

# Making Settlements Last

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A settlement is meaningless if it the parties don't respect it. Parties who don't respect settlements simply see breach as another cost of doing business, accepting further litigation if they see the overall result to be profitable. An all too common example may occur when a large small vendor is owed money by a large retailer. In a typical scenario, the vendor needs prompt payment to remain healthy and a continuous flow of sales and payments to remain in business. Knowing this, the vendor may choose to "stretch" payments as far out in time as possible, until forced to the bargaining table by a desperate vendor. If the retailer is sufficiently unscrupulous, it may make a small payment at that time and agree to make monthly payments, but insist that in exchange for the monthly payments, the vendor must allow the amount of credit to remain as is. The vendor, back against the wall, often feels that it has no choice but to accept. The agreement in place, the retailer then orders as much product as possible from the vendor over the next few months while making the minimum agreed payments, then never pays another dime. The upshot is that the retailer finds another vendor immediately, and the original vendor can either quietly go out of business or try to finance a lawsuit and deal with the inevitable stalling tactics that will follow. Welcome to the exciting world of business litigation!

These sorts of cases are very tough to mediate for several reasons. First, the playing field is hugely unbalanced; here, the retailer has all the economic strength. Second, the vendor will typically not be aware of the problem until it is likely too late. Third, the retailer clearly does not value a continuing relationship. And fourth, *and most importantly*, the retailer is not bargaining in good faith.

I use this example to segue into an area where the landscape is very different: divorce mediation. In California, where I practice, divorce is a matter of right. A spouse cannot successfully contest a Petition for Dissolution. There are three general ways in which divorce is accomplished: (1) through negotiation, whether by mediation or collaborative law; (2) through adversarial negotiation and settlement

between attorneys; and (3) by court trial. Let's discuss the issue of spousal support in light of each of these.

Consider a case in which the husband makes a good living and the wife has limited earning capacity in a marriage in excess of twenty years in which there are young children. In a case like this, it would be fair to assume that child support is automatic and that spousal support is highly likely with a long duration, possibly even lifetime. In a trial setting, a judge will order the support amounts and duration. It is not surprising that many husbands feel "jobbed." They feel that the judge (especially if the judge is a woman) is unfairly biased towards wives, or that their attorney did a poor job, or that the bad weather that day had something to do with it. Bottom line: the husband feels that he's being bled dry. Given the customary awards here in Los Angeles, if his attorney hasn't done a good job of educating his client, the husband is in for a rude awakening. All of this sets the stage for the stereotypical husband who does everything he can to avoid paying the alimony. Unfortunately, the line between the spousal and the child support is too often blurred and the entire matter devolves into a lifetime of orders to show cause, contempt hearings, even jail time, and two very affluent attorneys.

An adversarial settlement is somewhat better, since the husband and wife must agree to the terms of the contract. But even in these cases, there's a lot of pressure on them to agree. For one thing, the soaring costs of litigating divorce may have placed them in a position of financial exhaustion, where they feel compelled to settle so that there's something left to divide. And at the same time, each attorney, if he/she is doing his/her job, is putting pressure on their client, through hard reality checks, to accept terms that are anathema to them. While there may be a greater personal investment by the parties in this settlement, there is still a pretty high rate of husbands in the case I've outlined who walk out with steam coming out of their ears, itching to get even.

Finally, we have the mediated settlement. In a mediated settlement, both sides are required to be transparent; all information regarding the marital estate must be provided for the mediator to be able to work with the couple. In addition, part of the mediator's job is to see that the playing field is balanced. The mediator will also ensure that before either party agrees to anything, that party is fully informed of all possibilities and makes the wisest decision in light of the entire picture. In this way, if a party makes a concession, that party will

understand why the concession is necessary and what will be gained in return for that concession. Every step of the way, the mediator will empower the parties to make their own decisions and to really agree on how they are going to terminate their marriage. Studies have shown that people who mediate their divorce are *far more likely* to respect the terms of an agreement that they crafted themselves, albeit with the assistance of a professional.

The lesson to be taken from this is: **when parties can invest in the creation of an agreement, they are far more likely to honor that agreement and the settlement made by that agreement is far more likely to endure.**