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The psychology of settling vs. litigating

Litigation is more like poker than sports—driven by strategy, ego, and emotional biases, where decisions to settle or go to trial hinge less on law and evidence, and more on human psychology, emotional drivers, and the elusive pursuit of "being right."

By Leonid M. Zilberman

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I believe that a majority of trial lawyers would agree that if litigation were a sport, it wouldn't be football or baseball, it would be poker. A slow burn of strategy, ego, bluffing and psychological maneuvering. And just like in poker, some players stay in the game far too long, not because they're holding a royal flush (the highest hand), but because they think they are.

As Yogi Berra famously stated, "Baseball is 90 percent mental. The other half is physical." In the legal world, I would argue that deciding whether to settle or go to trial is about 20% a matter of evidence and law. The other 80% is a deeply human decision, pulsing with emotions, biases, pride, fear, and the allure of perceived victory. These emotional undercurrents create two very different psychological mindsets: the settlement mindset and the litigation mindset. Each has its own emotional drivers and impact on decision-making. The path you choose can lead to resolution or ruin. But I can guarantee one thing: something an old mentor used to tell me when I graduated from law school, "Lawyers who need to be right lose more cases than lawyers who don't."

The settlement mindset is analytical and not always easy to accept

Let's start with the settlement mindset. This is often portrayed as the more rational, adult-in-the-room approach. Think of it as choosing to leave the casino with your winnings rather than doubling down because the guy next to you just hit a jackpot. And while the financial considerations are important, clients often value closure or acknowledgement as much as, if not more than, the money.

Settlement-minded parties are typically more focused on risk mitigation, closure, cost-effectiveness, and emotional peace. They ask, "What's the best outcome I can realistically live with?" rather than, "How can I win everything and crush the other side?" Settlement isn't an easy pill to swallow. Settling often feels like conceding, even when it's the strategically wise choice with better financial outcomes. Having a settlement mindset requires the ability to override the part of the brain that equates settling with losing. It's more Buddhist monk than Viking warrior. If you think you have a 99% chance of victory, you're not going to settle. Typically, a mediator will only have about eight hours to convince both parties, and importantly their lawyers, that life is more than about winning or losing.

The settlement mindset thrives on objectivity, cost-benefit analysis, and a grasp of legal unpredictability. People in this mindset are more open to advice and more willing to let go of punitive fantasies in favor of practical outcomes. Indeed, this is the "secret sauce" to resolution. Any good mediator will tell you that without a settlement mindset, cases do not get resolved.

The litigation mindset is driven, determined and sometimes dangerous

Now contrast that with the litigation mindset. This one has a soundtrack. It's Rocky running up the courthouse steps. Do you hear the theme song? It's dramatic, righteous and certain of inevitable victory. Or, the Karate Kid plot, the proverbial "David vs. Goliath" and in the end the little guy

beats the big bad adversary (typically a monolith corporation). It makes for great movies, but what they don't tell you is that not all stories end that way.

Litigation-minded parties tend to be driven by justice, principle or sometimes just revenge. This mindset is less about resolution and more about validation. It whispers things like: *"I'm right, and the world needs to know it."* Or, *"I've already come this far, I can't back down now."* Or, *"I'm going to make them pay for what they did to me!"*

But here's the catch: these motivations can often cloud judgment. The litigation mindset has a nasty habit of confusing emotionally satisfying outcomes with *likely outcomes*. And that's where things can get psychologically dangerous. People who have a litigation mindset often forget that, in Court, statistics show that it's a 50/50 chance of losing as much as winning your case. As a reminder, when you lose as a plaintiff, you get zero. And, from a defense perspective, when you lose, you can go bankrupt fast.

Critical emotional drivers: When justice crashes into reality

If settlement seems like the more advantageous way to proceed, then why do people resist settlement when it's clearly the smarter route? Emotional drivers. Here are a few that we always see in lawsuits and consistently muddy the waters during mediations:

1. **Ego and identity:** For many people (unfortunatly, including lawyers), the dispute has become personal. "Settling" feels like surrendering a piece of who they are, especially if they see themselves as fighters or defenders of truth.

2. **Sunk cost fallacy:** The more time, money and emotional energy invested, the harder it is to walk away. It's the legal version of staying in a bad relationship because you've already been together five years.

3. **Fear of regret:** People fear settling and then hearing a jury would have given them millions. This "fear of missing out" (FOMO) translates into legal decision-making.

4. **Moral righteousness:** The belief that justice is on their side leads some to view settlement as morally inferior and a disfavored outcome. They see the courtroom as a crusade, not a forum for probabilistic outcomes.

