

Introduction

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.
—Abraham Lincoln¹

Effective settlement agreements convert the risks, delays, and expenses of lawsuits into solutions that the parties choose for themselves. Good settlement agreements help the parties transform misunderstanding into understanding, conflict into resolution, and the stress of litigation into freedom from worry. Bad settlement agreements, however, worsen the conflict. Poorly drafted settlement agreements perpetuate legal battles with ambiguities in their terms, raise new points of contention with problems of enforceability, and provide loopholes allowing parties to shirk their obligations. Defectively written settlement agreements invite claims of malpractice and damage the reputations of the attorneys and mediators involved in the settlement process. In short, the process of crafting settlement agreements has the potential to make things much better or much worse for the mediation's participants.

1. Abraham Lincoln, *Notes for a Law Lecture* (July 1, 1850) in 2 COLLECTED WORKS OF ABRAHAM LINCOLN 81 (Roy P. Basler, et al. eds., Rutgers University Press 1953).

A. The Value of Craftsmanship in Settlement Agreements

In their book on achieving meaning in a secular world, Hubert Dreyfus and Sean Dorrance Kelly conclude:

Learning a skill is learning to see the world differently. The skilled surgeon, for example, sees something more than a broken and bloody leg; [the surgeon] sees a particular kind of break, one that requires this precise surgical technique to fix it. Likewise, we hear people say that the successful running back has “great vision,” the point guard has extraordinary “court sense.” In each case this means that the person’s skill at surgery or running or passing allows them to see meaningful distinctions that others without their skill cannot.²

Likewise, with developed skill, attorneys and mediators see nuances in the process of drafting settlement agreements and discern the implications of terms that are not obvious to the untrained.

Many different skills are required to craft effective settlement agreements. These skills include understanding the legal requirements for settlement agreements in a specific jurisdiction, navigating complex interpersonal dynamics of people with opposing interests, and analyzing the practical implications of proposed contractual terms. The ability to write a settlement agreement represents mastery over many different constituent skills. These skills are never inherited or quickly developed.

The more developed your skill in crafting settlement agreements the better you are at discerning which terms are important and which insignificant. This allows attorneys to make better trades among terms for their clients and to speed up the process by knowing when to rely on favorable default legal rules. By understanding the elements of settlement agreements, mediators can facilitate substantive communications about terms and foresee the sticking points in the drafting process. “Skills reveal meaningful differences to us and cultivate in us a sense of responsibility to bring these out at their best.”³ With mastery, attorneys see how small changes can greatly benefit their clients while steering clear of hidden dangers with calamitous consequences.

2. HUBERT DREYFUS & SEAN DORRANCE KELLY, *ALL THINGS SHINING: READING THE WESTERN CLASSICS TO FIND MEANING IN A SECULAR AGE* 207 (Free Press 2011).

3. *Id.* at 213.

With understanding, mediators discern the parties' underlying concerns and know where the opportunities lie for attorneys to find practical solutions. With developed skills, attorneys and mediators can be flexible, responsive, practical, and highly effective in their work with settlement agreements.

The effort required to develop skills in analyzing, facilitating, and writing effective settlement agreements is noble work. Agreements help parties move beyond the wrongs of the past and into a future in which they know what to expect, what their obligations are, and that they will be free of litigation settled in the agreement. For attorneys who are usually relegated to arguing positions, they can participate in the creative process of crafting agreement. For mediators, it is the successful culmination of their hard work in developing rapport with the parties, facilitating information exchange, and overseeing often difficult negotiations.

B. Guidance for Attorneys

*Knowledge favors the prepared.
Persistence accompanies the successful.*

To fulfill the promise of settlement agreements and to avoid their perils, this book provides practical advice for attorneys regarding the process of drafting settlements as well as the substantive terms required for enforceable agreements.

