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Preparing for a Successful Settlement Agreement

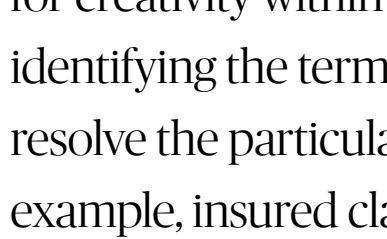
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IN BRIEF

- Settlement agreements can be the most effective way to resolve litigation.
- Most attorneys prepare to negotiate their case, but few get ready to write an effective settlement agreement that optimally addresses all of the issues between the parties and comports with statutory requirements.
- Adequate preparation requires practitioners to research potential terms, discuss possible solutions with clients, gather necessary documents, and take other necessary steps.

Effective settlement agreements convert the risks,  agreements are reached as the product of mediation, a process that helps parties transform misunderstanding into understanding, conflict into resolution, and the stress of litigation into freedom from worry. Settlement agreements do not instantly spring into being, however; fully formed and ready to be enforced. Moreover, many issues can be addressed in an effective settlement agreement only with advance preparation. Unfortunately, many attorneys who would not dream of showing up unprepared for trial will arrive at a mediation without having done their homework. Betsy A. Miller and David G. Seibel report in “Untapped Potential: Creating a Systemic Model for Mediation Preparation” in Volume 64 of *Dispute Resolution Journal* (2009) that one survey of experienced litigators found that “[a]lmost none said they spend more than an hour or two to prepare specifically for the mediation process.” Yet, lack of preparation to draft an agreement may doom the agreement for lack of necessary information, such as who should sign the agreement, what the jurisdiction requires for a valid agreement, and what terms are unlawful or otherwise unavailable. The importance of preparation for success in resolving a legal dispute warrants the following tips for how to prepare to write an effective settlement agreement.

Research potential terms of a settlement agreement. Understanding possible settlement options may itself facilitate agreement in allowing for creativity within the limits of the law. Begin by identifying the terms that have the potential to help resolve the particular case to be mediated. For example, insured claims resolved by settlement agreement tend to involve payment in exchange for release of legal liability. For cases such as these, a minimum of preparation requires consideration of whether payment will be made as a lump sum, in a series of payments, or via annuity. In addition, the scope of the release must be considered—whether it extends only to known claims or includes unknown claims, encompasses only claims made, or includes claims that could have been asserted.

Discuss possible solutions to the legal dispute with clients before the mediation. One exhaustive survey of commercial settlement agreements discussed in *Settlement Agreements in Commercial Disputes: Negotiating, Drafting and Enforcement* by Richard A. Rosen et. al (Aspen 2015) concluded that “there is no such thing as a ‘boiler plate’ settlement agreement.” In other words, there is no one-size-fits-all solution that can be used to settle cases. For this reason, attorneys must engage their clients in discussions about possible solutions to their legal conflict as part of their work in preparing clients for mediation. Sophisticated business people and frequent mediation participants might have specific terms and proposals they expect to include in a final agreement. Institutional clients might provide settlement agreements they have used in the past to help with preparations.

Gather the necessary documents. Before the mediation session, gather all potentially applicable insurance policies, medical bills, liens, statements of fees and costs associated with the litigation, and any other document bearing on the ultimate value of a settlement agreement. For a breach of contract claim, gather not only the primary contract, but also any subcontracts and side agreements. Read these documents with an eye toward settlement by watching for fee-shifting provisions, indemnification clauses, and subrogation agreements.

Ascertain the exact legal claims and parties. In protracted litigation, it may have been a long time since anyone read the operative legal complaint or cataloged which claims actually remain pending. With surprising regularity, even the attorneys of record have a mistaken understanding of the exact scope of pending causes of action. Rather than guessing, attorneys should review the operative complaint to determine the existing causes of action and exact identity of the parties to the lawsuit. Attorneys should pay attention to claims that could be, but have not yet been, asserted in order to determine the appropriate scope of a release of liability in a settlement agreement.

Prepare in advance for any transfer of property. If the legal dispute involves claims over property such as a house, a business entity, or negotiable instruments, preparation often means obtaining an appraisal to determine the value of the property. Documents establishing title, possession, or a leasehold also may be necessary to write an agreement that properly refers to the property to be transferred. Some transfers of property, such as out-of-state real property, may require substantial investigation to determine condition, valuation, and requirements for transfer.