All four of these forces lead to a distorted view of risk, and none is more powerful or more misleading than *confirmation bias*. I have personally witnessed confirmation bias as the strongest auger towards litigation and away from resolution, even when the facts or the law aren't in a party's favor. Have you ever thought: "I don't care what the (fill in the blank) says, I know we'll win this!" If that's your opinion, why are you coming to mediation?

Confirmation bias is your most dangerous friend

Confirmation bias is the mental tendency to seek out, interpret, and remember information in a way that confirms what we already believe is true. It's why a client with a weak case will latch onto one small piece of evidence and say, "See? That proves it!"

In the litigation context, confirmation bias turns reasonable people into selectively blind optimists. They'll dismiss damaging facts as irrelevant, see neutral witnesses as allies, and treat any opposing argument as fundamentally flawed, even when it's airtight.

And it's not just clients. Lawyers too often fall into the confirmation trap, particularly when they've grown emotionally invested in a case. The courtroom becomes a stage for a narrative they've sold themselves, and like any good author, they hate bad endings. Countless times, I've played Devil's advocate and suggested an outcome that is different than what the lawyer is trying to sell me and my words go in one ear and out the other without ever being considered as a potential for an adverse outcome.

Confirmation bias makes it harder to accept settlement offers–even generous ones–because it distorts the perceived odds of success. The client and their lawyer both believe the jury *will* believe them, that the judge *will* see their point, and that justice *will* be served. I see this on LinkedIn when lawyers post large jury verdicts, only to say, the settlement offer was only 50% (or less) of this amount. But do they also post when the verdict is against them? I don't see any of those because that's when confirmation bias loses. Unfortunately, courts and juries don't traffic in "shoulds," only probabilities.

The real cost of misguided litigation

When confirmation bias and emotional drivers go unchecked, they fuel unrealistic expectations, delay resolution, and often result in worse outcomes than a well-timed settlement would have achieved. This is not just "theory" but proven through objective statistics, that sometimes people choose not to believe at their peril.

Think of it like this: you're on a road trip, and your GPS says you're going the wrong way. But your gut insists otherwise. So, you keep driving for another 50 miles, until you finally realize you're in a desert with no gas, no cell signal and only a vague sense of righteous indignation. That's what going to trial on a weak case feels like. It's expensive, exhausting and often ends with a painful realization: "We should have settled this case a long time ago." Just like you should have turned around when your GPS was telling you the right path to your desired destination was the other way.

Good resolutions: The art of aligning emotion with reality

So, how do we get clients and lawyers to embrace resolution without feeling like they're capitulating or just giving up better outcomes (which they aren't)?

1. **Normalize settlement as strength:** Culturally, we need to redefine settlement as a savvy, strategic, and courageous move. It's not weakness, it's wisdom that comes from strength. While there is no centralized registry, I forecast the number of mediators in California is now 1000X what it was 10 years ago. The reason? They are resolving cases with parties who see the value in a negotiated resolution versus a roll of the dice in court.

2. **Use mediators as emotional translators:** Good mediators don't just relay offers, they manage egos, translate emotions and reframe narratives. They help parties save face while finding closure. They can change perspective and minds to get to resolution.

3. **Pre-mortems instead of post-mortems:** Ask, "If this goes badly, why would that be?" This forward-looking exercise helps parties confront the weaknesses in their case while there's still time to act on them before the bad result in court.

4. **Highlight the hidden costs of trial:** Beyond legal fees, trials exact a toll–emotional strain, time loss, reputational risk. Parties often ignore the non-economic costs, which need to be made abundantly clear, visible and real.

5. **Reality testing with outside perspectives:** Bring in someone unfamiliar with the case to test the strength of your arguments. Have a neutral attorney critique the case to expose weaknesses. Look at jury verdicts in your jurisdiction on similar facts. Taking employment cases as an example, many people often think "If I'd fought harder, I'd have won" (ignoring that 97% of employment lawsuits settle prior to trial).

If litigation is like a war, getting to resolution is less about who's right and more about what's *realistic*. The key is acknowledging the emotional weight of conflict while making decisions rooted in strategy. I have a quote framed on my desk that I look at every day. Written by Sun Tzu in 490 BC, it says: *"To win 100 victories in 100 battles is not the acme of skill. To subdue the enemy without going to war is the acme of skill."* So, before marching to trial with swords raised, pause. Ask yourself not "How do I win?" but "What outcome gets me back to my life with peace, dignity, and minimal harm?" Sometimes the bravest thing you can do is shake hands, walk away, and get on with living.

The views and opinions expressed within this article are solely the author's and do not reflect the opinions of the firm.

Leonid M. Zilberman *is a partner at Wilson Turner Kosmo LLP, where he practices employment law and mediation.*