Settlements: What could go wrong?

The devil really is in all the details of the settlement agreement

By David Gordon and Nancy Neal Yeend

After direct negotiations between counsel or even following mediation, typically, everyone is excited that they arrived at a settlement. *"We've got a deal!"* What does that mean? All too often the individuals, who participated in the settlement discussions or mediation, are so glad the haggling is over that they miss some of the details, and soon thereafter, the deal falls apart.

The following are typical examples of things overlooked, and which can cause a settlement to unravel. Taking a little extra time may help keep those settlements from disintegrating.

1. Discussions are not summarized

The basic mistake is that all the topics discussed during settlement negotiations are not summarized. Everyone has their own understanding of what was agreed, but what happens when people do not take the time to *"compare notes"* and clarify? As the old adage says, *"An ounce of prevention is worth a pound of cure."*

The parties are in mediation because of a fundamental disagreement. Has the basic disagreement been identified? By definition, the parties do not place the same level of importance on the disagreement. A mediator must be adept at identifying the importance each party is placing on the issues and making sure those elements are addressed in the summary.

Summarizing can provide the vehicle for clarification and comparing of notes. Experienced mediators summarize and seek clarification through the entire process. Summarizing needs to start with the mediation intake process, or at the initial conversation suggesting direct negotiations. Whether during mediation opening remarks or in direct negotiations with counsel, summarizing the key issues to be addressed and resolved, and referencing an anticipated timeline for finalizing a settlement creates the foundation for a solid agreement. This brief listing of topics to be discussed and resolved can become the *settlement checklist* for ensuring that everything initially mentioned is actually addressed in the final resolution.

Skilled mediators understand that the *devil is in the details*, so will often schedule a follow-up session before everyone leaves the mediation, just in case issues arise during drafting of the settlement. Confirming a back-up discussion date does two things: it often helps motivate people to resolve any differences on their own, and also establishes an atmosphere of collaboration to resolve the case. Going over the summary and asking clarifying questions, prior to someone actually drafting the final settlement document, may prevent the need for a follow-up session. Think of this as a *"care-and-feeding"* requirement of a settlement. If neglected, the settlement can die during this stage and the process will have to be restarted, or will move to an alternate arena, such as litigation. Mediators and attorneys would be well advised to set reminders for themselves to check on the progress of the summary and review. Additionally, a settlement checklist would provide a good opportunity to memorialize key dates, and agreed procedures for modifying those dates.

2. A boilerplate settlement form is used

Too often, a *"boilerplate"* settlement form or contract is used. The main issues that arise from using these forms comes from the participants not sharing the form in advance of the settlement discussions, or that the parties do not closely read the form if it is provided prior to the negotiations. People assume they know what it says, they will read it later, or they will edit it when and if they reach a settlement.

As soon as a mediator receives a case or attorneys start to explore the possibility of direct settlement negotiations, the parties need to exchange and review any *"boilerplate"* form that might be used for the settlement. Discussing these pre-drafted forms prior to direct negotiation provides an opportunity to remind everyone that their agreement on the form is an example of how their cooperation can provide a pathway to settlement and help prevent further costly litigation.

3. Failure to anticipate disagreements

Anticipating that disagreements may emerge during the drafting process is an important consideration and yet often-missed. It may be prudent to ask the

participants, during the settlement discussions, to identify the areas they believe might become problematic to carry out. Discussing, in advance of drafting the settlement, questions such as, *"What if you cannot agree on the terms of the draft?"* will enable everyone to remain calm and outline a process for working out the details in a constructive manner.

Additionally, getting everyone's input about what constitutes reasonable timeframes helps prevent people from walking away from a settlement. What is reasonable to the plaintiff may not serve the defendant at all, and both parties may differ from the attorneys' or the mediator's ideas of a reasonable time frame.

Often after settlement discussions, one attorney proposes to draft the contract, and the other attorney agrees to review it. What gets left out of the negotiation conversation is when will the document be drafted, how long does counsel have to review it, and what is the process should the attorneys, or their clients for that matter, disagree on the draft?

Everyone who has drafted a document for review has probably had the experience of having to make changes, and then at the last minute, having the reviewing party ask for additional changes. How many *bites of the apple* does the reviewer get? Will the reviewer get one chance to make changes, or will drafts be reviewed multiple times? This could be a delaying tactic, used to kill a settlement once the initial excitement of having reached a settlement has evolved into second thoughts.

The parties need to acknowledge that the mediation is not complete, and confidentiality is still in effect, until a settlement draft is written, provided to all parties for review, and ratified. Specifically identifying who bears the responsibility for drawing up the settlement, identifying the time frame by which the draft settlement will be completed, and the period of time, during which parties will be able to review the draft before it is finalized, must be clarified.

Taking the time to ask basic clarifying questions at the end of each negotiation may decrease the probability of a settlement unraveling. Basic questions include the following:

- Who will draft the settlement, and how much time do they need?
- How long will it take for the reviewer to scrutinize the draft?
- Does anyone, other than the parties, need to review or ratify the document – board of directors or governmental entity?
- Will those individuals who directly participated in the settlement discussions agree to advocate for acceptance of the settlement, if the document must be ratified by an individual or entity not present at the negotiations?
- Does the draft cover all of the issues discussed, or were some topics determined to be outside the scope of the current draft and remain to be addressed later? When? How?
- In the event additional information or further discussions become necessary to complete the draft, who will undertake getting the information and by when?
- How will the settlement be enforced? If the settlement is negotiated during mediation, is it out from under the confidentiality umbrella?
- What is the final date by which the agreement must be executed?
- Does a court need to be notified of a settlement, and if so, who completes the notification?

4. Fulfillment of the settlement terms

Fulfillment of the settlement terms is often an *off limits* topic. What happens if there is a final settlement, but one or more of the parties do not fulfill the terms of the agreement? Providing a process for handling potential problems *"down the road"* is important to consider in the initial negotiation discussions.

Naturally, during the intake process and opening remarks, the mediator determined the authority of the parties to enter into a settlement agreement. While having reminded parties of the requirement for confidentiality throughout the mediation, the participants may wish to consider including a clause within the settlement agreement that allows for an exception to confidentiality if compliance or enforceability become issues later. It can be helpful to remind parties of some of the costs associated with abandoning the settlement through compliance and enforceability challenges, in both dollars and time.

A few essential questions to ask during the negotiation discussions include: What recourse is available if a party fails to fulfill the terms of the settlement? Are there penalties for failing to fulfill the terms of the settlement, and if so, what are they and how will enforcement be accomplished?

Will an ADR clause be included in the settlement, and if so, what are the details as to type(s) of processes, qualification of the neutrals and time frame for initiating or completing any ADR process?

To summarize: In a perfect world, attorneys will have worked together in advance to provide a boilerplate form that will anticipate and provide for all issues discussed within the negotiation. They will have summarized their settlement so that everyone leaves the session with a similar vision of what the final agreement will include. In reality, this does not happen, and so attorneys and mediators would be well advised to develop their own settlement forms, be prepared to summarize and clarify before leaving the negotiations, and use the summary as a checklist to guide the person drafting the settlement contract. Active follow-up, via phone calls or emails, can go a long way toward fulfillment of the terms within the agreed upon time frames.


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