Determine the type of the release needed. Consider the procedural posture of the legal dispute. If a lawsuit has not yet been filed, a covenant not to sue might make most sense to prevent further conflict. If the settlement agreement is to address ongoing litigation, a release of liability and a plan for dismissal of the case is likely more appropriate. Releases come in many permutations: releases of only claims made, releases of claims made and those that could have, but have not yet, been asserted, releases based on known facts only, releases of known and unknown claims, and more.

Lay the groundwork to settle an insured claim. Insurance is a strange product. The buyer pays in hopes of never using it. The seller hopes to never pay on it. Even so, insurance policies play an integral part of many settlement agreements. The potential applicability of insurance coverage to a legal claim can make finalizing a settlement easier in some respects and more difficult in others. The availability of insurance proceeds to fund or contribute to a settlement increases the likelihood that the parties can agree on an amount to be paid for release of the legal claims. However, the world of insurance comes with its own set of rules, procedures, and timelines that vary from insurer to insurer. It is too late to begin pondering insurance coverage at the end of a mediation session. Preparation for an insured claim settlement agreement should begin at least two to three months before any mediation begins.

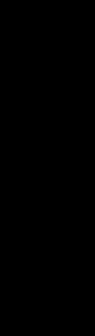
Determine whether the case involves, or even potentially involves, any payments by Medicare to the injured party. If the case to be settled involves any claims for medical expenses, attorneys must consider the possibility that Medicare has a claim to at least part of the settlement proceeds. Medicare, which pays medical expenses for qualifying elderly and disabled individuals, is considered to be a “secondary payer.” This means that Medicare can recover any payments it has made from a “primary” payer, such as automobile or liability insurance as well as the proceeds of a settlement agreement. See 42 U.S.C. § 1395y(b)(2)(A); see also *Taransky v. Sec’y of U.S. Dept. of Health & Human Serv.*, 760 F.3d 307 (3d Cir. 2014). The consequences of misjudging the amount of settlement funds to set aside for Medicare can be dire if the plaintiff is cut off from further Medicare payments (and thus medical care) until the reimbursement is made. Conversely, when Medicare is not reimbursed by the plaintiff, the defendant is liable for double damages plus interest, even if the defendant has fulfilled the terms of the settlement by paying the plaintiff.

Consider whether confidentiality will likely be a term. Confidentiality regarding a settlement agreement’s terms or very existence requires careful thought about which communications are to be restricted and which are to be allowed. Parties may agree that their private conflict should not be shared with outsiders or on social media, but the parties may need carve-outs to allow them to comply with applicable statutes, regulations, and court orders requiring disclosure. Carve-outs are often framed to include spouses and tax advisors. To be sure, discouraging breach of confidentiality is a delicate balancing act. An insufficient penalty will not incentivize compliance, whereas an excessive penalty will not be enforced by the courts. Thus, the scope and penalty should be carefully considered ahead of time along with the possible tax consequences that apply upon inclusion of a confidentiality provision.

Write a rough draft before the negotiations or mediation commence. Given that a blank page can be a formidable opponent for any writer, attorneys may wish to begin by surveying settlement agreements in similar cases. If the current case lies in an area of law in which the attorney frequently practices, the attorney may have comparable settlement agreements from which to draw. However, attorneys must resist the temptation to automatically cut-and-paste their way into new agreements without critically evaluating whether old boilerplate remains legally valid and is factually applicable to the case being settled. Ideally, the process of preparing to draft potential settlement terms generates ideas for workable solutions as well as revealing issues that must be resolved in order to end the conflict. At the very least, a carefully prepared draft will help avoid the risk of omitting important terms or including void terms.

Preparation is tremendously important to drafting an effective settlement agreement. Effective settlement agreements help parties move beyond the wrongs of the past and into a future in which their expectations and obligations are known, and where the parties are absolved of the litigation resolved in the agreement.

Brendan Ishikawa’s [Crafting Effective Settlement Agreements: A Guidebook for Attorneys and Mediators](#), published in 2018, offers valuable guidance for attorneys regarding the process of establishing settlements as well as the substantive terms required for enforceable agreements.

Authors 

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