Attorneys should appreciate the importance of the process. Settlement agreements are often thought of like a shopping cart—a static container that holds the items on your checklist. A more realistic way to think about settlement agreements is to imagine the shopping cart while buying groceries with hungry young children. You must somehow manage to fill your cart with all of the nutritious items you need, watch to make sure that the children don't sneak in any junk, and negotiate the occasional temper tantrum. The challenge isn't so much getting the right items into your cart but the process of cooperating with others who would prefer an entirely different set of products inside the cart. To provide guidance on the process within which settlement occurs, this book explores the procedures involved in the preparation, negotiation, and drafting of settlement agreements.

Substantive terms require research and critical thinking. Attorneys who draft settlements must take account of the myriad statutes, cases, rules of court, and regulations that govern mediated agreements. And what a task it is! There are “over 2,500 separate state statutes [that] affect mediation proceedings in some manner.”⁴ Of these, “more than 250 deal with confidentiality and privileges issues, alone.”⁵ During just one, five-year period, there were 1,223 state and federal decisions on mediated settlement agreements that spawned further litigation rather than resolution of the cases they were intended to solve.⁶

This overwhelming set of laws explains why this book does not contain simple, fill-in-the-blank settlement agreement forms. No form (or even set of forms) can accommodate the complexities of all settlement agreements in all jurisdictions. Within a single jurisdiction, different courts may be subject to different local rules of court. And, the laws of a jurisdiction may change overnight with a statutory enactment or a new state supreme court decision. This book explores these possibilities and prepares you to understand the importance and implications of various terms in settlement agreements. Even perfectly legal and seemingly innocuous terms can be problematic when they carry unacceptable adverse consequences to your client.

Attorneys should be aware of ethical quandaries. Rules of professional responsibility concerning litigation are well developed and are often the subject of continuing-education requirements for attorneys. However, the ethics challenges arising during the process of negotiating, drafting, and executing settlement agreements benefit from only the most laconic guidance. This book aims to explore several of the most common quandaries that attorneys face during the writing process. For example: Do you have a duty to point out errors in drafts of settlement agreements written by opposing counsel? Can you ethically draft a settlement agreement with terms of doubtful legal validity? Can you ghostwrite a settlement agreement for someone without having to attend the mediation or assume any other representation obligations?

This book is intended to be generally applicable throughout the United States. However, every jurisdiction has a unique set of laws

4. <http://uniformlaws.org/ActSummary.aspx?title=Mediation%20Act>.

5. <http://uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UMA>.

6. James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 3, 51 (2006). Professors Coben and Thompson noted that they “did not anticipate the sheer volume of litigation about mediation” that they found. *Id.* at 47. Moreover, during the five-year period studied, the volume of mediation litigation increased by 95 percent while general civil case loads remained relatively static. *Id.* at 47–48.

governing settlement agreements, and many have unusual quirks that can be traps for the unprepared. Consequently, you must do your own research as to the particularities and vagaries of laws bearing on settlement agreements that govern in your jurisdiction. Before drafting a settlement, you should check that the agreement is admissible in court, is enforceable, and avails itself of all the benefits of the laws of your jurisdiction. Beware that some terms—such as those involving Medicare reimbursements or annuity payments—cannot be written without extensive advance legal research and due diligence.

C. Guidance for Mediators

To be helpful, you first have to understand what's needed.

Crafting a settlement agreement is an important phase of the mediation. This book will help mediators with a phase of mediation that usually gets little or no attention in alternative dispute resolution trainings and literature. The short shrift that the drafting phase of mediation usually receives is unfortunate because parties and attorneys continue to benefit greatly from continued facilitation skills that mediators can provide. Mediators who end their services after a “successful” mediation has resulted in a meeting of the minds, but not a fully executed written agreement, do parties and attorneys a disservice. Without the continued assistance and vigilance of the mediator, the process of resolution stalls as the initial agreement falls apart with buyer’s remorse or the discovery that the initial meeting of the minds did not reveal deep differences over important terms such as indemnification, allocation of fees and costs, and the scope of the release of liability. Mediators who know where these sources of discord lurk can help parties and attorneys navigate the process to a truly successful and final conclusion.

