

## **Setting a Course to Mediation Success: The Impact of Framing and Anchoring**

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Our previous articles have discussed how Navigator can help parties use more rigorous financial and behavioral analysis to achieve mediation success.<sup>i</sup> This article reviews how Navigator can help parties fully utilize the basic tools of “framing” and “anchoring” in settlement negotiations.

### **Framing**

“Framing” is presenting a settlement proposal in a way that influences how the other side perceives that option, *even if* that proposal has essentially the same economic value as other alternatives.<sup>ii</sup> This negotiating technique is supported by research showing that framing a settlement proposal can strongly affect how it is received by the other side, *regardless* of its relative merits, and that perception in turn can affect whether lawyers and their clients (“Parties”) choose to settle or to pursue litigation.<sup>iii</sup>

Specifically, settlement terms framed to create the perception of a gain for the receiving Party induce in that Party a risk aversion to litigation and an inclination to choose settlement.<sup>iv</sup> Conversely, settlement terms framed in a way that create the perception of a loss will induce risk seeking behavior and an inclination to litigate.<sup>v</sup>

Creating the perception of a perceived gain or loss in turn depends on using an accepted reference point.<sup>vi</sup> That reference point in mediation can often be what Parties each expect would be the result in litigation. So, to make a settlement option attractive, it should be framed to create the perception of a gain relative to such expectations.<sup>vii</sup> For example, a defendant might consider a \$5 million settlement option to be a “loss” if framed relative to obtaining a defense judgment. But the same option might be perceived as a “gain” if framed relative to the litigation cost of achieving that defense judgment *plus* the risks of continued litigation.

Put another way, framing creates a cognitive bias to evaluate a settlement choice differently depending on the perspective from which the choice is viewed.<sup>viii</sup> If the bias created is negative, that has considerable impact: empirical studies comparing

settlement options to trial outcomes show significant rates of decision error resulting from framing settlement options in a way that are perceived as creating a loss.<sup>ix</sup>

Remember that framing can occur by using different reference points for perceived gains or losses. For example, a settlement option can be framed using a different measure of damage (such as “out of pocket loss” instead of “lost net profits”) or to show that a perceived gain in a settlement may not be available in litigation.<sup>x</sup>

### **Anchoring**

“Anchoring” is a variant of framing.<sup>xi</sup> It describes a tendency for Parties to give the first settlement number – the anchor -- too much weight, and not adjust from that starting point.<sup>xii</sup> First impressions make a big cognitive difference, and thus an initial offer can become the benchmark against which subsequent offers are measured.<sup>xiii</sup>

Anchors can create negative results. For example, an initial offer that is too high can adversely impact the other side's estimates and expectations with respect to outcomes of settlement negotiation, and can cloud rational decision making going forward.<sup>xiv</sup> In addition to taking on disproportionate weight, those initial perceptions can also crowd out other factors in negotiations.<sup>xv</sup> If a Party is confronted with an unacceptable anchor early in the negotiation, it should expressly defuse that anchor in the context of any counter-offer.<sup>xvi</sup>

More positively, negotiators can gain an edge by designing a first offer that establishes a compelling benchmark. That edge is most likely to be accomplished if one Party has strong insight into the range of acceptable outcomes. If the other side has an equal or stronger knowledge of the acceptable range, then anchoring will be more difficult.<sup>xvii</sup>

### **Conclusion**

Navigator can help you set a course to mediation success by exploring the framing of settlement options using common reference points, and by identifying ways to use anchoring positively in negotiations. These steps will ensure that these negotiating techniques are promoting, not undermining, rational settlement decision making.

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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>; <https://www.navmas.com/wp-content/uploads/2024/05/Excessive-Optimism-In-Litigation-Outcomes.pdf>;  
<https://www.navmas.com/wp-content/uploads/2024/06/Information-Asymmetry-in-Mediation.pdf>; <https://www.navmas.com/wp-content/uploads/2024/06/Information-Asymmetry-in-Mediation.pdf>.
- ii <https://www.law.cornell.edu/wex/framing>.
- iii Jeffrey J. Rachlinsky and Andrew J. Wistrich, *How Lawyers' Intuitions Prolong Litigation*, 86 Southern California Law Review, 101, 119 (2013) ("Rachlinsky and Wistrich Article"); Maya Steinitz, *How Much Is That Lawsuit In The Window? Pricing Legal Claims*, 66 Vanderbilt L. Rev. 1889, 1912, 1914 (2013) ("Steinitz Article").  
Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 109-110, 133, 137 (1994) ("Korobkin and Guthrie Article"). Available at: <https://repository.law.umich.edu/mlr/vol93/iss1/3>; See also Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341, 344 (1984); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 268-69 (1979); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453, 453 (1981).
- iv Keith N. Hylton, *Mutual Optimism and Risk Preferences in Litigation*, 75 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 2, 19 (2023),  
[https://scholarship.law.bu.edu/faculty\\_scholarship/3621](https://scholarship.law.bu.edu/faculty_scholarship/3621) ("Hylton Article").
- v *Hylton Article, supra*, at 19; Heather D. Heavin and Michaela Keet, *Litigation Risk Analysis: Using Rigorous Projections to Encourage and Inform Settlement*, Journal of

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Arbitration and Mediation, 2, 3 (August 1, 2017) (“Heavin and Keet Article”); *Rachlinsky and Wistrich Article, supra* at 122–124.

vi *Rachlinsky and Wistrich Article, supra* at 119–120; *Korobkin and Guthrie Article, supra*, at 142; Ian Weinstein, *Don’t Believe Everything You Think: Cognitive Bias in Legal Decision-Making*, *Clinical L. Rev.* 783, 797, 819 (2002–2003) (“Weinstein Article”).

vii *Id.*

viii *Weinstein Article, supra*, at 797.

ix *Heavin and Keet Article, supra*, at 3 fn 6.

x *Weinstein Article, supra*, at 819.

xi *Korobkin and Guthrie Article, supra*, at 138.

xii *Korobkin and Guthrie Article, supra*, at 139, 142;  
<https://www.pon.harvard.edu/daily/negotiation-skills-daily/what-is-anchoring-in-negotiation/>; *Steinitz Article, supra*, 1912, n. 98, and 1914.

xiii *Weinstein Article, supra*, 797.

xiv *Id.* *Korobkin and Guthrie Article, supra*, at 138–139, 142; See also Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 *AM. PSYCHOLOGIST* 341, 344 (1984); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263, 268–69 (1979); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *SCIENCE* 453, 453 (1981).

xv *Weinstein Article, supra*, 797.

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xvi <https://www.pon.harvard.edu/daily/negotiation-skills-daily/what-is-anchoring-in-negotiation/>

xvii *Id.*