

Setting a Course to Mediation Success

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Most commercial litigation disputes present three fundamental problems: they cost too much, they take too long, and their outcomes are adversely affected when costs and duration are disproportionate to the size of the case.

Navigator Mediation and Arbitration Services (“Navigator”) mediates commercial disputes by directly addressing these three fundamental problems. Navigator explores with lawyers the financial analysis necessary to measure the impact of litigation costs and case duration on outcomes, and how that impact on outcomes affects the range of acceptable settlements.

Addressing these financial issues directly does *not* replace the traditional analysis of the merits of the case and probable outcomes based on the merits. Nor does it limit the standard mediation approaches of opening dialogue, building trust, and finding common ground with the lawyers and their clients. Rather, financial analysis deepens the understanding of what a case is worth at a given point in time, and what parties are gaining/giving up in a resolution, compared to pursuing litigation. Ultimately, it seeks to drive optimal outcomes in the shortest time for the lowest cost.

Even if lawyers and their clients cannot mediate an early resolution after doing this financial analysis, the work will serve as a reliable roadmap for their more efficient and productive pursuit of litigation in the case going forward. That in turn will help manage costs and case duration so they do not become disproportionate to the size of the case, and thereby avoid the adverse outcomes could otherwise occur.

The Fundamental Problems to Address

The barriers to resolution of commercial litigation were reviewed comprehensively several years ago in a collection of articles by a federal judge and several leading lawyers, in a Report by the New York City Bar Association, and in a panel of federal judges. (the “Reviews”).ⁱ Those Reviews concluded that commercial cases cost too much and last too long and identified well-known “causes and culprits” for those problems: broad boundaries for discovery create burdens and expense in our electronic age; lack of decision-making and active management by judges; and the unhealthy profit motives and gamesmanship of lawyers.ⁱⁱ

From a mediation perspective, the Reviews’ conclusions about the *consequences* of excessive cost and case duration are important for the “vast majority” of cases:

- “the vast majority of [commercial] disputes exist in a range of controversy that makes litigating to a decision unaffordable as a practical matter;”

- “the settlements that follow [in these disputes] tend to be governed too much by cost and differentials in ability to tolerate further litigation;” and
- Settlements get negotiated only after expenditures of substantial litigation cost that could otherwise have been spent to resolve the case (emphasis added).ⁱⁱⁱ

Based on these conclusions, the Reviews logically proposed earlier Alternative Dispute Resolution in most commercial litigation.^{iv} They emphasized the well-known benefit of using for settlement the money that might otherwise go to pay substantial litigation costs.^v

But the Reviews also highlighted the need for lawyers to “focus on the management of economic risk” in their cases by calculating the cost of various stages of litigation, and performing a risk-discounted valuation of the claims.^{vi} This helps lawyers “measur[e] the trade-offs” between litigation costs and the expected effects of those costs on the ultimate result,^{vii} as well as weigh the probability of outcomes and the costs of litigating.^{viii}

Using Financial Analysis in Mediation

Navigator’s approach to mediation directly addresses these important conclusions and identifies the financial analysis necessary to comply with them.

Specifically, using its financial experience and expertise, Navigator helps lawyers use more sophisticated analysis to develop a full appreciation of the litigation costs and case duration required to achieve the outcomes they are pursuing, and whether and how costs and case duration threaten to become disproportionate to the size of the case.

This financial analysis gives lawyers sharper insight into whether and how the costs and case duration will impact outcomes in the case, what the case is really worth at a particular stage based on a risk and time-discounted assessment, and what parties are gaining/giving up in an early resolution. That also helps lawyers better identify a range of acceptable settlements more precisely based on measurable variables (the expected costs and case duration) rather than less predictable variables (the merits of the case, and the resolution of complex factual and legal issues).

This financial analysis further provides a critical comparison between an early resolution and a more extended litigation process, and whether an investment of additional time and money in the litigation process will generate a “return” (a significantly better outcome) that justifies the cost and time value of money caused by an extended case duration. In short, focusing on the cost and case duration helps lawyers be better managers of economic risk, and measure the economic trade-offs, as they try to “weigh the probability of outcomes and the costs of litigating.” By employing this perspective, lawyers in mediation can better to maximize the value of the litigation asset (from the plaintiff’s perspective) and reduce the risk of the liability probability and consequence (from the defendant’s side).