Effective mediation skills and strategies used in the process leading to initial agreement should continue to be employed during the process

of drafting the agreement.⁷ The same ingredients that bring a mediation to the point of “agreement on a number” continue to be effective, such as facilitating the exchange of information, employing reflective listening skills, and demonstrating empathy. The most effective mediators continue to provide facilitative support until a final written settlement agreement is signed, even if that occurs long after the mediation session ends.

Mediators must understand the language used by the attorneys and parties. Would you agree to mediate a case in which everyone spoke only Sanskrit? If you cannot understand the language used to describe the parties’ needs, aversions, risks, and desires, you can be only minimally helpful. Even if you never personally write a settlement agreement, the ability to do so will help you understand the concerns and desires of the attorneys and parties in the cases in which you serve as mediator. Short-hand references to commonly used settlement terms—such as indemnification, Medicare set-aside, and covenants—mask their deep complexity. By gaining an understanding of the common terms in settlement agreements, how they work, and their practical implications, you can become a more effective mediator.

Mediators should strive to keep the parties themselves involved during the drafting process. Thus, mediators should employ their skills to actively engage the parties who must live with the agreement. Unlike surgery, mediation works best when the parties are not anesthetized objects to be operated upon. Instead, parties should actively participate in the process of crafting the settlement agreement. “Mediation agreements have a high rate of compliance predominantly because the parties

7. Fundamental advocacy strategies for attorneys to employ during mediations lie beyond the scope of this book to address, but are addressed in such works as ROGER FISHER & DENNY ERTEL, *GETTING READY TO NEGOTIATE: THE GETTING TO YES WORKBOOK* (Penguin Books 1995) (a practical workbook by the authors of the classic work on negotiations aimed at win-win outcomes); ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (Harvard U. Press 2000) (providing an insightful approach for attorneys as they negotiate on behalf of their clients); SPENCER PUNNETT, *REPRESENTING CLIENTS IN MEDIATION: A GUIDE TO OPTIMAL RESULTS BASED ON INSIGHTS FROM COUNSEL, MEDIATORS, AND PROGRAM ADMINISTRATORS* (ABA Section of Litigation 2013) (collecting practical wisdom from many experienced practitioners).

Mediators can gain from the guidance provided in *BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION* (Jossey-Bass 2003, Daniel Bowling & David Hoffman eds); GARY FRIEDMAN & JACK HIMMELSTEIN, *CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING* (ABA Section of Dispute Resolution 2008) (laying out an approach to client-centered, understanding-based mediation); BRENDON ISHIKAWA & DANA CURTIS, *APPELLATE MEDIATION: A GUIDEBOOK FOR ATTORNEYS AND MEDIATORS* (ABA Section of Dispute Resolution 2016): 111–62, 197–272 (providing an overview of the mediation process with practical tips for mediators).

are actively involved in constructing those agreements.”⁸ Parties are far less likely to experience buyer’s remorse or dissatisfaction when they have actively participated in the entire process—including turning their chosen solution into a written contract.

Mediators should be mindful of ethical issues. As Professor Ellen Waldman observes about mediation ethics, “You’d think a field that self-consciously sees itself as ‘doing good’ would have a well-developed literature on ethics, but ours does not.”⁹ Although this book cannot fill the gap in the literature, it does strive to shed some light on a few of the most common ethical problems that mediators face, such as: What should you do when it appears one of the parties does not understand key terms? What obligations, if any, do you have to try to equalize the power imbalance if one party is represented and the other is unrepresented by legal counsel? What if the attorneys seem to have forgotten an important term?¹⁰

Mediators should remember their due diligence obligations. Even if your role is limited to facilitating the process of drafting the settlement agreements, you still must keep current about the state of law governing settlement agreements in your jurisdiction and the ethical obligations that apply to your role in the mediation.

