

Preventing Settlement Regret

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Attorneys commonly see clients unhappy with a previously negotiated settlement. Such discontent may express itself in numerous ways, including client statements of dissatisfaction, efforts to seek a modification, attacks on reputation, and change of counsel. More serious expressions of settlement distress can be found in client threats, bar complaints, legal malpractice suits, and, in rare instances, violence.

The development of settlement unhappiness typically follows a common path: a conflict originates between parties, evolves a life of its own, then triggers legal intervention. In light of that genesis, it is understandable that a subsequent legal fight is unlikely to create an outcome received merrily by all. Some argue that the adversarial process itself, as it has evolved today, contributes specifically to settlement discontent in that the nature of litigation and the heightened pressure to settle produces clients generally unhappy with the resultant agreements.¹

In light of such dissatisfaction, the profession has turned in recent years to an increasing emphasis on mediation² and other forms of alternate dispute resolution to supplement or replace litigation.³ Such efforts undoubtedly provide benefit opportunities but research shows they contribute as well to the population of clients dissatisfied with their legal settlements.

CLIENT DISSATISFACTION

A recent *Harvard Negotiation Law Review* found in a five-year period more than 1,000 state and federal decisions reported in which mediation itself was the subject of litigation.⁴ This should come as no surprise because it is not uncommon to hear an experienced mediator profess that, “one definition

of a good settlement is when both sides are equally unhappy”⁵ or that “a truly good settlement is one that leaves everyone unhappy.”⁶ Although not a universal viewpoint, if many start with the notion that a “good” mediated agreement will produce up to 100 percent of clients unhappy with it, reducing settlement discontent would appear increasingly unlikely.

Less pessimistic is the International Academy of Collaborative Professionals (IACP) report⁷ that 75 percent of paying clients selected from collaborative practice who were willing to complete a survey stated being satisfied with the settlements achieved. Although this may provide a welcome optimism, it should be noted that 25 percent of these willing, paying IACP clients did not express satisfaction with the outcome. Further, because the views of collaborative clients refusing to complete the survey are not available, the 25 percent figure may significantly underestimate lack of satisfaction if applied more generally, particularly with clients less interested in a collaborative resolution. Future research will determine how large the population of dissatisfied collaborative clients may be.

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All told, no form of dispute resolution today is immune from producing a substantial percent of clients unhappy with the settlements they execute voluntarily. The size of the population of clients who seek a modification is one indicator of that unhappiness and is smaller than the total number of clients dissatisfied with their agreements. Despite the commonality of clients experiencing adverse reactions to the settlements they agree to and the serious consequences that may unfold, it has yet to become the focus of systematic study. Accordingly, the present article will address the phenomenon of *settlement regret*. In so doing, it is hoped that future agreements arising from litigation, mediation, or other means will generate fewer dissatisfied clients.

EMOTIONAL REACTIONS TO LEGAL SETTLEMENTS

Individuals who execute a formal agreement to resolve a legal dispute usually experience positive or negative emotions about it, or both. The experience of mixed emotions may include diverse combinations of positive feelings (*e.g.*, contentment, delight, joy, relief, success) and negative ones (*e.g.*, anger, frustration, humiliation, sadness, self-doubt).

Emotional reactions to a settlement can vary across individuals and over time. In particular, these emotions may change in intensity, frequency, and duration, as well as in their expression (*e.g.*, crying, smiling, sullen). They may also change in character (*e.g.*, happy at one time, frustrated at another). All individuals experience some type of emotional reaction to settlement of a significant legal dispute. Not all individuals will express it directly.

Dissatisfaction with a negotiated settlement may be short-lived or long-term, intermittent or consistent. It is not uncommon for individuals who settled a legal dispute to have subsequent moments of "second-guessing" themselves in regard to the executed agreement. For many, such fleeting thoughts are normal. However, when the level of dissatisfaction is significant and the experience of it persists over time, obviously there is a problem.

When dissatisfaction with a legal settlement is strong, the probability that the client will take action about it would appear likely to increase. Such actions may be directed at the *agreement itself* or at *particular individuals* involved in creating the agreement, or both. Examples of the former

may include initiating informal efforts to change the agreement, intentionally violating the agreement, and filing a lawsuit to modify the agreement. Examples of expressing dissatisfaction at individuals may include complying with the agreement in a hostile way, attacking an attorney's reputation, refusing to pay legal bills, filing a bar complaint, initiating legal malpractice litigation and in rare cases, violence, including murder.⁸

Although many clients experiencing strong dissatisfaction with a legal settlement may not engage in any of the above examples, there is little question that a settlement achieved comes with risk for both clients and attorneys. In light of this risk, it is appropriate to attempt to understand the phenomenon better and seek improved approaches toward its management. The beginning of such understanding is facilitated by defining the phenomenon.

