013).

viii Depoorter Article at 4. see also Prescott and Spier Article at 77-78. Bar-Gill Article, *supra*, at 2; see also <https://www.pon.harvard.edu/daily/business-negotiations/beware-your-lawyers-biases>.

ix Heather D. Heavin and Michaela Keet, *Litigation Risk Analysis: Using Rigorous Projections to Encourage and Inform Settlement*, Journal of Arbitration and Mediation, 2-6 (August 1, 2017); see also <https://www.linkedin.com/pulse/mediation-tip-calculating-risk-adjusted-value-case-patrick-russell-pn3wc/> at 3; <https://www.linkedin.com/pulse/mediation-tip-need-risk-cost-assessment-patrick-russell-7w8me>, at 2-3, 5-6.

x See, e.g. Joseph A. Grundfest and Peter H Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 Stanford Law Review 1267, 1279 ( 4/11/2006).

xii [Setting-a-Course-for-Mediation-Success.pdf \(navmas.com\)](#)

xiii Prescott and Spier Article, *supra*, at 75-76, 78.

xiv [Setting-a-Course-for-Mediation-Success.pdf \(navmas.com\)](#), p.2.

xv Prescott and Spier Article, *supra*, at pp. 98,101-102.