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## Effective Mediation: Consider the Intangibles

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When preparing for a mediation, counsel and clients are focused on the core elements of analyzing a case: facts, liability, causation and damages. There will be endless discussions about legal issues and whether damages can be substantiated. How good are the defenses? There may be a strong dispositive motion. There may be a smoking gun document. These are all critical components of a case analysis and provide an important foundation for a settlement evaluation. However, counsel and litigants often fail to consider other elements that may have a significant impact on the outcome of a case. Sometimes these variables are difficult to categorize. I like to think of them as intangibles. The following is a list of some intangibles that are important to consider when evaluating a case for settlement as well as trial.

### 1. Judge/Jurisdiction

Certain judges and venues are considered to be very generous to plaintiffs and risky for defendants and vice versa. Most seasoned trial attorneys can name numerous courts that they would prefer to avoid. They often remark that there are certain judges who have never issued one single favorable ruling for

any of their clients. Consider the complexion of the jury pool in this jurisdiction and how that jury pool will view your case. Are you in state or federal court? Being in state court may reduce the chance of prevailing on a dispositive motion or obtaining a directed verdict. If you are in an unfriendly jurisdiction, think carefully about your settlement position.

### 2. Appeal and Sympathy

Does the plaintiff have a compelling story? Is the plaintiff so sympathetic and/or incredibly likeable that the jury is likely to award a huge verdict? In a recent mediation of an employment case, the plaintiff's narrative was extremely powerful and credible. He was openly complimentary and appreciative of an employer that inexplicably declined to pay a \$1 million commission he claimed he was entitled to. Notwithstanding its strong legal defenses, the defense realized during the mediation that the plaintiff would be believable and generate a great deal of sympathy if the case proceeded to trial.

### 3. Quality of Witnesses

How does the credibility of your clients and witnesses match up against those on the other side? Did your client engage in unsavory or unethical conduct that could inflame a



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judge or jury? Would your client or any important witness be such a terrible witness as to doom your case? How do the experts match up? If any of your important witnesses are marginal or unpresentable, you may need to revise your settlement expectations.

### 4. Timing

Consider whether one of the parties may feel pressure to settle the case now. Does the plaintiff need money sooner than later? Is the continuity of a business contingent upon settlement? Is it the holiday season, when people may be looking for payment and closure?

During this COVID-19 pandemic, when many people are facing health, employment and/or financial challenges, parties may feel differently about being involved in protracted litigation. A worldwide public health crisis like COVID-19 can rearrange our priorities.

Parties may be more flexible in their settlement positions. They may also be anxious for an immediate payout or simply seek closure.

### 5. The Value of Hearing the Plaintiff's Story

Do not underestimate the importance of giving a plaintiff an opportunity to tell his or her story. When parties feel that they have been heard, that provides psychological relief, which in turn can soften their settlement positions. Likewise, it is helpful for the defense



team to better understand the plaintiff's narrative and be able to assess the plaintiff as a witness. Both sides may have more clarity and be less inclined to want to proceed with litigation after the plaintiff shares their story.

### 6. Secrets/Undisclosed Information

If a mediation is occurring prior to depositions, this may present an opportunity to avoid disclosing unhelpful or damaging information. Here is a case that illustrates this point. The defendant law firm in a

legal malpractice case has recently split. The two factions of the former firm are not on the same page. The case file that is the subject of the lawsuit is a giant mess. The individually named defendant attorney is a terrible witness. Defense counsel and the insurer understand that when the defendant attorneys are deposed, the settlement value of the case will increase exponentially.

In this case, the defense was exceptionally motivated to resolve the case and willing to pay a premium to settle.

#### **7. Sensing a Settlement**

Prior to a mediation, or perhaps in the early phases of a mediation, the plaintiff may make a stratospheric settlement demand that seems unwarranted and the defense may take a settlement position which the

plaintiff thinks is unreasonable and insulting. However, when the negotiations start to unfold and the prospect of resolving the case feels real and imminent to both sides, parties are more likely to revise their settlement postures.

Mediation is effective for many reasons, including the fact that having a focused conversation and exchange of information is usually productive. Mind-

sets can be changed. Settlement positions that seemed intractable can be revised when parties and counsel factor in these variables into the settlement equation.

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