DEFINITION OF SETTLEMENT REGRET

For purposes of the present discussion, *settlement regret* is defined as dissatisfaction with a previously agreed-upon legal settlement to end a dispute such that the individual:

- is currently discontent for having made that agreement;
- has been discontent consistently over time about the agreement following its execution;
- wishes he or she had not made the agreement;
- desires a particular modification or termination of the agreement; and
- believes the discontent will not change favorably unless the agreement is modified in the way the individual desires.

There are some key components in this definition to consider. First, the client must express discontent at present and consistently over time, expect the unhappiness to continue, and specifically wish in hindsight to have not consented to the agreement. In other words, the client's regret is significant and stable, not fleeting. This distinction helps to differentiate individuals who experience regret but not to the extent of wishing the agreement had not been adopted.

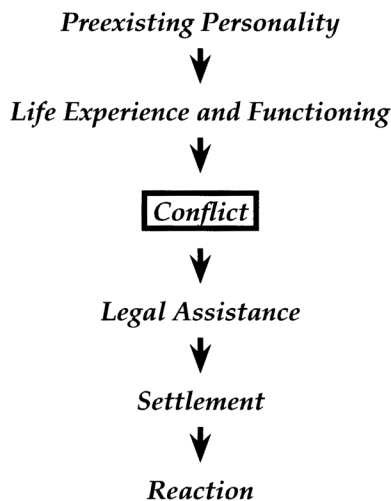
Second, as defined in this article, the presence of regret is of such a significant level that the client not only desires the agreement to be modified, but believes this desire will not change. This pessimistic prognosis helps to differentiate clients with faith their current negative reaction will diminish compared to those expecting it will not, and thereby keeps the standard for inclusion to be those with significant and persistent regret.

Third, no time limit has been specified for the experience of discontent other than that it has been persistent for some constant period of time after execution of the agreement and continues to the present time. As such, this aspect of the definition of settlement regret can accommodate a wide range of cases, including for example, those who do not develop regret early but ultimately do so consistently, to those engaging in impulsive unlawful acts of regret shortly after the agreement has been executed, as well as all others in between that meet the full definitional criteria.

In brief, using multiple criteria as presented in the definition of settlement regret helps to separate the more serious cases from less troubled ones.

SEQUENCE OF SETTLEMENT REGRET

Settlement regret does not occur by accident. Nor does it appear in a vacuum. Rather, settlement regret must go through a particular sequence in order to present itself. In fact, any reaction to a settlement follows this sequence:



Examining the sequence underlying cases of settlement regret and those without regret may aid in

understanding the former. An example from my earlier days as a psychologist will help illustrate why.

I was asked to evaluate two individuals in the emergency room who were found floating for days in the ocean. Their boat had capsized with no shore in sight. They clung to life by holding onto a floatable insulated cooler. While their bodies dangled in the chop of the sea, both were convinced they would die there.

The first survivor I interviewed presented as the happiest, most grateful person on Earth. In contrast, the second survivor reported constant feelings of "shaking inside" as if the ocean waves were still hitting upon him. He was extremely anxious and struggled to understand how he would ever get over what he had just experienced. Two individuals exposed to the exact same stressor yet their reactions were vastly different. Why?

Serious settlement distress is found in threats, bar complaints, malpractice suits, and violence.

The happy survivor had a normal life history. The shaken survivor did not. Prior to this experience, he had problems with anxiety and stress throughout his life. Thus, the difference in these individuals' reactions to the exact same life-threatening circumstance varied in accord with their experiences in life that predated this frightening event. The unfolding of settlement regret may be viewed similarly.

Each person coming to a settlement enters the sequence with a preexisting personality and history of functioning based on life experience and genetics. A conflict develops, lawyers become involved, a settlement is agreed upon, and reactions occur. Like the two individuals described above floating at sea, the sequence is the same but the reactions may differ. Sometimes the divergence in reaction may be due to life events predating the conflict, sometimes not. Dissatisfaction may also come from a variety of sources, such as the:

- conflict itself,
- nature of legal assistance,
- conditions in which the settlement was agreed to,

- terms of the settlement, or
- events that develop following the settlement.

