

## NEWSLETTERS

# Are Settlement Agreements Written On The Backs Of Napkins Enforceable?

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For the last three years, your team has been working feverishly on an epic bet-the-company complex litigation matter. The lawyers are exhausted. The business leaders have grown impatient. The judge has had enough. Finally, after an action-packed period of fact depositions and just prior to the exchange of expert reports, there appears to be a beam of light streaming from the litigation sky. Both parties have agreed to a mediation that will be attended by business leaders who have the authority to settle the case.

Lawyers and their clients swoop into town from all over the country. Each team spends the night prior to the mediation bonding over the mutual disdain of the other side's lead counsel.

The mediator walks into the big conference room with her eyes glazing over, having read the 50-page mediation statements that were, no doubt, made more "pithy" by the senior partners' insistence that the introductions "pack more punch." The parties plaster on their best no-nonsense faces, stare each other down, and politely decline offers of coffee and soft-drinks.

The mediation begins. To the parties' feigned surprise, the mediator does not appear to be doing much of anything. She allows both sides to give meandering opening statements. One side stands up and begins to pontificate about things that do not relate to the substantive facts or evidence that has been gathered to date, while the other side alleges all sorts of improper behavior.

The parties take a break. Both teams proclaim that the mediator is "with us" to themselves and not buying any of the garbage that the other side has proffered.

The negotiations begin. Both sides open the negotiations with ambitious opening amounts. The plaintiff asks for a multiple of the amount sought in the complaint. The defendant offers \$10,000 and the courtesy of withdrawing its counterclaims.

The offers infuriate both sides. Each side complains to the mediator about what a waste of time and money the mediation has been and threaten to scurry back to their respective cities on red-eye flights (first-class, of course).

The deftly aware mediator coaxes both sides back to the negotiation table. Several more hours pass. It is now late into the night. A settlement is near.

Finally, at around midnight, the mediator has managed to shove both

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sides into agreeing on key settlement terms. Notwithstanding, given how late it is, how exhausted the parties are, and the complexity of the case, there is neither the will nor ability to draft a detailed settlement agreement on the spot. Instead, the parties handwrite a two-sentence document that provides something like this:

- Party A agrees to pay Party B \$4 million.
- Both parties agree to waive all claims against each other.

The business leaders and their lawyers sign and date the handwritten document. The parties depart each other by doling out fake smiles and relieved handshakes.

On the next day and after a good night's rest, one of the business leaders (Party A) has a change of heart. The settlement that appeared reasonable late the night before suddenly does not look so great the morning after. The client calls up the lawyer and complains about putting the company in such an untenable position. The lawyer apologizes profusely and suggests that it is not too late because the formal settlement agreement has not been signed.

For the next few weeks, the parties exchange drafts of a formal settlement agreement until Party A officially declares that the deal is off.

Left with few viable options, Party B seeks to enforce the handwritten document in court. Will the court rule that the handwritten document is enforceable?

The Seventh Circuit recently answered a similar question with a resounding yes. In *Beverly v. Abbott Labs.*, 817 F.3d 328 (7th Cir. 2016), the plaintiff (Martina Beverly) sought hundreds of thousands of dollars from Abbott Laboratories in an employment discrimination/retaliation case. The parties decided to mediate the case after the district court denied summary judgment. One day prior to the mediation, Abbott's counsel forwarded Beverly's counsel a six-page template for a formal settlement agreement to prevent any surprises if the parties were able to settle the case during the mediation. Notably, that template included provisions related to a review period, payment mechanisms, indemnification, and waivers/releases.

After a lengthy 14-hour mediation, the gap remaining between the parties was only \$10,000. Accordingly, the parties drafted and signed a handwritten document which provided as follows:

I Jon Klinghoffer will commit that my client will communicate to its internal business client the fact that Abbott/AbbVie has offered \$200,000 + Abbott/AbbVie pays cost of mediation to resolve this matter and that Martina Beverly has demanded \$210,000 + Abbott/AbbVie pays cost of mediation to resolve this matter. Both parties committ [sic] that their offer and demand will remain open until Tuesday, July 22, 2014, 3:00 PM central.

*Id.* at 332. Thus, either side could accept the last demand of her/its opponent at any moment prior to the expiration period (*i.e.*, July 22, 2014 at 3:00 p.m. CST).

