

## PARADIGM FOR COURT'S ASSESSMENT OF REASONABLENESS OF SETTLEMENT

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Court-annexed mediation of employment cases is distinguished from peer mediation by at least three important factors: (1) Judges mediate cases only after a lawsuit has been filed; (2) Judges tend to be more evaluative in encouraging lawyers and parties to reach consensus; and (3) Judges, especially federal judges, typically conduct pre-mediation conferences, either by telephone or in person, before the parties meet to negotiate a settlement.

Those circumstances suggest that the lawyers, or negotiators, be well-prepared - and prepare their clients - for the process, not just the potential outcome. Usually, the benchmark of judicial mediation is two-pronged, i.e., the reasonableness of the settlement proposals, and thus the settlement itself, and the likelihood of recovery.

Judges expect lawyers to develop an approach or strategy for mediation that is designed to achieve their goals, or secure the most for their clients. However, the mediation process is substantially aided when lawyers develop a profile of the case, consisting of a comparative analysis of the parties, the structure of the evidence, the injury, the damages, the jurors, and verdicts in similar cases. In the end, it is the likelihood of recovery that drives the opposing party's receptivity to an offer of settlement.

The following Paradigm For Judicial Assessment of Reasonableness of Settlement is designed to assist lawyers in screening cases before mediation. It is not designed, and should not be used, as a format for pre-trying the substantive issues or assigning liability.

Rather, the paradigm is an instrument for *negotiation of the process*, to facilitate *negotiation of the claims*; the success of the former is critical to the achievement of the latter.

The following uses are contemplated:

1. In planning their own offense and anticipating opposing counsel's defense, lawyers may use the model as a mere checklist or as an answer sheet.
2. Because mediation often fails because lawyers and clients have differing opinions about the reasonableness of proposals, lawyers may also find it useful to permit clients to treat the model as a questionnaire well in advance of the mediation, and thereafter compare the clients' responses to their own.
3. The model is a convenient way to chart not only simple responses, but also supporting evidence (including depositions, page numbers, exhibits, witnesses) for easy reference during the negotiation.
4. In cases involving multiple parties on either or both sides who are represented by different lawyers, the model is also a convenient instrument for comparative analysis of the strengths or weaknesses of the positions of the several plaintiffs or defendants.

Even if clients are not encouraged to respond to the inquiries, the paradigm should be reviewed with clients to familiarize them with settlement issues (as opposed to litigation issues), to objectify the opposing party's offers, to stimulate an honest assessment of their positions, and to help them overcome impasse. Its use should not diminish aggressive, focused negotiation. Rather, it should engender respect for a party's position, and not

unimportantly, the gratitude of the court.

## PARADIGM FOR JUDICIAL ASSESSMENT OF REASONABLENESS OF SETTLEMENT

### FACTS

- Are the facts undisputed?*
- Is there an obvious victim or offender?*
- Were the acts intentional?*
- Is there a pattern of behavior?*

### CREDIBILITY

- Is the claim/defense feasible in view of the facts?*
- Is it believable?*
- Is the claim/defense singular?*
- Have the pl's/def's statements been consistent?*
- Is the claim/defense corroborated?*

### RELIABILITY

- Is the pl/def known to be honest and truthful?*
- What is the historical relationship between the parties?*
- Are the wrongdoing and the injuries parallel?*
- Are the injuries and the damages parallel?*

### SYMPATHY

- How familiar is any juror with the wrongdoing, the injuries, or the damages?*
- Are the parties on parity?*
- Are the injuries life-altering?*
- Does the plaintiff evoke pity?*
- Are the losses out-of-pocket?*

### RENEWABILITY

- Can the verdict undo the injury?*
- Could the pl/def be transformed by a favorable verdict?*
- Could a favorable verdict be enduring beyond this case?*

1. FACTS
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Element	Plaintiff(s)	Defendant(s)
<b><i>Are the facts undisputed?</i></b>		
<b><i>Is there an obvious victim or offender?</i></b>		
<b><i>Were the acts intentional?</i></b>		
<b><i>Is there a pattern of behavior?</i></b>		

2. CREDIBILITY
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Element	Plaintiff(s)	Defendant(s)
<b><i>Is the claim/defense feasible in view of the facts?</i></b>		
<b><i>Is the claim/defense common or unusual?</i></b>		
<b><i>Is the claim/defense believable?</i></b>		

<b><i>Have the pl's/def's statements been consistent?</i></b>		
<b><i>Is the claim/defense corroborated?</i></b>		

<p><b>3. RELIABILITY</b></p>
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ELEMENT	PLAINTIFF(S)	DEFENDANT(S)
<b><i>Is the pl/def known to be honest and truthful?</i></b>		
<b><i>What is the historical relationship between the parties?</i></b>		
<b><i>Are the wrongdoing and the injury parallel?</i></b>		
<b><i>Are the injury and the damages parallel?</i></b>		

<p><b>5. SYMPATHY</b></p>
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ELEMENT	PLAINTIFF(S)	DEFENDANT(S)
<b><i>How familiar is any juror with the wrongdoing, the injury, or the damages?</i></b>		
<b><i>Are the parties on parity?</i></b>		

<i>Is the injury life-altering?</i>		
<i>Does the plaintiff evoke pity?</i>		
<i>Are the losses out-of-pocket?</i>		

<b>5. REMEDIATION</b>		
<b>ELEMENT</b>	<b>PLAINTIFF(S)</b>	<b>DEFENDANT(S)</b>
<i>Can the verdict undo or remedy the injury?</i>		
<i>Could the pl/def be transformed by a favorable verdict?</i>		
<i>Could a favorable verdict be enduring beyond this case?</i>		
<b>6. LITIGATION</b>		
<b>ELEMENT</b>	<b>PLAINTIFF(S)</b>	<b>DEFENDANT(S)</b>
<i>What percentage of similar cases survive summary judgment?</i>		

<b><i>What percentage of similar cases go to trial?</i></b>		
<b><i>What are the typical non-monetary settlement terms in similar cases?</i></b>		
<b><i>What are the typical settlement amounts in similar cases?</i></b>		
<b><i>What are the verdicts in similar cases?</i></b>		