By considering the sequence of settlement regret, it offers the opportunity to identify clues as to who may or may not be likely to develop settlement regret as well as what circumstances prior to, during or after the settlement may elicit it.

CAUSES OF SETTLEMENT REGRET

To prevent something from occurring, it helps to understand why it would appear in the first place. As such, identifying causes of settlement regret facilitates the development of efforts to prevent it. Although examining the sequence of settlement regret provides clues where to look, in and of itself, it does not specify the causes of settlement regret. For example, not all individuals with an abnormal level of functioning prior to coming to an agreement develop settlement regret. Likewise, not all individuals who go through highly contentious, protracted litigation develop settlement regret. However, it is not unreasonable to expect that having a preexisting abnormal personality and undergoing years of hostile litigation may increase the risk for developing settlement regret compared to those without such history. As the causes of settlement regret are varied, numerous, and inadequately understood from a scientific perspective, at the present time a consideration of factors likely to increase risk for developing settlement regret offers a beginning approach toward the elucidation of causes.

Mediation can be the subject of litigation too.

A *risk factor* is something that increases the likelihood that a particular problem may emerge. Smoking increases the risk for developing lung cancer but not all smokers will acquire the disease. By avoiding the risk factor, one reduces the likelihood of developing the problem of concern.

In well-developed scientific literature, risk factors are researched systematically and utilized accordingly. When scientific literature is scant or nonexistent, the identification of potential risk factors is developed at the practitioner level.⁹ Thus, to

prevent settlement regret, the search for risk factors begins with case experience.

A beginning set of potential risk factors for settlement regret is presented below, classified according to the sequence for reaching an agreement identified above.

Preexisting Personality and History of Functioning

- Normal personality with strong traits
- Personality disorder
- Abnormal psychological state
- Hidden agendas

As noted previously, the client's composition and history may affect risk for settlement regret. For example, a person who tends naturally to avoid conflict more than others, but not to the degree of having a psychiatric disorder (*i.e.*, a normal personality with strong traits), may agree to settle with the hope of reducing conflict, only to wake up later to the reality of a poor decision. Likewise, a person with a long-standing problem of inflexible adherence to rules including rigid monitoring and interpretation of technicalities (*i.e.*, a personality disorder) can easily be envisioned to be upset by minor, inconsequential agreement violations. Another example is a client battling depression during the conflict who may come to view an adopted agreement differently once the depression has lifted.

Sometimes, a client may harbor an unspoken agenda and approach settlement with a covert goal in mind. For example, a client who secretly hopes to win back a spouse seeking divorce may agree to "easy" terms that ultimately fail to produce the fantasized outcome, but settlement regret instead. As another example, an opposing client covertly seeking revenge may deliberately agree to ambiguous settlement terms on certain issues to create periodic distress for the other party, leading the victim toward settlement regret.

In many cases akin to the aforementioned examples, the attorney may have little awareness or understanding of these preexisting personality and functioning issues, and with the best of intentions guide the client toward settlement without consideration of them. In all fairness, it would seem a rather tall standard to expect counsel to be aware of these case attributes, especially the subtle ones,

without specific expertise advising counsel as such. Attorneys face additional obstacles in this regard because psychologists as a group are not especially accurate when making predictions about future behavior.¹⁰ As such, it would appear that in select cases of this kind, both client and attorney may find themselves at risk for the consequences of settlement regret.

Two parties exposed to the same stressor may react differently.

The Conflict

- Heightened hostility
- Protracted battle
- Complexity of issues
- Rush to resolve

It stands to reason that the more complex, hostile, and protracted the conflict is, the more likely the settlement agreement will not adequately address all issues and hence, increase the risk for settlement regret. It is not uncommon to see one party in a bitter dispute for years who wearily comes to agree to settle generously with hope the bitterness will dissipate, only to experience great anguish when that agreement fails to produce the desired outcome.

Another source for settlement regret risk is when the parties rush themselves to an agreement. The pressure to settle prematurely may stem from various influences, including newly developed relationships, impulsivity, naïveté, efforts to “put one over” on the other party, financial considerations, professed need to “get on with my life,” as well as other factors. One can easily see how a rush to settle may set the stage for settlement regret in cases involving complex issues in which the self-induced speed to settle may interfere with the thorough consideration advised by counsel.