On the morning after the mediation, Abbott's counsel: (1) timely accepted Beverly's demand, such that Abbott/AbbVie agreed to pay Beverly \$210,000 and the mediation costs to resolve the dispute and (2) emailed

a draft settlement agreement that largely reflected the terms of the template that Abbott's counsel had sent the day prior to the mediation. A few minutes after receiving the aforementioned, Beverly's counsel responded: "Oh happy days! Best \$10,000 Abbott has ever spent. You are a gem." *Id.*

Notwithstanding the aforementioned, Beverly ultimately decided not to sign the formal settlement agreement. Accordingly, Abbott's counsel moved to enforce the handwritten document that was signed by the parties after the 14-hour mediation.

The trial court granted Abbott's motion, but Beverly appealed. On appeal, Beverly argued that the handwritten document was not enforceable and it lacked key terms that spelled out certain obligations of the parties. More specifically, Beverly argued that the handwritten document did not contain, among other things, provisions with respect to waiver/release, indemnification, cooperation between the parties, and future employment options. Thus, at issue before the Seventh Circuit was whether the handwritten document created an enforceable settlement agreement.

The Seventh Circuit rejected Beverly's arguments and concluded that: (1) albeit inartful, the handwritten document sufficiently provided for waivers and releases and (2) Beverly had failed to explain how other terms were "so vital that the parties would not have settled the dispute without them." *Id.* at 335.

We find that the district court correctly concluded that the handwritten agreement was enforceable because the agreement sufficiently defines the parties' intentions and obligations. The material terms in the agreement clearly provide that Beverly offered to 'resolve this matter' – i.e., voluntarily dismiss her alienage and disability claims – if Abbott paid \$210,000 and mediation costs. See *Elustra v. Mineo*, 595 F.3d 699, 709 (7th Cir. 2010) ("We find that the material terms were definite and certain: defendants would pay \$6,000 to the Elustras in exchange for their dismissal of the lawsuit."). It also states that Abbott had five days within which to accept Beverly's offer, which it did the following day. Both parties and their respective attorneys signed the agreement, further demonstrating their intent to be bound by the terms of the document. And the elated response of Beverly's counsel to Abbott's acceptance further underscores the parties' understanding that the handwritten agreement would settle Beverly's claims. . . . We agree with the district court that the parties' failure to execute the typewritten proposal simply left the handwritten agreement's enforceability undisturbed. . . . A settlement agreement may be enforceable despite the omission of certain terms so long as those terms are not material.

*Id.* at 333-35.

*Beverly*, therefore, underscores the fundamental principle that even a simple handwritten settlement agreement will be enforced so long as the bare-bones material terms are included.

In light of *Beverly*, here are some practical takeaway tips for drafting enforceable "same-day" settlement agreements for you to consider:

1. If you and/or your client are hesitant, in any way, with respect to the material terms that were negotiated, do not sign anything after the negotiations (even a simple handwritten note signed on the back of a napkin could be enforceable).
2. If, however, you and/or your client approve of the material terms that were negotiated, do not leave until you obtain a signed document (even a handwritten note could suffice).
3. Indeed, consider bringing a pre-made one-pager that includes at least the following provisions with blank spaces that can be filled in at the end of the negotiations:
  1. The parties have reached a binding agreement and have agreed to compromise and settle all disputes related to **[Insert Case Name(s) and Caption(s)]**.
  2. The signatories of this document have apparent and actual authority to settle such disputes and sign this document on behalf of their corporation and/or client.
  3. **[Insert Party Name]** agrees to release and waive all claims against **[Insert Party Name]**.
  4. **[Insert Party Name]** agrees to pay **[Insert Amount]** to **[Insert Party Name]**.
  5. The parties agree to negotiate a more detailed settlement agreement that will eventually supersede and replace this settlement agreement.
  6. If the parties are unable to agree to a more detailed settlement agreement, however, this settlement agreement shall be fully enforceable.
  7. Alternatively, if the parties are unable to agree to a more detailed settlement agreement, the parties may, upon mutual consent, present the remaining disputes, in writing, to **[Insert Mediator's Name]** who shall have the authority to finalize the terms of the settlement agreement in her sole discretion so long as those terms do not conflict with the terms contained herein.
  8. The parties agree that **[Insert Judge's Name and Court]** has jurisdiction to enforce the terms of this settlement agreement.

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