D. Settlement Agreements in a Nutshell

There’s no point in bringing a snow parka to Tahiti or scuba gear into the tundra. Until you know where you’re going, you don’t really know what to pack.

Thankfully, the basics of settlement agreements are pretty simple. The best place to begin is with the goals for an effective agreement that conclusively resolves legal conflict between litigants. These include:

Understandable terms. All terms in the settlement agreement should be understood by the parties to the agreement. Even though the parties are probably not attorneys themselves and may lack familiarity

8. <http://nycourts.gov/whatsnew/pdf/ADR-FocusOnCrts052314.pdf> (quoting Mark Collins).

9. *MEDIATION ETHICS: CASES AND COMMENTARIES x* (Ellen Waldman, ed., Jossey-Bass 2011).

10. See chapter 8 (addressing, among other things, a few ethical quandaries mediators are likely to encounter).

with even the most basic rules of contract law, they must nonetheless understand the terms if an agreement is to be formed.

Actual agreement. For a legally binding agreement, *all* the terms in the settlement must be accepted by *all* the parties to the agreement. Effective settlement agreements describe all of the parties' legal obligations. Usually, there is no legally valid settlement agreement until there is expressed consensus on payment amount, scope of liability release, and other obligations required by the parties' agreement. This means that the moment in mediation when someone accepts an offer of money represents the beginning of the process of crafting the actual agreement, rather than the end of the mediation.

Practicable terms. The terms of the settlement must be practicable so that parties can realistically fulfill their duties under the agreement. This means that the parties should appreciate the implications of the terms to which they are agreeing and the full extent of the obligations they are assuming.

Enforceability. The settlement agreement should credibly provide for an expedient method of enforcing its terms. A settlement agreement should be more than just a remedy for ongoing litigation; it should also be preventative against breach of contractual obligations. Settlement agreements can greatly increase the odds of compliance by all parties to the agreement when they contain efficient enforcement mechanisms.

Stated in writing or on the record in open court. The settlement agreement should be memorialized so that its terms can be remembered and the parties will fulfill their obligations. Parties cannot comply with terms that no one remembers or, worse yet, that everyone remembers differently.

Keeping these goals in mind can help inform choices about the form of the settlement agreement, the terms to be included, and even the parties necessary for the agreement to work as contemplated. These goals can also inform whether the settlement agreement in a particular case is short and simple or requires extensive documentation and several terms to resolve complex litigation.

For simple settlement agreements, a binding agreement generally requires no more than a writing that identifies who is bound by the agreement, the legal claims resolved, the value to be transferred, and the scope of the release of liability.¹¹ Although this bare minimum suffices

11. Only rarely do courts invalidate settlement agreements for duress, coercion, or lack of capacity to consent. Coben & Thompson, *supra* note 6, at 51.

for an enforceable agreement, it also probably forfeits additional value to the parties that a more comprehensive agreement can offer. Well-structured and comprehensive settlement agreements contain seven basic categories of terms:

1. *Context.* A settlement agreement should begin with the context in which the agreement occurs by identifying who is bound by the agreement, the background facts, litigation to be resolved, and the parties' motivations for entering the agreement.
2. *Value to be transferred.* Every settlement agreement involves payment of money, transfer of property, and/or a promise to take some action. An effective agreement delineates the exact steps that the parties must take to fulfill their obligations to pay, transfer, or take specific action.
3. *Release of liability.* A good settlement agreement articulates the exact scope of the release of legal liability, including whether the release encompasses unknown claims in addition to known claims. Sometimes collateral litigation may be included in a global settlement that extends the value of a settlement agreement beyond a single case.
4. *Terms that add additional value to the agreement.* Parties frequently find additional value beyond money or property transfer by providing for confidentiality, allocating attorney's fees and court costs, and securing nondisclosure of the mediation discussions in jurisdictions lacking statutory mediation privileges. Parties may also safeguard trade secrets or other highly sensitive information that requires additional protections.
5. *Plans for interacting with the court.* Settlement agreements should make express plans for dismissal of the underlying case, approval of the settlement when it involves minors or persons lacking contractual capacity, and/or reservation of jurisdiction to enforce the agreement. An effective settlement agreement should allow for expedient enforcement in a court of competent jurisdiction.
6. *Interpretive aids.* Settlement agreements should be drafted for an audience that might include a court that is asked to approve, interpret, and/or enforce the agreement. Interpretive aids regarding an integrated agreement, joint authorship, and other matters can provide valuable guidance to the court.