Legal Assistance

- Terms of agreement
- Problematic verbiage
- Unanticipated problems

Settlement regret undoubtedly can appear with or without attorney missteps and a thorough review is beyond the scope of this article. However, a few commonly encountered sources of settlement regret deserve discussion pertaining to “judgment calls,” which more often than not contain proper legal advice.

The terms of any agreement result from considerations by client and attorney. Regardless of the way the terms of the agreement are reached, if they do not bring an end to the conflict, the likelihood for settlement regret is increased. In some cases, the parties come to adopt an agreement “with holes” as opposed to no agreement, perhaps expecting the fight to be fought another day, or not anticipated at all. Although decisions of this kind may appear pragmatic at the time, they nonetheless increase the likelihood for settlement regret. For example, an agreement that is silent on a sensitive matter may lead to settlement regret when a party who in good faith gave up much in return for an expected end to the conflict finds an unaddressed sensitive matter surfacing in a disturbing way.

A client seeking revenge may agree to ambiguous terms to create periodic stress.

Another factor that may increase the probability of settlement regret is the failure to anticipate problems that may arise from the terms of the agreement that appear reasonable on the surface but actually may produce difficulties. For example, parties in a hostile divorce may sign an agreement containing the well-intentioned verbiage, “all communications between the parties shall be respectful and they shall cooperate fully with one another.” In fact, their loathing of one another renders them unable to comply with that clause even with professional assistance, thereby rendering this agreement language a means to antagonize and attack the other.

Even when the terms of an agreement are acceptable to both sides, problematic wording may unintentionally set the stage for settlement regret. For example, “papering over differences” through ambiguity may be used to produce an agreement at times, but the lack of clarity sets the stage for conflicting interpretations and further battling down the road. Clients who do not clearly see the consequences of signing an agreement ambiguous on

adverse issues or who are inadequately prepared would appear at greater risk for settlement regret.

In all fairness to attorneys working diligently and often under duress to help their clients bring closure to one of the worst episodes of their lives, these precursors for settlement regret may be subtle in presentation, difficult to envision, seen as relatively inconsequential or appear beyond true resolution. The luxury of 20/20 hindsight offers no immediate assistance. Nonetheless, the fact remains that clients unable to envision such problems or not advised about them are at increased risk for settlement regret.

Conditions Surrounding Agreement

- Pressure to settle
- Negotiation stress
- Settlement as goal

Settlements are usually produced under pressure. The sources of such pressure are relatively common yet may vary from case to case. In litigated matters, financial considerations, battle weariness, events on the ground, and judicial prodding (whether overt or not) are typical sources of pressure. In nonlitigated matters, the threat of litigation may generate considerable pressure.

The pressure to settle prematurely may stem from new relationships, impulsivity, naïveté, finances ...

Negotiation itself may provide a variety of common pressures including threats regarding failure, battling egos, the stress of back-and-forth deliberations, time pressure, and the stress of being pressed to reveal one's bottom line, as well as inadvertent or intentional pressure to settle from counsel or others involved.

Scientific evidence is clear that stress affects decisionmaking.¹¹ A review of the research literature is beyond the scope of this article, but some illustrative findings have implications for the conditions surrounding an agreement and potential for settlement regret.

In negotiating an agreement, clients need to evaluate the pros and cons of the terms proposed.

Unfortunately, this may be difficult to do in a balanced way under pressure. For example, recent research has shown that, when stressed, individuals generally tend to focus on the "upside" of a deal and pay less attention to the "downside."¹² Thus, the stressful nature of coming to an agreement under pressure may reduce clients' abilities to balance issues well and thereby increase the risk for settlement regret.

Likewise, under the pressure of negotiation, clients often determine whether to take certain risks or not. Some scientific research shows that anxious individuals are less likely to make risky decisions under stress.¹³ Consequently, more pressure applied to an anxious client may inhibit the client's willingness to take reasonable risks and thereby limit the scope of the agreement and perhaps set the stage for settlement regret. On the other hand, a person without such anxiety might be more willing to make a fairly risky decision that could also lead to settlement regret. These scientific findings help to highlight the importance of reading one's client well, including consideration of how applying pressure may not be wise in trying to reach the best possible agreement.