How The Financial Analysis Works

In any standard mediation process, lawyers will be expected to evaluate:

- the strengths and weaknesses of each parties' position procedurally and on the merits;
- the expected outcomes on liability and damages, and the level of probability of those outcomes;
- the expected costs of litigating those positions, the expected duration of the case during which these costs will be incurred, and the level of probability of those expected costs and duration;
- the probability of deviation from expected outcomes, costs or duration that could occur, and the level of such deviations; and
- the range of acceptable settlements based on the above evaluations.

The Navigator approach does not replace this standard evaluation process. Nor does it limit the typical mediation techniques of opening dialogue, building trust, and finding common ground with the lawyers and their clients. Instead, Navigator asks the lawyers to better utilize information on:

- each party's amount of expected costs for litigating the case to trial,
- how the costs are proportioned to the size of the case,
- the duration of the case, and
- the probability that costs and duration could deviate, and the amount of deviation.

This information permits lawyers to understand internally the net present value of their costs, and how that value affects each party's expected outcome, based on different scenarios in litigation.

This analysis reveals internally for each lawyer the "net outcomes" that they can expect in an early mediation, what they will be gaining and giving up based on those the net outcomes, and acceptable ranges of settlement. This information also helps each lawyer compare what the net outcomes will be if they continue to litigate, and incur litigation costs, for periods into the future.

The financial analysis has the added benefit of providing a more objective overall assessment of the case value and settlement ranges for each lawyer. In a standard mediation process, the parties' assessments of outcomes can be overly optimistic when prepared for purposes of negotiating with the other side. But there is no advantage for each lawyer to be less than objective with himself or herself in conducting their cost assessments. The costs will impact the case regardless of whether the case is resolved in mediation or continues in litigation. Honestly confronting early on the expected costs and duration, and the expected impact of those factors on outcomes, is a practical way to conduct a clear-eyed analysis of the advantages and disadvantages of settlement compared to continued litigation, and to make an informed decision about the range of acceptable settlements.

To be sure, this objective financial analysis requires more substantive work up front in a case. But the

time spent is productive not only in trying to resolve the case through early negotiation. It serves as a component of a disciplined litigation plan if negotiations fail, and the case has to be litigated.

Conclusion

Commercial litigation presents three fundamental problems. Navigator sets a course to mediation success by directly addressing those problems with increased financial analysis. Lawyers are able to better measure the impact of litigation costs and case duration on outcomes, and how that impact on outcomes affects the range of acceptable settlements. That in turn helps them make more informed decisions on whether to settle or to pursue litigation in a way proportionate to the size of the case.

ⁱ John S. Kiernan, *Reducing the Cost and Increasing the Efficiency of Resolving Commercial Disputes*, 40 *Cardozo Law Review* 187, 188 (2018) (“*Kiernan Review*”). See also The Hon. Victor Marrero, *The Cost of Rules, the Rule of Costs*, 37 *Cardozo Law Review* 1599 (2016) (“*Marrero Review*”); John D. Feerick, *Judge Victor Marrero’s Challenge to the Legal Profession: A “Little Rebellion Now and Then,”* 40 *Cardozo Law Review* 147 (2018) (“*Feerick Review*”); New York City Bar, Report of the City Bar President’s Committee for the Resolution of Disputes, *Recommendations for the Efficient Resolution of Disputes* (June 26, 2018) (“*NYC Bar Report*”); Panel Transcript: Controlling the High Cost of Justice: Perspectives from the Federal Judiciary (April 3, 2017, <https://cardozolawreview.com/wp-content/uploads/2018/11/40.1.8.Transcript.pdf>).

ⁱⁱ See, e.g. *Kiernan Review* at 188-189; *NYC Bar Report* at 1-2; *Marrero Review* at 1622-1624, 1625, 1627, 1632-73.

ⁱⁱⁱ *Kiernan Review*, *supra*, at 189.

^{iv} *Feerick Review* at 165-171; *NYC Bar Report* at 9-10; *Kiernan Review* at 204-222.

^v *Kiernan Review* at 189.

^{vi} *Kiernan Review* at 214; *NYC Bar Report* at 7-8.

^{vii} *Kiernan Review* at 193, 213.

^{viii} *Kiernan Review* at 208.

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