7. *Provisions for making agreement effective.* A handshake deal does not suffice to end a legal conflict. There is no binding settlement until the agreement is written or stated orally on the record in open court. The best practice is for a settlement agreement to be made in writing and signed by the parties themselves. In some jurisdictions, special language or special typography is required for settlement agreements to be valid. Although oral settlement agreements stated on the record in open court are valid, they tend to suffer from problems with ambiguities, difficulty in being remembered accurately, and omission of terms that the parties would otherwise have included in a written agreement.

In a nutshell, these seven categories comprise the basic building blocks for effective settlement agreements.

E. What You Will Find in This Book

This book focuses on mediated settlement agreements and is intended to provide guidance for attorneys and mediators. “In mediation, a neutral third party analyzes the strengths and weaknesses of each party’s case, works through the economics of litigation with the parties, and otherwise assists in attempting to reach a compromise resolution of the dispute.”¹² Although many settlement agreements are negotiated and executed without the help of a mediator, the mediated settlement agreement is subject to unique statutory and ethical considerations that are explored in this book.¹³ Thus, this book makes the case for a drafting process in which attorneys are fully engaged and the mediator continues to use his or her facilitative and reflective communication skills.

12. *Frei v. Davey*, 22 Cal.Rptr.3d 429, 124 Cal.App.4th 1506, 1514 (Cal Ct. App. 2004).

13. Courts will sometimes presume that mediated agreements are free of collusion in a way that they will not assume for agreements negotiated without the assistance of a mediator. *See Nen Thio v. Genji, LLC*, 14 F.Supp.3d 1324, 1334 (N.D. Cal. 2014) (concluding a settlement was “the product of serious, informed, non-collusive negotiations,” in part due to “the assistance of a mediator experienced in wage and hour class actions.”); *International Longshore & Warehouse Union, Local 142 v. C. Brewer and Co., Ltd.*, 2007 WL 4145228, at *2 (D. Hawaii 2007) (“The assistance of an experienced mediator in the settlement process *confirms* that the settlement is non-collusive,” italics added); *In re Gilat Satellite Networks, Ltd.*, 2007 WL 1191048 (E.D.N.Y. 2007) (same); *but see Kakani v. Oracle Corp.*, 2007 WL 1793774 (N.D. Cal. 2007) (holding that for a fairness objection to a settlement agreement, “[i]t is ... no answer to say that a private mediator helped frame the proposal.”).

This book pays special attention to the types of terms commonly found in tort, contract, and employment cases, which together comprise the vast majority of settled cases.¹⁴ The exploration of the most common types of settlement terms is broadly applicable to other types of claims. Even so, cases involving complex litigation or niche areas of law require additional preparation and will necessitate specifically tailored terms. Much more than the basics are required to settle lawsuits founded on mass torts, class actions, shareholder derivative suits, and other specialized forms of litigation. Marital settlement agreements and other cases involving custody, visitation, and support of children are governed by a unique constellation of laws and rules that lie beyond the scope of this book.

This book also explores what should happen after “getting to ‘yes’” that is, after the parties have reached initial agreement on the dollar amount to be paid, property to be transferred, or other primary point of contention. Parties tend to feel that they have reached the end of the process once they reach initial agreement and are often happy just to leave matters to their attorneys to “work out the details.”