Finally, in some cases, an additional pressure may appear in the form of the settlement being viewed as the goal of legal assistance as opposed to being a means to achieve a goal. It is easy to understand how this might occur in response to protracted litigation, battle weariness, and judicial prodding as well as other factors. Unfortunately, not every settlement is a good one. Thus, when attorneys or clients find themselves valuing any settlement as an improvement over no settlement, the risk for settlement regret likely increases.

Events Following Agreement

- Agreement violations
- Change of circumstance
- Modification expectancy

There is little question that when one party violates the terms of an agreement, it increases the risk for settlement regret. Obviously, there are many factors that come into play, such as the nature of the violation, the level of the infraction, the sensitivity of the parties, and the stakes involved.

Similarly, a change in circumstance specific to an important part of an agreement may trigger

settlement regret, particularly if the change is material, aversive, and not anticipated at the time of the agreement. Likewise, an individual's attitude can change over time. When a change in viewpoint relevant to a key term in the agreement occurs, this could spark settlement regret as well.

Although some attorneys at the time of executing particular settlements may expect their clients to ultimately seek a modification later on, usually clients are significantly less experienced in such matters and feel the weight of settlement regret far greater than counsel might imagine. This may include clients who resent the fact that the conflict they thought had ended with a settlement puts them in a situation requiring a choice among aversive alternatives. Accordingly, the degree and extent of settlement regret will likely impact the consequences for both client and attorney.

Recent research shows that, when stressed, individuals focus on the "upside" of a deal.

It is important to note that this discussion on causes of settlement regret is clearly not exhaustive. Further, the specified causes may appear on their own, in conjunction with others, and can certainly overlap. A fair rule of thumb may be that the more risk factors present or the greater the impact of any particular risk factor(s), the likelihood of settlement regret increases as well.

PREVENTION

Conceptually, preventing settlement regret is relatively straightforward: design an agreement that both parties are happy with and will stay happy with. Practically, this is easier said than done, especially in complex or highly contentious matters.

Regardless of approach to prevent settlement regret, one must begin with the premise that there will always be some cases of it. For example, a party who agreed reluctantly to give up financial interest in an entity that subsequently skyrockets in value may well develop settlement regret. Even in cases in which the agreement proved to be truly equitable, some combative individuals will find fault with anything having to do with the opposing client, including having signed a settlement between them. By assuming there will always be

a baseline level of individuals unhappy with their settlement, the goal of prevention is to reduce the size of the population when possible. Just as not all smokers will be able to give up tobacco, prevention efforts focus on reducing the size of the smoking population and thereby reduce the incidence of lung cancer.

The effort to prevent settlement regret begins by avoiding, eliminating, or minimizing those factors believed to increase risk for its development, when possible. From the considerations presented above, first steps might include the following:

1. Read your client well so that you don't encourage adopting the wrong language or terms.
2. Aim to create an agreement that ends the conflict.
3. Approach settlement as a means to an end and not as the primary goal.
4. Reduce or eliminate unnecessary pressures to settle.
5. Do not encourage a rush to an agreement at the expense of proper consideration.
6. Approach unresolved issues with specificity over ambiguity.
7. Do not advise silence on known issues of concern.
8. Do not create terms that sound right but are unrealistic.
9. Anticipate where things can go wrong and create terms to prevent that.
10. Articulate how the other party could outmaneuver the final version of the proposed agreement.

The steps offered here are likely to prevent many cases of settlement regret but certainly not all. In fact, some cases may preclude counsel from taking various preventive actions. However, in challenging or complex cases that lend themselves to taking a preventive approach, one might consider bringing in specialized expertise to help create practical and innovative solutions to meet client goals in a way that produces wording acceptable to the other side. Such expertise is likely to be more effective when brought on early in the case as it allows improved conceptualization of the issues at hand

with time to begin generating potential solutions with creativity and realism.

All things being equal, attorneys truly striving to prevent settlement regret are easily differentiated by their efforts to use these 10 advisory steps and procure specialized expertise to assist in doing so in appropriate cases, compared to attorneys who do not. It is a matter of trying to get it right the first time when possible, to help their clients be able to put the current conflict behind them, and to not have to look back. In so doing, the experience of settlement regret and the resultant troubling consequences for client and attorney are less likely to appear.

Finally, in all fairness to mediators who work diligently to generate the best settlements they can to bring two opposing sides together, I approach settlement regret as a work product consultant who only takes on just causes, and thereby operate with a different aspiration in mind: a *great* settlement is one in which our client is thrilled and the other party never opposes our client again; a *good* settlement comes as close to that as one can get.

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