

SUSTAINABLE RESOLUTIONS

Agreement Writing for the New Year and Beyond

TIPS AND CONSIDERATIONS WHEN WRITING AGREEMENTS

Agreement Writing (Stage 4) Goals:

- Bring closure to problem-solving
- Assist parties in considering all ramifications of their agreement(s)
- Assist parties in committing resolutions(s) to writing
- Should a stranger read the agreement, it would be clear who does what, when, and how.

Role of the mediator:

- When do you start thinking about the agreement?
- Reality-testing – are the terms of the agreement comfortable for parties in the short and long term? Are they achievable? The silent question: what could go wrong?
- Keep it positive: setting the terms without creating negativity. Laundering language and reframing skeptical parties.
- Be a good listener. Write an agreement that is:
 - Specific – Who, what, where, when, how
 - Positive
 - Balanced
 - Clear
 - Realistic
 - Written in the parties' words
- Remind parties that agreements may affect their legal rights and encourage them to have the agreement reviewed by legal counsel before signing. What if the parties want to seek counsel?
- What is the meaning of “good faith” in relation to the agreement?

Typical elements of an in-court agreement:

- The pros and cons of a “chapeau” – a statement briefly describing the nature of the case.
- Handling personal information – address, phone numbers, bank accounts, etc.
- Agreement body – what the parties have agreed to do (or not do).

- Future evaluation – is there a test period involved? Is future evaluation necessary? How do you decide between continuing the case or dismissing with or without prejudice?
- Handling future controversies – how will future conflicts be handled?
- Disclaimers. For example: “This agreement settles the above case in its entirety.”
- Signature blocks. Who should sign? When should you ensure the parties are authorized to sign the agreement?
- The importance of a first draft.
- Use simple language and avoid legalese. Will the parties understand their obligations a week from now when the excitement is over?
- What if a party suggests a clause drafted by a lawyer? Hint: what does the other party want?

Ethical considerations:

- Have the parties considered all ramifications of the agreement?
- How will other parties not present be affected?
- Have the parties entered in the agreement voluntarily?
- Is there anything preventing the parties from advocating for themselves when making the agreement?
- Ensuring the parties agree with the language and content of the agreement.
- Maintaining the appearance of neutrality while creating the terms of the agreement.
- What if one party is doing all the giving? For example, if the defendant agrees to pay the debt, how do you create a sense of balance and compromise?

Avoiding UPL during agreement writing:

- The Four Legals and confidentiality offer protections to mediators.
- Remember that you are a scrivener. Persuading parties to add language to an agreement based on your legal knowledge or belief affects their self-determination and diminishes your impartiality. If you are a lawyer, it may create a lawyer-client relationship.
- From the NVMS Mediation Skills and Process manual: *“A mediator may make statements declarative of law, however – caution – what may be a permissible statement declarative of the law in one context may constitute unethical mediation practice or legal advice in another. Mediators must carefully consider whether, under the totality of circumstances, a law-related statement is likely to have the effect of **predicting a specific resolution of a legal issue or of directing the actions of the parties.**”*
- When in doubt, ask a neutral question.

- Avoid legal boiler-plate language. Most comes with extensive interpretation by the courts, which the parties - and you - may not understand or intend.
- You can include legal concepts if the parties request it. But it should be written in their lay-language.
- If you have legal knowledge or personal experience with the legal issues raised, beware: you may be wrong and there may be more to the case than you have learned in an hour of mediation.
- Explaining the legal enforceability of the agreement. Mediators should not advise on the enforceability of the agreement being drafted since that is a matter of state contract law. But, the mediator may note that *“If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract.”* Code of Virginia, section 8.01-576.11. This is the difference between legal information (the latter) and legal advice (the former).
- UPL creates a prohibition against preparing legal instruments.
- But there is an exception for mediators serving as scriveners: Virginia statutes *“...authorize mediators to prepare written agreements for disputing parties so long as they, like attorney-mediators, limit their drafting services to those of a scrivener.”*
- How to serve as scrivener:
 - Copy the agreement as dictated by the parties
 - You may choose particular words or phrases to include in the agreement as long as the parties indicate the language chosen accurately reflects their desires
 - You must strive to use the disputants’ own words whenever possible and always write agreements in a manner that comports with the wishes of disputants.
 - You should not use language that one or both parties do not understand.
 - You may assist in organizing the information
 - Allow time for the parties to review (or hear you read aloud) the agreement so they can make any changes
- Avoid:
 - Merger clauses (usually about incorporating other agreements)
 - Binding effect clauses (re successors and assigns)
 - Severability clauses (if one clause fails, the rest will stand)
 - Choice of law clauses (to apply to litigation re the contract)
 - A remedies clause
 - Legal terminology

Language Traps (Excerpt from “Get It in Writing” presentation by Ken Rosenbaum):

- Dangerous assumptions
 - Uncritical inferences – when your mind fills in details that aren’t there

- The Curse of Knowledge – keeping definitions vague by assuming everyone is on the same page because they have a high understanding of the topics discussed – e.g. “The tools will be returned.”
- Tricky language
 - What time? – e.g. midnight, end of business day, late at night, noon, etc.
 - Pronouns – he, she, it, them, we, that, which, who – consider the antecedent
 - Slipshod references - when drafters use two different words or phrases to refer to the same thing
 - Modifiers that could apply to more than one thing, an adjective or noun that changes something
 - Avoid the passive voice