Although many mediation participants feel like the legal conflict concluded the moment they agreed on a dollar amount for the settlement, much more work is usually necessary before the parties finally resolve their legal conflict. Sometimes agreement on a dollar amount does not even represent the most important part of a settlement agreement for a particular party. Defendants may be more concerned about the scope of the liability release. Sometimes confidentiality may be paramount for a party concerned about reputational risk. An indemnification provision may be the priority for an insurance company agreeing to pay policy limits. Alternatively, a stipulated reversal of judgment may be most valuable to a company seeking to avoid the bad press of an adverse judgment.

Principles for crafting effective settlement agreements. Chapter 2 explores ten principles that attorneys and mediators can follow to ensure an optimal drafting process and result for settlement agreements. The amount of effort devoted to following the principles determines the quality and durability of the settlement agreement.

Preliminary Settlement Agreements. Chapter 3 explores the preliminary settlement agreement, which constitutes the most legally problematic area involving settlement agreements. Traps abound. With surprising frequency, parties find themselves bound by a preliminary

14. Coben & Thompson, *supra* note 6, at 56, Table 3.

settlement agreement even when it declares it is nonbinding. Preliminary settlement agreement in particular require research into the laws of the jurisdiction in which they are made. In some jurisdictions, a preliminary settlement agreement is expected to be drafted by the mediator and does not constitute a binding agreement. In other jurisdictions, preliminary settlement agreement are enforceable as final settlement agreements. Understanding the pitfalls of preliminary settlement agreement allows mediation participants to make informed decisions about whether to take a recess or continue until a final settlement agreement is signed.

The written settlement agreement. Chapter 4 covers the gold standard for settlement agreements: a single, integrated, written document that is personally signed by all parties. At best, a written settlement agreement represents the outcome of careful drafting, contains all terms agreed upon by the parties, and captures their plan for resolving the litigation. Careful attention to these terms goes a long way toward avoiding problems that lead to disappointment and further litigation.

Settlement agreement checklists. Chapter 5 contains a detailed checklist for settlement that can help both in the drafting of an agreement and during the negotiations as a reminder of available options. Chapter 5 also contains an abbreviated checklist containing only the minimum necessary to effectively settle a case.

Oral and nonintegrated settlement agreements. Chapter 6 delves into oral settlement agreements. Oral settlement agreements stated on the record in open court are valid in every jurisdiction but have their perils. Chapter 6 also explores nonintegrated writings—usually a series of back-and-forth e-mails—from which a court gleans the terms of a settlement agreement. Attorneys must understand the risk that a fully enforceable agreement can result from an e-mail exchange that seems to be just a discussion on the road toward agreement.

Problematic settlement agreements terms. Chapter 7 briefly surveys the types of terms likely to cause trouble for a settlement agreement, from threatening to undermine the agreement on public-policy grounds to exposing parties to serious monetary penalties.

Ethical issues relating to settlement agreements. Chapter 8 explores some of the more difficult ethical issues that attorneys and mediators face during the process of drafting settlement agreements—including questions of whether attorneys have duties to point out errors committed by opposing counsel and whether mediators draft the parties' agreements.

Conclusion. Chapter 9 contains my personal reflection on settlement agreements as an opportunity for learning and the further development of skill for professionals who are already highly accomplished.

Sample settlement agreements. The appendix contains the full text of the four hypothetical settlement agreements used in this book. These four samples can help alleviate the difficulty of staring at a blank page by providing a sense of the contours and flow for settlement agreements.

A note about the quotations you will find sprinkled throughout this book. While researching and writing about settlement agreements, I sometimes came across gems of insight from Abraham Lincoln, Albert Einstein, Yogi Berra, and others that I could not help but share for their insight and wit. And, when this book delves into dense topics such as indemnification and Medicare set-aside, I could not resist injecting a little levity with a few observations of my own. Thus, for better or worse, unattributed “quotations” are mine.

Ultimately, I hope this book provides you a readable and practical approach to the process and substance of effective settlement agreements.