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## The Appeal of Mediation Is the Absence of Appeals

There are no appeals from a mediated settlement agreement. In mediation, I find that the power and beauty of that statement is sometimes lost on the litigants. Lay people, including sophisticated parties and insurers, may sometimes forget that the case does not end when trial is over. Post-trial motions and appeals can take years.

Psychologists can offer a lot of reasons why people might forget about appeals during litigation. Perhaps because trial is a major ordeal, and television and media reaffirm the drama and apparent finality of trial, even if it is not really the end. We all recognize that appeals can be filed, but in comparison to trial, appeals are rather mundane, technical and remote. Hence, the possibility of appealing a case is less likely to be at the forefront of our thinking. Clients and their attorneys may have assessed the jury, the witnesses, the venue, the judge and other litigation risk factors. But what is commonly lacking and not discussed between the client and attorney (in the context of deciding what is a "good" number) is the ability to avoid *appellate risk*, including the likelihood of an appeal by either side, and its associated delays and costs. Any party who boasts about the strength of their case or the weakness of the other side faces a double-edged sword. If the plaintiff scores a huge verdict that the defendant did not anticipate and cannot easily pay, won't the defendant be motivated to appeal? If the defense obtains a contested defense verdict, won't the plaintiff's attorney feel compelled to appeal? Of

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course.

Perhaps there are novel questions of law, evidence, immunity, pre-emption defenses or contested causation arguments. All of that makes for appellate fodder. Whether as appellant or appellee, both sides bear the expense, delay and uncertainty of result. Waiting two years for an appellate decision can be agonizing and, for some, substantially undermine the value of the verdict. Defendants need to consider that, even if their case is strong, an appeal is expensive and there is a risk of bad publicity, unfavorable precedent and judicial error at trial warranting retrial. Both sides are encouraged to be mindful of *appellate risk* when evaluating any offer and to consider the benefit of immediate resolution at mediation.

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